

DR. YES—IMMIGRATION OPTIONS FOR DOCTORS

by Scott M. Borene and Jeanne Glader Kildow*

INTRODUCTION

More than 25 percent of current U.S. doctors are foreign-born. The demand for top quality health care services and for highly trained medical specialists to deliver those health care services grows daily in the United States and other developed countries with rapidly aging populations. As noted at the Sixth International Medical Workforce Conference in Ottawa, Canada, in 2002, "International medical graduates [IMGs] have formed an important part of the U.S. physician workforce . . . since the 1960's. In the early 1960's, IMGs were about 10% (26,048)

of the physician workforce; by 1970 that percentage had increased to nearly 18% (57,217). Today, IMGs are about 25% (196,961) of the U.S. physician workforce."¹

Currently, virtually all developed countries in the world have in place significant barriers to international physician immigration. These barriers take the form of general immigration restrictions, domestic labor market protection schemes, and special additional professional and immigration credential requirements applied only to foreign-born and foreign-trained physicians.

Critical Interests of Health Care Employers and Their Communities

Employers and immigration sponsors of doctors include not only primary clinical service providers such as hospitals, but also private, nonprofit, and public sector employers, large and small, in the allied fields of medical research, education, pharmaceuticals, and biotechnology. Typical employers include major medical centers such as the Mayo Clinic and Johns Hopkins; pharmaceutical companies such as Eli Lilly; large medical technology companies such as Medtronic and Genentech; nursing homes; community hospitals; and tens of thousands of smaller enterprises organized as biotech start-ups, clinics, or self-employed professionals.

As immigration clients, health care employers and the communities they serve have a lot at stake in their immigration projects. This is especially true in cases involving clinical physicians in underserved areas. Resourceful, speedy, and effective representation can provide substantial economic and patient-care benefits to the community. Avoidable delays and pursuit of poorly planned or ill-conceived strategies can have an immediate and serious economic impact on health care employers and their small, often rural, communities. Frequently the local hospital is one of the community's largest employers. Even in remote areas, it is not unusual for the addition of an M.D. to a small hospital or clinic to

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Scott Borene's original article, "Dr. Yes—Some Practical Strategies for the Diagnosis and Treatment of Immigrant Visa Cases of Health Care Professionals," was included in the Advanced Practice Volume of AILA's 1993-94 *Immigration & Nationality Law Handbook*. While this article further develops concepts introduced by the author in the earlier article, the article published here is significantly updated.

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¹ Marilyn Biviano & Farzaneh Makarehchi, "Globalization and the Physician Workforce In the United States," paper presented at the Sixth International Medical Workforce Conference, Ottawa, Canada, April 25, 2002.

affect the employer's aggregate revenues substantially. Time is money. Even a brief delay (or advance) in bringing an M.D. on line could mean significant lost (or gained) revenue for the employer. More importantly, the quality of available medical care directly affects the lives of the patients in the clinic's service area.

Looking to the future, presenters at the Sixth International Medical Workforce Conference optimistically concluded that,

Despite the barriers, it has been predicted that the time is coming when national identity among the health professions will be obsolete. In its place will be the truly world class physician, nurse or other healthcare professional. With encouragement of the movement of professional services as well as goods, national borders for higher education, and particularly for professional education, will become blurred. It may be reasonable to anticipate that globalization will encourage uniform medical credentialing (at least among the developed countries) which in turn will facilitate migration of the physician workforce unencumbered by national boundaries.²

In the meantime, we all have to cope with the immigration world as it is. This article provides some analytical tools to help doctors and their employers to comply with U.S. immigration rules. The tools include three appended checklists that may be useful in planning immigration projects for doctors:

- A Checklist of Temporary Immigration Options for Doctors (Appendix A);
- A Checklist of Permanent Immigration Options for Doctors (Appendix B); and
- A Checklist of Key Questions for Doctors Seeking Work Visas (Appendix C).

In addition, this article identifies some key issues involved in the immigration sponsorship of doctors and provides an inventory of possible temporary and permanent work visa options. It is intended as a starting point for the analysis of U.S. immigration options for physicians. It is far from a complete review of the subject. A more comprehensive analysis of U.S. physician immigration issues detailing the full range of complexity and alternative strategies for work visas would require, at a minimum, a text of more than a thousand pages.

