

FOREIGN MEDICAL GRADUATES – ONE SOLUTION TO THE PHYSICIAN SHORTAGE IN THE U.S

The United States may be facing a different kind of healthcare crisis in the coming decades. One of the most prosperous countries in the world may not be able to provide adequate healthcare to its citizens, not due to a lack of funding or to a lack of technology, but due to a shortage of physicians. The Department of Health and Human Services issued a report in 2006 which indicated that by the year 2020, the deficit of physicians could reach 55,000. Other studies predict that due to the aging of our population and the inadequacy of the managed care system, among other factors, we will suffer from a shortage of up to 200,000 physicians in the next two decades.

A shortage of physicians in the future is imminent, in part due to the following factors: (1) 79 million aging baby boomers are increasingly demanding more medical care; (2) the physician workforce is aging (29% of U.S. physicians are over the age of 55); and (3) many younger physicians are choosing to work fewer hours than their predecessors. Moreover, it takes approximately ten years to train a physician, and in order to cope with this impending shortage, U.S. medical schools will need to graduate 3,000 to 10,000 more physicians each year to meet the growing need.

How can the U.S. replenish the dearth of physicians? It is simple. We must tap into the world's vast pool of talented medical professionals, specifically, Foreign Medical Graduates. (Foreign Medical Graduates are also referred to as International Medical Graduates.) Our immigration laws currently provide various mechanisms for Foreign Medical Graduates ("FMGs") to obtain temporary employment based visas while still protecting U.S. patients and ensuring the provision of superior healthcare. However, historically, the state licensing authorities in the U.S. required physicians to be U.S. citizens to obtain medical licenses, and immigration laws in effect in past decades did not provide for work visas for the majority of foreign physicians. Fortunately, U.S. laws were amended in 1991 to allow foreign born physicians the ability to obtain temporary visas to perform patient care. Although not always a simple process, it is possible for foreign physicians and their employers to obtain temporary visas for training and employment in the U.S.

The most commonly used visa type for professionals, including physicians, is the H-1B visa. The H-1B visa is a nonimmigrant temporary visa for professional positions requiring at least a bachelor's degree or the equivalent as the minimum requirement for entry. When employers seek to use this visa option for physicians, FMGs must also have a medical degree or medical license in their country of origin and hold a valid medical license in the state of intended employment.

So why isn't the physician shortage solved if U.S. employers can recruit foreign medical graduates from across the globe to fill their available positions? Regrettably, direct recruitment of physicians from foreign countries is not possible since most FMGs cannot immediately obtain state medical licenses. Every state medical licensing authority in the U.S. requires FMGs to complete residency training in the U.S. as a prerequisite to the

issuance of a state medical license. States are trying to ensure that all physicians treating and providing care to patients in the U.S. are competent and well trained in their field. The result is that even if an employer locates and recruits a well educated and highly trained physician from abroad, that physician will not be able to practice medicine in the U.S. until completing extensive training in the U.S.

Alas, some exceptions to this rule do exist. Direct recruitment of foreign physicians is possible when the purpose of the employment is research only and not patient care. The H-1B visa is immediately available to FMGs in this category. Foreign physicians may come directly to the U.S. to conduct research as long as they do not treat or provide care to patients.

If FMGs desire to practice medicine and provide patient care within the U.S., they must understand that the completion of medical residency training in the U.S. is mandatory in most cases. FMGs interested in training in the U.S. will commence the process by contacting the Educational Commission on Foreign Medical Graduates (ECFMG) (www.ecfm.org) to have their credentials evaluated and ensure that they possess all the prerequisites to enter into a U.S. medical residency training program. Many U.S. residency training programs will typically have available slots in their internal medicine, psychiatry and other primary care programs. The majority of FMGs enter as J-1 exchange visitors. There are seven requirements for clinical FMG trainees to qualify for J-1 status. FMGs must:

1. Have adequate prior education and training to participate in U.S. Medical Residency Training Program.
2. Be able to adapt to educational and cultural environment.
3. Have background, needs, and experience suitable to the program.
4. Have competency in oral and written English.
5. Have passed Part I and II of NBME, USMLE or equivalent.
6. Provide statement of need from home country.
7. Submit agreement from U.S. program offering to provide graduate medical training.

Alas, the one significant drawback for FMGs who enter the U.S. on a J-1 visa is the two-year foreign residence requirement. FMG residents on J-1 visas are required, upon completion of their J-1 training, to return to their home country for at least two years. Until FMGs comply with this two-year foreign residence requirement, they are ineligible to obtain H-1B or L-1 nonimmigrant status or legal permanent residence.

