



NAFSA Conference 2010

## **Hot Immigration Issues for Academic Healthcare Institutions**

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## **H-1B Issues**



## **Prevailing Wages for Medical Residents**



- **The first step is to find prevailing wage survey to use. There are 2 choices:**

**OES or Published Survey**

## OES Survey

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- If choosing OES, some possible OES categories and levels that can be used for medical residents include:
  - ☐ 29-1069, Physicians and Surgeons, All Other, Level I
  - ☐ 29-1062, Family & General Practitioners, Level I
  - ☐ 29-1063, Internist, General, Level I
  - ☐ 29-1199.99, Health Diagnosing & Treating Practitioners, All Other, Level I

## Published Survey

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- If choosing published survey, generally use AAMC Survey of Resident/Fellow Stipends and Benefits

## Information you need to know about the AAMC survey:

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1. Every fall, the AAMC publishes Resident and Fellow Stipend report based on data collected the previous July.
2. The report that is published by the AAMC provides nationwide data for the stipends.
3. In order to receive localized data (either by state or metropolitan area), send a request to LaTonya Ford, Program Specialist, Health Care Affairs ([lford@aamc.org](mailto:lford@aamc.org)), or to Jennifer Gold ([jgold@aamc.org](mailto:jgold@aamc.org)). Indicate that you wish to receive the weighted mean.

## Information you need to know about the AAMC survey:

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4. State-wide data has been accepted by the Department of Labor ("DOL"), but you may be able to obtain more localized data for the metro-region you need. AAMC will let you know in advance if it has enough data.
5. It typically takes a few days to receive a survey.
6. The cost for AAMC members is \$150; for non-AAMC members, \$300.

## Information you need to know about the AAMC survey:

- There may not be enough data for a state-wide survey to be statistically sound
- It is possible that the weighted mean at the state-wide level for your state is higher than your House Staff stipends

- **The next step is to decide if you want to seek a “safe harbor” wage (request wage from DOL) or determine prevailing wage on your own.**

## Analyzing Safe Harbor

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- Advantage of safe harbor
  - Wage cannot be challenged in an investigation
- Advantages of abandoning safe harbor
  - Avoiding two to three week delay
  - Any change requires new waiting period
  - Avoiding getting unrealistic wage that you may be stuck with
  - Using your own PWD calculation

## Analyzing Safe Harbor *(cont'd)*

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- Risk of investigation extremely low
- If investigation, opportunity to prove your wage is correct
- Investigations extremely rarely result in finding against employer based on incorrect wage level
- Safe harbor is no guarantee of safety anyway
  - DOL can challenge job description, job requirements
  - DOL can challenge actual wage

## Analyzing Safe Harbor (cont'd)

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- Can employer disregard safe harbor PWD and file LCA with different PWD?
  - Differing opinions
    - Opinion 1: employer is bound by safe harbor PWD
      - 20 CFR 655.731 (a)(2)(ii)(A)
    - Opinion 2: employer can avoid liability in the event of an investigation by proving that its PWD was proper under the regulations

## Analyzing Safe Harbor

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- Unanimous opinion:
  - Better not to request safe harbor wage than to get safe harbor wage and not pay it.
  - Especially problematic if employee knows PWD
- Ramifications of DOL investigation
  - Back pay award for difference between prevailing wage and wage paid
  - Civil fine up to \$5,000 and/or debarment if willful

## Safe Harbor

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- If you want DOL to determine the prevailing wage, complete Form ETA 9141, Application for Prevailing Wage Determination.

## General Tips for Completing ETA 9141

- Duties box “magic language” for Colleges/ Universities:

**\*\*\*This employer is an institution of higher education or a research entity under 20 CFR 656.40(d)\*\*\***

- Useful to add to “Duties” box:

**\*\*This is an entry level position\*\***

(House Staff are still in training, not fully trained physicians.)



## Performing your own PWD

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- Advantages
  - Save two to four weeks
  - Avoid unrealistic PWDs
- Disadvantage
  - No safe harbor, that is if audited by DOL, have no protection against a finding that wage too low.