The questionnaire (Appendix C) identifies facts and evidence that can help or hinder a doctor's case. Every question is related to one or more factors affecting a doctor's immigration options. Immigration lawyers who are very experienced in managing physician immigration matters can use this checklist as a screening tool. For those with less experience, it provides a starting point for fact gathering and a sample of the range of facts and factors that can affect a doctor's immigration case. Also for those with less U.S. immigration experience, the next section provides a brief overview of the U.S. immigration system generally. The following section identifies some critical immigration issues for doctors. Some potential pitfalls that await the unwary are described in the section on "Traps for the Unwary." The article concludes with a dozen practical tips on immigration for doctors.

Overall, this article assumes that the reader has a familiarity with U.S. immigration law generally and a particular familiarity with the current temporary and permanent employment-based visa categories, the labor certification process, and the special rules applicable to physicians and "foreign medical graduates," including their uniquely difficult problems with INA §212(e) requirements and the special licensing and credentialing issues relating to physicians.

For the benefit of readers who are not experienced U.S. immigration lawyers, the following section provides a brief overview of the U.S. immigration system as a foundation for the more specific discussion of doctors' immigration issues that follows. Readers who are already familiar with general U.S. immigration law may wish to skip ahead to "Some Critical Immigration Issues for Doctors."

OVERVIEW OF THE CURRENT U.S. IMMIGRATION SYSTEM

The current U.S. immigration program is probably the most bureaucratized and technically complicated immigration legal system in the world. Its only close rival for complexity in the U.S. legal system is the U.S. federal tax code administered by the IRS. The U.S. tax laws, while very complex, are relatively coherent (as compared with U.S. immigration laws) and are administered by a single federal agency. Consequently, there is substantially uniform application of U.S. tax laws worldwide. Unfortunately, the situation with U.S. immigration laws is very different.

² *Id.*

U.S. immigration laws are administered by several different federal agencies that frequently have competing and overlapping jurisdiction over the same cases. These separate agencies include the Department of Homeland Security, the Department of Justice, the Department of Labor, the Department of State, and U.S. consular offices abroad, among others. In addition, many U.S. immigration decision-makers in all agencies and at all levels are vested with broad discretion in individual cases. The result is that apparently similar cases can produce very different outcomes depending upon many factors other than the basic facts of the case.

Current U.S. immigration law places all persons in the world into one of two categories—U.S. citizens (including U.S. nationals such as natives of Puerto Rico) and non-U.S. citizens. The noncitizens are called “aliens.” Every noncitizen needs the permission of the U.S. government to enter, stay, or be employed in the United States.

All noncitizens are further divided into two sub-categories: nonimmigrants (persons who presently do not intend to immigrate permanently to the United States) and immigrants (persons who presently do intend to immigrate permanently to the United States). The U.S. law presumes that all noncitizens seeking entry to the United States are immigrants, unless they can prove they are nonimmigrants to the satisfaction of often-skeptical U.S. consular and immigration officials. Presumed “immigrants” who are not in possession of valid permanent immigrant visas are generally barred from entering the United States. Permanent immigrant visas are often difficult and time-consuming to obtain on behalf of any person who lacks a U.S. citizen (USC) parent or spouse. Currently, complete processing of an employment-based permanent residence case may take two to three years or longer from commencement to final approval.

More than 20 million people enter the United States legally each year in one of more than 100 different temporary categories. Most of the temporary visitor categories do not permit U.S. employment. However, temporary work permits (usually restricted to a particular employer, worksite, and position) are available in many cases.

Temporary Options

Some of the most frequently encountered temporary visa categories are:

- B-1/B-2 Temporary Visitor for Business—U.S.-based employment activities are generally for-

bidden to “B-1” visitors. Usually limited to short duration visits of a few days to six months per visit.