Some FMGs attempt to circumvent the two-year foreign residence requirement by avoiding J-1 status for residency training, and in the alternative, securing an H-1B visa for residency training. In some circumstances, it is possible for employers to petition for an H-1B visa for FMGs who are coming to work and train as residents in the U.S. FMGs must pass the USMLE Part I, II, and III to obtain an H-1B visa while the J-1 visa only requires the passing Parts I and II of the USMLE. If FMGs enter the U.S. in H-1B status to complete residency training, they are not subject to the two-year foreign residence

requirement; and therefore, immediately eligible for future H-1B visas and permanent residence after the completion of residency training. Most foreign doctors would prefer to obtain an H-1B visa for their residency training, especially if they intend to stay permanently in the U.S. In order to obtain an H-1B for employment as a medical resident, the FMG must possess a temporary state license, and pass all parts of the FLEX, NBME, or USMLE exams. However, an H-1B visa is not always available to FMGs, even if they have completed all of the above requirements since only eleven states permit individuals to sit for the USMLE part III prior to entering their residency programs.

Similarly, other impediments exist for FMGs seeking H-1Bs for residency training. Some residency programs have policies in place that do not allow them to sponsor FMGs in H-1B status for training. Other programs do not want to hassle with the preparation of H-1B petitions, reporting requirements and additional fees. Other potential employers of FMG medical residents see the H-1B quota as a barrier. Further, employers and FMGs need to beware of the unavailability of H-1B visas due to the annual quota of 60,000. Though, most residency programs would likely fall under an exemption to the H-1B cap, i.e. status as institution of higher education or a non profit entity affiliated with an institution of higher education. FMGs need to also consider that even if the residency program employer is exempt from the H-1B cap, the FMG may become subject to the cap when they leave residency and go to a private employer who is not exempt from the annual H-1B quota.

FMGs may desire an H-1B visa for the purpose of medical residency, but in many cases cannot obtain one due to the issues previously discussed. In that case, they must comply with the requirements of the ECFMG to obtain a J-1 visa. The ECFMG is the only exchange program sponsor allowed to bring exchange visitors for the purpose of medical residency training. The ECFMG evaluates educational and experience credentials, and also tests to ensure that FMGs have the appropriate skills to come to the U.S. for graduate medical training. Once FMGs meet all the requirements, the ECFMG issues the required Department of State document (Form DS-2019) which enables them to obtain a J-1 visa at the appropriate consulate abroad.

Now, let us move forward to the final day of residency training when FMGs have completed their residency training program and obtained a state license. Since the two-year foreign residence requirement looms, is the only option to book a flight home with the return ticket dated two years later? The answer is NO. FMGs have various options to successfully avoid the two years at home. First, they may be able to obtain an O-1 visa for extraordinary ability in the sciences. Employers may sponsor FMGs for O-1 visas by demonstrating their extraordinary work in their field. This visa may be extended indefinitely, but the O-1 visa holder will remain subject to the two-year foreign residence requirement and will never be able to obtain permanent residence status until they have complied with the two-year requirement or obtained a waiver. In order to be issued an O-1, the employer petitioner must provide documentary evidence that the FMG possesses “extraordinary ability” in the sciences. The applicant must have risen to the top of a very specialized field of endeavor. Additionally, FMGs must travel to the consulate abroad to obtain the O-1 visa, since a change of status in the U.S. is not available.

A better option for those FMGs who want to remain in the U.S. and practice in their field of specialty is the J-1 waiver program. The U.S. government has created various programs and mechanisms that allow FMGs subject to the two-year foreign residence requirement to avoid returning home for two years while at the same time providing some relief to the physician shortage in the U.S.

In order to obtain a waiver of the J-1 two-year foreign residence requirement, an applicant must show one of the following: (1) well founded fear of persecution; or (2) exceptional hardship; or (3) sponsorship by an Interested Government Agency. With regard to sponsorship by an interested government agency, one may seek sponsorship from one of the following: (1) Appalachian Regional Commission (ARC); (2) State Department of Health – Conrad State 30; (3) Delta Regional Authority; or (4) Veterans Administration.

Due to recent policy changes at the United States Citizenship and Immigration Services, exceptional hardship and persecution waivers are becoming very difficult to obtain. FMGs may want to focus on obtaining the sponsorship of an interested government agency as a more secure waiver option. Generally, with these programs, the FMG must serve in H-1B status for a period of 3 to 4 years working in an area with a designated physician shortage.