## Performing your own PWD

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- If you determine prevailing wage on your own, skip Form 9041 and complete Form ETA 9035, Labor Condition Application

# Tips For 9035 (LCA)

## Using Self-Determined OES Wage

## Performing your own PWD Using OES: 9035 Completion

PLC Version 2 Custom - Windows Internet Explorer

http://lcert.doleta.gov/index.cfm?event=ehETAForm.doStartCase

PLC Version 2 Custom

### A. Employment-Based Nonimmigrant Visa Information

Indicate the type of visa classification \*  ?  
supported by this application (Write classification symbol):

### B. Temporary Need Information

1. Job Title: \*  ?

2. SOC (ONET/OES) Code: \*  ?

3. SOC (ONET/OES) Occupation Title: \*  ?

4. Is this a full-time position? \* ☒ Yes ☐ No ?

## Performing your own PWD Using OES: 9035 Completion (cont.)

**Place of Employment: Location 1 (required)**

**a. Place of Employment 1**

1. Address 1: \* 5323 Harry Hines Blvd. ?

2. Address 2: ?

3. City: \* Dallas ?

4. County: \* Dallas ?

5. State/District/Territory: \* TEXAS ?

6. Postal Code: \* 75390-9011 ?

**b. Prevailing Wage Information (corresponding to the place of employment location listed above)**

7. State Workforce Agency which issued prevailing wage: \$ N/A ?

7 a. Prevailing wage tracking number (if applicable): \$ N/A ?

8. Wage Level: \* ☒ I ?  
☐ II  
☐ III

Internet

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## Performing your own PWD Using OES: 9035 Completion (cont.)

9. Prevailing Wage: \* Enter OES Wage ?

10. Per: (Choose only one): \* ☐ Hour ?  
☐ Week  
☐ Biweekly  
☐ Month  
☒ Year  
CLEAR

11. Prevailing wage source: \* ☒ OES ?  
☐ CBA  
☐ DBA  
☐ SCA  
☐ Other  
CLEAR

11 a. Year source published: \* 2010 ?

11 b. If "OES", and SWA/NPC did not issue prevailing wage OR "Other" in question 11, specify source: OFLC Online Data Center ?

# Tips for 9035 (LCA)

## Using Self-Selected AAMC Wage

### Performing Your Own PWD Using AAMC Survey: 9035 Completion

#### b. Prevailing Wage Information (corresponding to the place of employment location listed above)

7. State Workforce Agency which issued prevailing wage: § N/A

7 a. Prevailing wage tracking number (if applicable): § N/A

8. Wage Level:

- \* ☐ I  
☐ II  
☐ III  
☐ IV  
☒ N/A

CLEAR



## Performing Your Own PWD Using AAMC Survey: 9035 Completion

11. Prevailing wage source: \* ☐ OES ☐ CBA ☐ DBA ☐ SCA ☒ Other ?

CLEAR

11 a. Year source published: \* 2010 ?

11 b. If "OES", and SWA/NPC do not issue prevailing wage OR "Other" in question 11, specify source: \$ AAMC Survey of Residents/Fellows Stipends & Benefits ?

The screenshot shows a web form for completing the AAMC Survey: 9035. It includes radio buttons for selecting a wage source (OES, CBA, DBA, SCA, or Other), a text input for the year published, and a text input for specifying the source if 'Other' is selected. Annotations include a circle around the 'Other' radio button, a circle around the 'AAMC Survey of Residents/Fellows Stipends & Benefits' text, and a yellow highlight on the '2010' year.

## Tips for 9141 (Prevailing Wage Request Form)

When Asking DOL to Issue “Safe Harbor”  
Prevailing Wage Based on AAMC Data

## Completing 9141 for NPWHC Prevailing Wage Using AAMC Data

OMB Approval: 1205-0466  
Expiration Date: 11/30/2011

Application for Prevailing Wage Determination  
ETA Form 9141  
U.S. Department of Labor



**a. Job Description (continued)**

<b>3. Number of hours of work per week *</b> Basic: <u>40</u> Overtime*: <u>N/A</u>		<b>3a. Hourly Work Schedule *</b> From 08:00 AM to 05:00 PM	
<b>4. Job Title of Supervisor for the Workers (if applicable)</b> Professor and Chair			
<b>5. Does this position supervise the work of other employees? *</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		<b>5a. If yes, number of employees worker will supervise (if applicable)</b> <u>N/A</u>	
<b>6. Job duties – A description of the job duties to be performed <u>MUST</u> begin in this space. If necessary, add attachment to <u>continue and complete</u> description. *</b> Complete clinical residency training under the direct supervision of a fully licensed M.D. in Ophthalmology; assist with cataract, intraocular, and other surgery related to the eye. Completion of training is required to obtain unrestricted medical licensure as an M.D. in Ophthalmology.***AAMC Survey of Resident/Fellow Stipends and Benefits, Weighted Mean Resident/Fellow Stipends, Academic Year 2009-2010, for institutions in Texas***			