- E-1 Treaty Traders—Very useful for executives, managers, and key employees with “essential skills.” Especially popular with Japanese, U.K., and German companies. This category requires a qualifying treaty between the United States and the applicant’s home country, a qualifying U.S. business operation, and proof of “substantial trade” activities between the United States and the home country by the sponsoring employer.
- E-2 Treaty Investors—Similar to E-1 category and often used by entrepreneurs. Instead of the E-1’s “substantial trade” requirement, the key element for E-2 is proof of a “substantial investment” in U.S. business activities by the qualifying employer.
- F-1 Student—Limited work permission is possible.
- H-1B Temporary “Specialty Occupation” Worker—Requires that both worker and job must meet minimum required bachelor’s degree equivalence test. This is the category most often used by employers for newly-hired international managerial and professional employees. To qualify as a “specialty occupation,” the position must require the completion of a U.S. four-year university degree or its equivalent and the sponsored worker must actually have a U.S. bachelor’s or higher degree or a foreign equivalent, or an acceptable combination of appropriate education and work experience.
- J-1 Exchange Visitor—Frequently used by large multinational employers and research universities. Beware of a two-year home country residence requirement applicable in many cases. Employment permitted in many cases.
- L-1 Intracompany Transferee (available for executive, managerial, and “specialized knowledge” personnel)—Often the “first choice” category for transferred international employees because of high approval rates and fast turn-around. Like the related Permanent Immigration category for “Transferred Multinational Executives and Managers,” this category generally requires at least one year of qualifying experience with the sponsoring employer as an overseas employee within the preceding three years. Not available for new hires.
- O Extraordinary ability in the sciences, arts, education, business, or athletics—Infrequently used

category; may require as much documentation as a sponsorship in Extraordinary Ability permanent category.

- TN NAFTA-based Temporary Work Category for Certain Canadian or Mexican Professionals and Business Workers—Roughly equivalent to H-1B Temporary Worker category. Easier rules for Canadians, more difficult rules for Mexicans.
- WT/WB Visa Waiver for Tourism or Business—Note 90-day absolute time limit and absolute bar on any change of status or extension of time in United States beyond 90 days.

Careful well-informed evaluation and selection of the most appropriate visa category several weeks in advance of a U.S. employment assignment is highly recommended as multiple options with differing processing times and difficulty are frequently available in each case.

Permanent Residence Options

The phrases “legal immigrant,” “lawful permanent resident,” “immigrant visa” holder, or “green card” holder are all terms commonly used to refer to a person who has been granted the legal right to live and work permanently in the United States; *i.e.*, a “Permanent Resident.” To obtain Permanent Resident Status, a person must generally be eligible in an immigrant category and be admissible to the United States. Certain present or past conduct including, for example, drug abuse, criminal conduct, giving false information to the immigration authorities, or receipt of welfare assistance can create admissibility problems. The 1996 law greatly increases the severity of admissibility restrictions.³ A person with a history of any criminal conviction more serious than a minor traffic violation, or even a minor technical past violation of immigration rules (*e.g.*, a one-day overstay of a prior visa, incomplete or incorrect information on any prior visa application, minor casual unauthorized employment) should now proceed with great caution.

During the past decade approximately one million people each year have obtained Lawful Permanent Resident (LPR) Status in the United States (evidenced by the legendary “Green Card”) using one of the more than 50 alternative pathways to legal

gal permanent immigration to the United States. These numbers exceed the totals for legal permanent immigration to all other developed countries in the world combined. The alternative pathways to permanent residence in the United States can be divided into five main groups: (1) Employment-based immigration; (2) Family-based immigration; (3) Investment-based immigration; (4) Special Categories; and (5) the Permanent Immigrant Visa Lottery (Diversity Visa Lottery).

The issuance of immigrant visas for permanent residence in the United States is subject to both worldwide and per country annual limits for each category of sponsorship according to an extremely complex formula of priorities. Waiting times for fully qualified immigrants can range from one day to more than 20 years.

Employment-Based Permanent Residence

Under current law, most employment-based immigrants use one of the following categories of admission:

- The “Extraordinary Ability” category—Certain immigrants with “extraordinary ability and achievements in the arts, sciences, business or athletics,” who intend to enter the United States to continue to work in their field. *Note:* this category and the other Labor Certification-exempt categories generally require extensive documentation of the individual beneficiary’s career accomplishments and professional expertise.
- The “Outstanding Professor or Researcher” category—Certain immigrants with at least three years’ experience in teaching or research in their field entering a tenured or tenure-track or “comparable teaching or research position” in academics or private industry.
- The “Advanced Degree Professional” category—Certain members of the “professions” holding advanced degrees (*i.e.*, master’s degree or higher, or the equivalent) who are sponsored by an employer. This category usually requires a Labor Certification. However, if the applicant can establish that his or her admission will be “in the national interest,” a Labor Certification is not required.
- The “Exceptional Ability” category—Certain immigrants with exceptional ability in the arts, sciences, or business who are sponsored by an employer. This category generally also requires a

³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (IIRAIRA).

