

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

- 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

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

Information you need to know about the AAMC survey:

- 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 (<u>lford@aamc.org</u>), or to Jennifer Gold (<u>jgold@aamc.org</u>). Indicate that you wish to receive the weighted mean.

Information you need to know about the AAMC survey:

- 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 statewide 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

- 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)

- □ 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)

- 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

- 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

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

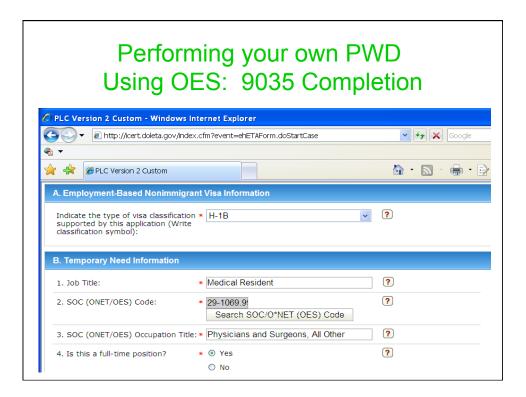
- Advantages
 - Save two to four weeks
 - Avoid unrealistic PWDs
- Disadvantage
 - No safe harbor, that is if audited by DOL, have no protection against a finding that wage too low.

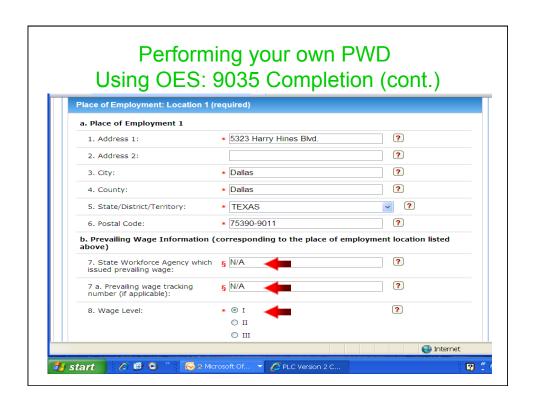
Performing your own PWD

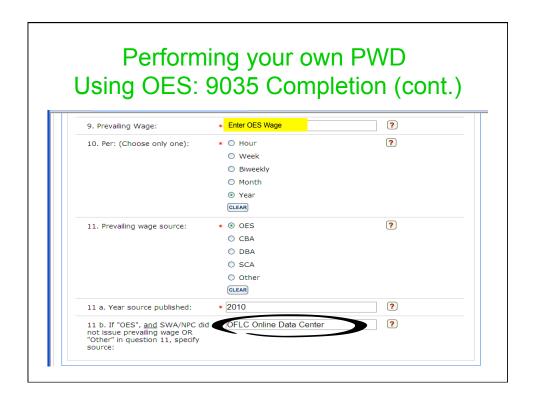
 If you determine prevailing wage on your own, skip Form 9041 and complete Form ETA 9035, Labor Condition Application

Tips For 9035 (LCA)

Using Self-Determined OES Wage

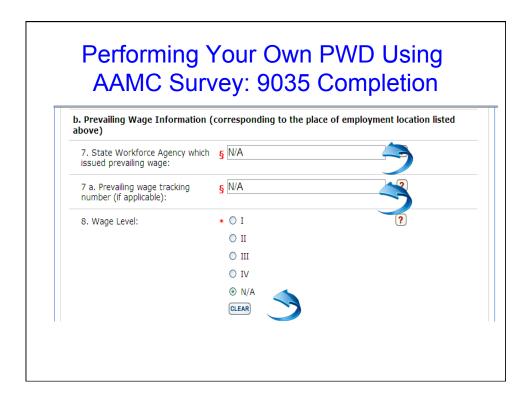


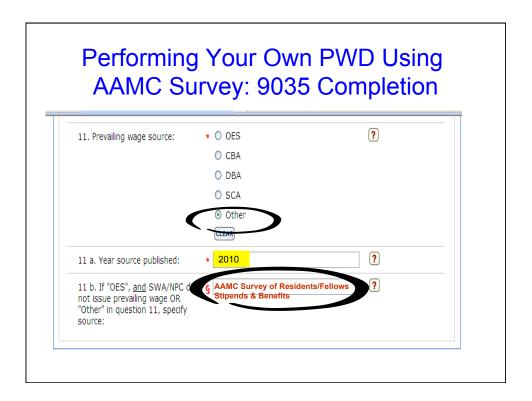




Tips for 9035 (LCA)

Using Self-Selected AAMC Wage





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)		
Number of hours of work per week * 3a. Hourly Wor		rk Schedule *
Basic: Overtime*:N/A		From 08:00 AM to 05:00 PM
Job Title of Supervisor for the Workers (if applicable) Prof	essor and Chair	
Does this position supervise the work of other employ	Li Yes 🗱 No	5a. If yes, number of employees worker will supervise (if applicable) N/A
 Job duties – A description of the job duties to be performed to continue and complete description. 		
Complete clinical residency training under the direct with cataract, intraocular, and other surgery related unrestricted medical licensure as an M.D. in Opthal	to the eye. Complimation to the eye.	Survey of Resident/Fellow Stipends and
Reports Weighted Mean Resident/Fellow Stipends	. Academic Year 2	009-2010, for institutions in Texas***

Completing 9141 for NPWHC Prevailing Wage Using AAMC Data

- The supporting documentation regarding the survey's methodology must be mailed to DOL
- 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 § N/A issued prevailing wage: 7 a. Prevailing wage tracking § N/A number (if applicable): * O I 8. Wage Level: \bigcirc II \bigcirc III O IV N/A CLEAR

Completing 9035 for NPWHC Prevailing Wage Using AAMC Data (cont.) ? * 0 0ES 11. Prevailing wage source: O CBA O DBA O SCA Other CLEAR ? 11 a. Year source published: * 2010 AAMC Survey of Residents/Fellow Stipends & Benefits 11 b. If "OES", <u>and</u> 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

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

- 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

- 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

- 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

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

- Is predominantly involved with observation, consultation, teaching, or research
- Incidental patient contact will be supervised by a licensed physician who is a US citizen or permanent resident
- 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 –
- 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