The ARC is a federal program for medically underserved areas in Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia. The ARC sponsors 200 primary care FMGs annually. The FMG must work in a medically underserved area for a period of three or sometimes four years in order to obtain a waiver of the two-year foreign residency requirement.

The Delta Regional Authority is the newest federal program instituted on May 17, 2004. The Delta Regional Authority encompasses a 240 county/parish area in 8 states including Mississippi, Alabama, Tennessee, Arkansas, Louisiana, Illinois, Kentucky, and Missouri. In order to obtain a waiver of the two-year foreign residence requirement, FMGs must serve in a primary care position at least 40 hours a week for three years in a Health Professional Shortage Area (HPSA), Medically Underserved Area/Medically Underserved Population (MUA/MUP), or a Mental Health Professional Shortage Area (MHPSA). They also must provide care to the indigent, Medicaid recipients and Medicare recipients.

Traditionally, only federal agencies could sponsor FMGs for J-1 waivers. However, now this power has been expanded to State Departments of Health under the Conrad State 30 program. Each state defines its own program and each state has the ability to sponsor up to 30 physicians each year for J waivers. This program was formerly known as Conrad 20 because it allowed each state to sponsor 20 FMGs for positions within the medically underserved areas of each state. The program has now been expanded to the Conrad 30 with 30 available slots for each state. The Conrad 30 program also allows the state to have 5 discretionary slots of the 30. So even if the FMG is not working in a traditional

field or a shortage area, the state may have discretion to sponsor them for a waiver. Generally, all Conrad State 30 programs sponsor primary care physicians and more states are sponsoring highly trained specialists as well.

The Veteran's Administration (VA) may also sponsor FMGs for waiver of the two-year foreign residence requirement. There are over 170 Veteran Administration hospitals in the U.S. These hospitals sponsor FMGs conducting research, teaching and, providing patient care, regardless of specialty.

This article has been a brief overview of the issues facing FMGs under current immigration laws. In future articles, we will elaborate on these topics as well as discuss issues facing Canadian trained physicians and avenues to permanent residence for foreign physicians.

The author, Elizabeth L.A. Garvish, is a Partner in the Atlanta based law firm of Marchman & Kasraie, LLC. She manages the nationwide immigration practice and has successfully handled all types of employment based and family immigration matters. She focuses a large part of her practice on the provision of legal counsel and assistance to foreign medical graduates obtaining waivers of the J-1 two year foreign residence requirement, H-1B and O-1 visas and extensions as well as permanent residence through various vehicles including PERM labor certification and the National Interest Waiver for physicians. Ms. Garvish works closely with hospitals and medical institutions to obtain nonimmigrant visas and permanent residence for their physicians, nurses and other foreign medical personnel, and prides herself on the superior client service she provides and her clients have to come to expect. Moreover, she understands the obstacles facing today's foreign workers, their families and their employers, and she is committed to using creative immigration strategies to solve problems and achieve the desired results.

Ms. is fluent in Spanish, well-versed in French and has written informative articles on immigration issues for publication in Spanish-language magazine and other publications and journals. She appeared as a legal expert on a Spanish Language television program on Georgia Public Television called "Leyes Cotidianas" or "Everyday Law." She frequently presents lectures instructing employers and human resources personnel on immigration topics.

Prior to joining the Marchman & Kasraie, LLC in 2005, Ms. Garvish practiced employment based immigration law with the national labor and employment law firm, Ogletree Deakins Nash Smoak & Stewart P.C. She also worked for a firm in Guadalajara, Mexico, where she acquired considerable knowledge of the civil law system and procedures used in Latin American countries, sociocultural protocol, and the business mindset related to Latin American commerce. Ms. Garvish has also devoted substantial time and pro bono hours to assisting Central American refugees in obtaining their permanent residence in the United States. She continues to dedicate a portion of her time to assisting needy or indigent clients with immigration matters.

Ms. Garvish is a graduate of Johns Hopkins University and Tulane University School of Law and is admitted to practice in Texas, South Carolina and Georgia. Ms. Garvish is active in the Atlanta chapter of the American Immigration Lawyers Association (AILA). She served as the Pro Bono Committee Chair during 2006-2007. She also served as the Project Chairperson of the AILA Citizenship Day Naturalization Drive held in March 2007. She is organizing the second annual Citizenship Day Naturalization Drive this year as well, to be held April 19, 2008. Locally, Ms. Garvish has served on the State Bar of Georgia Young Lawyers Division Executive Council from 2005 to the present.

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