Labor Certification, which may be waived in a suitable “national interest” case.

- The “Professional” category—Members of “professions” who are sponsored by an employer. In general, a profession is an occupation that requires education or experience equivalent to at least a four-year U.S. college degree in a field specific to that occupation. Labor Certification is required.
- The “Skilled Worker” category—Workers whose jobs require a minimum of two years of specific training or experience who are sponsored by an employer. Labor Certification is required.
- The “Other Workers” category—Workers whose jobs require less than two years of specific training or experience who are sponsored by an employer. Labor Certification is required. Generally, workers in this category can anticipate a wait of ten years or more before they will be eligible to immigrate.

Family-Based Permanent Immigration

The family-based categories require sponsorship by a close relative of the applicant who is already a U.S. citizen or permanent resident (“Green Card” holder). Qualifying “close relatives” who may sponsor others include spouses, parents, adult children and, in some cases, siblings.

Apart from ever-increasing backlogs and ever-longer visa quota waiting times for the brothers and sisters of U.S. citizens (now estimated to exceed 20 years for newly filed applications) and for the spouses and children of U.S. permanent residents (now exceeding five years delay), there have been no major changes in the family-based immigration categories since 1991 and most proposed new restrictions on legal immigrants were omitted from the 1996 legislation.

Investment-Based Immigration

This program, which has been allocated at least 10,000 “Green Cards” per year since its creation in 1990, has attracted few applicants. The primary reasons for its failure are the extremely high capital requirements, (a minimum of \$500,000 to \$1 million capital “at risk”), the onerous regulatory requirements (including the required creation of a minimum of 10 full time jobs for U.S. workers for a minimum of two years’ duration), the availability of simpler, faster, more reliable, and less costly U.S. immigration alternatives, and the availability of much simpler and less costly alternative investor immigrant

programs in other countries, especially Canada and Australia. This category is conditional for the first two years of the investment.

Permanent Immigrant Visa Lottery

Millions of applicants from more than 100 countries compete annually for 55,000 permanent immigrant visas in the “Green Card Lottery.” The State Department randomly selects approximately 110,000 individual applicants from among the millions of applications properly filed each year as “finalists.” Applicants may be (legally or illegally) in or outside the United States. If selected, a “finalist” must complete all other required immigration paperwork successfully before October 1 of the applicable year or the visa option is irrevocably lost.

SOME CRITICAL IMMIGRATION ISSUES FOR DOCTORS

The J-1 §212(e) Two-Year Home Country Residence Requirement

Few problems are as vexing to immigration lawyers and their clients as the §212(e) two-year home residence rule, as applied to physicians.⁴ Many doctors who have come to the United States for Graduate Medical Education or Training (GMET) (*i.e.*, medical residencies or fellowships) are subject to the §212(e) two-year home country residence requirement. The requirement typically becomes legally binding on the J-1 doctor at the moment of entry into the United States in the J-1 category. Once a doctor becomes “subject to §212(e),” the doctor is subject to four continuing immigration restrictions: (1) No H-1B, (2) No L-1, (3) No change of status in the United States, and (4) No permanent residence (*i.e.*, no “Green Card”). These restrictions continue indefinitely (*i.e.*, for the rest of the doctor’s life), until the doctor either physically resides in his or her home country for two years or obtains a waiver of the two-year home country residence requirement. The problem is one for which an ounce of prevention is worth many pounds of cure. Because of the difficulty in obtaining §212(e) waivers for physicians and the career-disrupting effects of living outside the United States for a minimum of two years, unquestionably the best way to deal with §212(e) is to avoid becoming subject to it in the first place.

⁴ INA §212(e), 8 USC §1182(e).

Unfortunately, immigration attorneys rarely have the opportunity to counsel prospective J-1 “Foreign Medical Graduates” (FMGs) before they accept Educational Commission for Foreign Medical Graduates (ECFMG) J-1 sponsorship and impale themselves firmly on the §212(e) “hook.” Also, regrettably, in many cases ECFMG sponsorship may be the only viable alternative. Nevertheless, if an FMG client has not yet become subject to §212(e), the strongest possible consideration should be given to non-J-1 alternatives including the following: H-1B, J-2, asylee, other statuses that provide unrestricted employment authorization, or Lawful Permanent Residence options.