Sample Job Description



## Completing 9141 for NPWHC Prevailing Wage Using AAMC Data




1. The supporting documentation regarding the survey's methodology must be mailed to DOL
2. Include the following information as provided by AAMC:
  - How the sample universe is defined
  - How the sample size was determined
  - How the participants were selected
  - Number of employers surveyed
  - Number of employees included
  - List of employer participants
3. When you receive the prevailing wage, complete Labor Condition Application

# Tips For Completing 9035 (LCA)


Using Prevailing Wage Determination  
Issued by DOL Based on AAMC Data

## Completing 9035 for NPWHC Prevailing Wage Using AAMC Data

**b. Prevailing Wage Information (corresponding to the place of employment location listed above)**

7. State Workforce Agency which issued prevailing wage:	\$ N/A	
7 a. Prevailing wage tracking number (if applicable):	\$ N/A	
8. Wage Level:	<div><div><div>*</div><div><input type="radio"/> I</div></div><div><div><input type="radio"/> II</div></div><div><div><input type="radio"/> III</div></div><div><div><input type="radio"/> IV</div></div><div><div><input checked="" type="radio"/> N/A</div></div></div> <div><div></div><div><div>CLEAR</div></div></div>	<div><div><div>?</div></div></div>

## Completing 9035 for NPWHC Prevailing Wage Using AAMC Data (cont.)

11. Prevailing wage source: \* ☐ OES ?  
☐ CBA  
☐ DBA  
☐ SCA  
☒ Other 

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11 a. Year source published: \*  ?

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11 b. If "OES", and SWA/NPC did not issue prevailing wage OR "Other" in question 11, specify source:  ?

Impact of January 8, 2010  
Neufeld Memo on  
Academic Healthcare H-1Bs

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## **Establishing Employer's Right to Control the H-1B**

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- Right to assign additional work
- Dictating hours of work
- Right to reassign
- Payment of wages
- Payment of benefits
- Tax treatment

## **Establishing Employer's Right to Control the H-1B**

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- Employment Contract
- Control over when, where and how the H-1B performs the job
- Supervision of H-1B
- Ability to fire
- Review of work product

## **Problems Created by Memo for Healthcare Industry**

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- Many states have laws that prohibit hospitals from being direct employers of physicians
- Sole or majority shareholder company has no “right to control” physician owner/employee

## **Problems Created by Memo for Healthcare Industry**

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- Hospital has “right to control,” but physician group is the employer
- Staffing companies are often employers of doctors, nurses and therapists, but no “right to control”

# Multiple Worksites

**Rose Chatelain**  
**Louisiana State University-New**  
**Orleans Health Sciences Center**

## Multiple Worksites

- Prevailing Wages
- LCA Addresses
- I-129 Addresses
- Partnering with contacts at additional  
worksites
- Residents and electives

# GME Program Training Issues

## **ECFMG Certification Requirements for International Medical Graduates (IMGs)**

- Medical Education Credentials
  - Completion of 4 year medical school curriculum
  - School and graduation year listed in IMED  
*International Medical Education Directory*  
<http://IMED.ecfm.org>
  - Primary source verification of medical diploma and transcript by ECFMG
- USMLE Exams
  - Step 1: Basic Science
  - Step 2: Clinical Knowledge (CK)
  - Step 2: Clinical Skills (CS)

## Visa Options for U.S. GME

### ■ Most Common

- J-1 “Alien Physician”
- H-1B “Specialty Occupation Worker”

### ■ Less Common

- F-1 “Student” (OPT/EAD)
- J-2 “Dependent” (EAD)
- O-1 of “Extraordinary Merit”
- Others (EAD)

## Most Common Visas for IMGs

	J-1	H-1
<b>Regulatory Oversight</b>	DOS, DHS, ECFMG, SEVIS	DOL, DHS
<b>Examinations</b>	USMLE Steps 1, 2CK, 2CS	USMLE Steps 1, 2CK, 2CS, 3
<b>Time Limit</b>	7 Years	6 Years
<b>Funding</b>	Generally hospital salary, can be home govt. or other	U.S. employer salary only *Prevailing Wage
<b>Return Home Requirement (Statement of Need)</b>	2 year home rule or waiver to work in MUA or HPSA	No service requirement
<b>Work Permit for Spouse</b>	J-2 can apply for EAD	H-4 cannot work
<b>Processing Time/Fees</b>	\$380 (ECFMG + SEVIS)	Filing fees, anti-fraud, premium processing, etc.