J-1 Waivers

Many doctors need to obtain waivers of the two-year home country residence requirement, which they typically incur during a period of medical residency training in the United States in the J-1 category under the sponsorship of ECFMG. Obtaining timely approval of a §212(e) waiver often presents the most difficult challenge in handling physician immigration matters.

There are multiple ways of seeking a §212(e) waiver, but the most commonly used strategy is a Conrad 30 Waiver. A Conrad 30 Waiver is based on a written request by a state Department of Public Health based on a three-year commitment of the doctor to work in a designated physician shortage area.

There are many specific, highly detailed eligibility requirements including the three-year employment contract that must be submitted for government review.

Among the contract requirements are the following:

- The contract must include the name and address of the health care facility and the specific geographical area or areas in which the physician will practice;
- The geographical area(s) of employment must be limited to those federally designated as physician shortage areas;
- The term of employment must be at least three years;
- The employment must be for no less than 40 hours per week providing medical care in a designated shortage area;
- The physician must agree to begin working within 90 days of receiving a waiver;

- The contract cannot contain a non-compete clause;
- The contract must include a statement by the physician that he or she agrees to meet the requirements of §214(l) of the INA (formerly §214(k)); and
- The contract must be signed by the physician and the head of facility.

Clinical Work versus Teaching/Research

It is critically important to know whether the doctor’s planned employment activities will involve clinical patient care, teaching, research, observation, consultation, training, or a combination of activities. Timing, eligibility, and professional and immigration credentialing requirements will vary greatly depending on the mix of activities. Temporary options strongly affected by this issue include B-1, WB, H-1B, TN, and J-1. Permanent options are also implicated. For example, the Outstanding Professor/Researcher category requires a full-time permanent job offer involved in teaching or research and the “Special Handling” Labor Certification category requires a full-time permanent position that involves “classroom teaching” at the post-secondary level.

Medical Credentialing versus Immigration Credentialing

A full discussion of the issues surrounding professional credentialing and immigration credentialing is beyond the scope of this paper. However, it is critical to note that in every case a doctor must have *both* the required professional credentials and the required immigration credentials to qualify for a particular work visa.

Primary Care Doctor versus Specialist

Eligibility for temporary and permanent immigration options and for J-1 waivers is strongly impacted by the doctor’s level of past professional education and his or her intended activities. For example, Conrad 30 waivers in many states are limited to primary care physicians. Alternatively, primary care doctors, no matter how distinguished, often have great difficulty in qualifying in the O-1 or H-1 (national or international renown) temporary categories or in the Extraordinary Ability, Outstanding Professor/Researcher, or Schedule A Group II (Exceptional Ability) permanent categories.

Employee, Independent Contractor, or Partner

The legal structure of the doctor’s practice can profoundly impact the doctor’s immigration status.

While an employer-employee relationship is most common, there are potential immigration advantages and disadvantages associated with a variety of legal relationships including self-employment and ownership of an employing entity.

TRAPS FOR THE UNWARY

Some potential traps for lawyers handling U.S. immigration projects for doctors include:

- Coping with the J-1 §212(e) two-year home country residence requirement can be extremely complicated and take much longer than expected (*i.e.*, waivers of the two-year requirement can take up to one year or more).
- Canadian physicians who hold LMCC (Licentiate Medical Council of Canada) status can usually easily qualify for U.S. medical licensing, but do *not* qualify for H-1B work sponsorship unless they have taken and passed all three parts of USMLE (U.S. Medical Licensing Examination) or the equivalent. Most Canadian M.D.s have not taken the USMLE at all. The few Canadian M.D.s who have passed USMLE have usually only passed Parts I and II, and not Part III.
- An unrestricted U.S. medical license or U.S. medical specialty board certification in most cases is *not* a sufficient credential to qualify for an H-1B work visa for a clinical physician.
- The H-1 annual quota applies to most private clinics.
- Contingent compensation arrangements for physicians can destroy the physician's eligibility for H-1B temporary work status and Labor Certification-Based Permanent Residence. The doctor's Prevailing Wage as defined by Department of Labor regulations must be guaranteed and paid in full as earned and not be contingent on personal productivity or organizational profitability. In the worst case, noncompliance with Department of Labor and U.S. Citizenship and Immigration Services (USCIS) wage rules can result in deportation of the physician and significant penalties for the employer.
- ECFMG Certification that is sufficient to allow a physician to pursue GME (Graduate Medical Education) in the United States as a J-1 is *not* sufficient to qualify most physicians for H-1B eligibility. In most cases, the physician must also take and pass USMLE Part III.
- USCIS does not accept "mix and match" medical credentials for H-1B eligibility even though many state medical licensing authorities do allow "mix and match" of FLEX (Federation of State Medical Boards Licensing Examination), NBME (National Board of Medical Examiners Examination), and USMLE component parts for state licensing purposes.
- A physician's ownership (or option to become a part owner) of even a small share of a private group medical practice can destroy that physician's eligibility for Labor Certification-Based Permanent Residence sponsorship by that clinic. Employment agreements must be closely analyzed for collateral immigration damage.
- A physician who is licensed in one state may not be licensable in another state. Make sure that the prospective employer and prospective physician-employee have determined for sure that the person can be licensed as required in the intended state of employment before visa petition processing begins.
- Remember that an H-4/O-3 spouse cannot work and a J-2 spouse can.
- TN status for Canadian physicians can be fast, but cannot be used for clinicians. Canadian physician TNs are solely for temporary assignments in one-year increments for M.D.s who are working as teachers or researchers.
- A physician generally cannot fulfill the J-1 two-year home residence requirement in any country other than the country of last lawful permanent residence just prior to initial J-1 entry. The Department of State continues to assert that the J-1 two-year home residence requirement must be fulfilled by EU nationals through physical presence in the last country of residence alone, not by physical presence in a combination of multiple European Union countries.
- "The top of the class doesn't always marry another from the top of the class." One frequent scenario: both spouses are physicians, J-1 and J-2. The J-1 spouse qualifies for O-1 while the J-1 waiver application is pending. However, the J-2 spouse is not "O-1-able." In this case, the J-2 spouse cannot independently obtain work authorization (such as H-1B), because he or she is still subject to §212(e) until the J-1 waiver is approved.
- J-1 Catch-22: Department of State still takes the position that the J-2 dependent cannot fulfill the

two-year requirement independently. So, if the J-2 spouse goes home for two years but the J-1 principal does not get a waiver (*e.g.*, stays here on an O-1), the J-2 is still subject to the two-year home country residence requirement when he or she comes back after two years (or until spouse obtains a waiver).

- Check to see if the spouse, who may now be a J-2, was ever a J-1 in his or her own right. This is not uncommon among physician-physician couples. If you have two physicians who are married to one another and each has incurred an independent individual §212(e) requirement, each physician must independently qualify for a §212(e) waiver. There is no “free ride” for the J-1 spouse on the other J-1 spouse’s §212(e) waiver. Two separate waiver strategies are needed.
- Do not confuse scarcity with “Extraordinary Ability.” For example, if there are only 20 physicians with expertise in the field, you still have to show that the person is among a small percentage at the *top* of the field (Top 3 of 20? Top 5 of 20?), not merely that there are very few people in the world with such expertise.

PRACTICAL TIPS

Some practical tips for advising and representing doctors in U.S. immigration matters include:

- Do not underestimate the complexity of the immigration compliance paperwork required for doctors. The complexity of the U.S. immigration system overall is well known. Less well-known is that U.S. immigration casework for doctors is often at the highest level of complexity of all professions.
- Plan ahead and start a year in advance, if possible. The best practice is to begin work on the needed immigration casework a minimum of six months to one year or more before the doctor needs to be on the payroll of the new employer with a U.S. work visa. Faster or transitional strategies may be available, but they are typically labor-intensive, unreliable, and/or very costly. Pursuit of such “emergency” strategies can add greatly to the expense and uncertainty of what is already a very expensive and uncertain process.
- Letters in support of O-1 petitions and EB-1 I-140 petitions should, to the greatest extent possible, come from writers other than “friends and family” of the applicant.