## Visa Considerations: U.S. Grads

- Foreign National U.S. Medical School Graduates
  - Exempt from ECFMG Certification for GME
  - Exempt from USMLE for J-1 and H-1B Purposes
  - May be Eligible for 12 Months of OPT for GME  
(Includes **U.S. Osteopathic Medical Schools Graduates** )
- J-1 Can Be Complicated
  - INA §214(b): Nonimmigrant Intent
  - INA §212(e): Statement of Need from Home Country
  - Encouraged to Seek Exception from J-1 Only Policy

## Visa Considerations: Canadians

- Canadian Medical School Graduates
  - Exempt from ECFMG Certification for GME
  - Exempt from USMLE for J-1 Purposes
  - Requires USMLE Steps 1, 2CK, 2CS, 3 for H-1B Purposes
  - Residents Seeking 1–3 Month Clinical Rotations on J-1s will be Subject to §212(e)
- Canadian IMGs
  - ECFMG Certification Required for GME Regardless of Licensure Status in Canada
  - Standard USMLE Requirements for J-1 and H-1B Purposes

## Visa Considerations: Hospitals

- Credentials: ECFMG Cert., USMLE, Licensure, etc.
- Timing: Arrival, Visa Eligibility for Entire Training
- Costs: Filing Fees, Attorneys
  - Prevailing Wage & Actual Wage
- Administrative Oversight, Compliance
- Interest in Post-Training Recruitment
- Physician's Immigration History
  - Personal/Family Issues
  - Long-Term Goals

## Visa Considerations: Foreign National Physicians

- Hospital Visa Policies: J-1 Only, H-1B, EAD, etc.
- Personal Immigration History
  - Time in temporary visa status, future eligibility
- INA §214(b): Nonimmigrant Intent
  - Evidence of Ties to Home Country
- INA §212(e): 2 Year Home Residency
- Timeline to Complete Educational Goals
- Personal/Family Issues (*i.e.*, J-2 with EAD)
- Processing Times/Risks: Long Delay or Denial

## Additional Employment

- J-1 physicians may not participate in any activities outside of their approved GME program.
- H-1B physicians may need to have a second petition approved in order to participate and receive additional compensation for activities outside the original, pre-approved job description.
- In accordance with ACGME requirements, all U.S. residency programs must count all additional clinical activities for residents in *“80 hour work week.”*

## Incidental Patient Contact/Care



## Non-Clinical J-1 Activities Incidental Patient Contact

If Incidental Patient Contact is part of the sponsor's program, a statement from the dean of US medical school or his or her designee shall certify five conditions of the activity:

1. Is **predominantly** involved with observation, consultation, teaching, or research
2. Incidental patient contact will be **supervised** by a licensed physician who is a US citizen or permanent resident
3. Shall conform with **state licensure**,
4. Will **not result** in final **diagnosis** or **patient treatment**,
5. And experience gained in this program will **not be creditable** towards any clinical requirements for medical specialty board certification



## H-1B Incidental Patient Care

- I.N.A. § 212(j)(2)(A) permits alien physicians to perform "services as a member of the medical profession" if coming to the United States to teach or perform research at the invitation of a "public or nonprofit private educational or research institution or agency," provided that "no patient care will be performed, except that which is incidental to the physician's teaching or research..."

## **NAFTA – Teaching/Research**

Operations Instruction 214.6(c)(ii) "To determine if the patient care will be incidental, officers must consider factors, such as the amount of time spent in patient care, whether the physician is paid for services rendered, whether the physician's salary offer is so substantial that incidental patient care is unlikely, and whether the physician is responsible for a regular patient load. "

## **Current Legal Issues**

## Special Handling Labor Cert Issues

- Recently DOL has audited or denied many cases on the issue of “some actual classroom teaching.” DOL TAG 656 p. 68.
- Will this eventually impact medical schools as very little instruction, particularly in later years, occurs in a “classroom.””?

## Healthcare Member Interest Group

The mission of the Healthcare Institutions IIG is to bring together NAFSA members who work with or in the academic healthcare and medical community for the purpose of better understanding the key issues confronting that community.

## Healthcare Member Interest Group Events at the Regional Conference

### Wednesday, October 27, 2010

- 9:15-10:30 a.m.: Hot Immigration Topics for US Academic Healthcare – Magnolia
- 11 a.m.-12:15 p.m.: Consular Affairs Update – LaSalle A
- 11 a.m.-12:15 p.m.: Working in the US and Pathways to Legal Permanent Residency – Les Continents

### Thursday, October 28, 2010

- 9:15-10:30 a.m.: Special Handling Labor Certification – Pelican I
- 9:15-10:30 a.m. Healthcare Students: The Prescription for Successful Advising – Oak
- 10:45 a.m.-12 p.m.: Of Course it's Worth It! Analyzing the Big Challenges and Great Opportunities of the J Exchange Visitor Program – Pelican I

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# Questions?

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