- Re: Conrad 30 waivers with H-1B. When possible, get a service center case number or Department of State file number for the J-1 waiver/I-612 before filing the H-1B petition. Then, when submitting the H-1B petition, clearly mark the cover letter, “PLEASE ADJUDICATE WITH I-612 WAIVER APPLICATION – FILE # _____.” This can save weeks or months of delay in final approval of a doctor’s H-1B work permission.
- Re: Hardship waivers of the two-year home residency requirement. Don’t forget to prove “double hardship” (*i.e.*, hardship to USC/LPR relative if the USC/LPR relative leaves the United States *and* hardship if the USC/LPR stays and the alien spouse/parent leaves).
- Re: IGA (Interested Government Agency) waivers of two-year home residency requirement. Remember: “*Every* federal agency can be an IGA.”⁵
- If the physician will be seeking a waiver of the two-year home residence requirement and the physician is running out of J-1 time, they should consider applying for a J-1 extension (*e.g.*, additional time to study for and take the U.S. medical specialty board exams) *before* the J-1 waiver application is submitted, when possible. The key consideration is to make sure that the J-1 extension is approved before the J-1 waiver is favorably recommended by the U.S. Department of State.
- Re: Satisfaction of the J-1 two-year home residence requirement in home country. Counsel the client before he or she leaves the United States about the need to keep careful documentation of his or her return to, and continued physical presence in, the home country (keep all passport stamps, copies of old and new passports, telephone bills, rent/mortgage statements, credit card statements, paycheck stubs, etc.) Warn the client that time spent in countries other than the designated home country will *not* be credited toward satisfaction of the two-year home residency requirement.
- There is no requirement that the doctor’s two-year residence in his or her home country to sat-

⁵ See Scott Borene, “Every Agency Can Be An ‘Interested Government Agency’—Developing 212(e) Waiver Options for Foreign Physicians,” *Immigration Options for Doctors*, 1st Ed. (AILA 1995).

isfy §212(e) must be continuous. Even physicians subject to §212(e) are eligible to apply for any kind of nonimmigrant visa except H or L.⁶ In appropriate cases, a physician may wish to satisfy the 24-month requirement in installments of perhaps four months a year over a period of six years, and to enter the United States in other non-immigrant categories such as O-1 until §212(e) is satisfied.

- Carefully consider the intersection of the multiple immigration issues and case-specific facts before choosing an immigration strategy in each case. (The attached checklist of questions in Appendix C provides a place to start the case analysis for doctors' immigration projects.)
- Carefully analyze all of the temporary and permanent immigration options at the outset. (The attached checklists of temporary options (Appendix A) and permanent options (Appendix B) can be a useful starting point.)
- Always have a backup work visa plan available that can be activated if the primary strategy is delayed or unsuccessful.

⁶ INA §212(e); 8 USC §1182(e).

APPENDIX A—A CHECKLIST OF TEMPORARY IMMIGRATION OPTIONS FOR DOCTORS

I. Options with No (or Extremely Limited) Employment Authorization

- 1. B-1 Clerkship (with or without honorarium)
- 2. WB Clerkship (with or without honorarium)

II. Options with Position-Specific/Employer-Specific Employment Authorization

- 3. H-1B (100% Clinical Patient Care or Mixed Clinical/Teaching/Research)
- 4. H-1B (100% Teaching/Research)
- 6. H-1B (Physician of National or International Renown)
- 7. O-1 (Extraordinary Ability)
- 8. TN (Teaching/Research only)
- 9. J-1 (ECFMG-Sponsored Medical Resident/Fellow for Graduate Medical Education (GME))
- 10. J-1 (ECFMG-Sponsored Researcher)
- 11. J-1 (Professor or Research Scholar)
- 12. J-1 (Short Term Scholar)
- 15. F-1 Student (with on-campus Employment Authorization)
- 16. F-1 Student (with Curricular Practical Training Employment Authorization)
- 17. F-1 Student (with off-campus "Affiliated" Employment Authorization)

III. Options with Broad Employment Authorization

- 18. Pending Applicant for Adjustment of Status to Permanent Residence with Employment Authorization
- 19. Spouse of E-2 or E-1 with Employment Authorization
- 20. L-2 (Spouse of L-1) with Employment Authorization
- 21. J-2 (Spouse of J-1) with Employment Authorization
- 22. K-3 (Spouse of USC) with Employment Authorization
- 23. TPS (Temporary Protected Status) with Employment Authorization
- 24. J-1 (with Academic Training Employment Authorization)
- 25. F-1 Student (with Optional Practical Training Employment Authorization)
- 26. F-1 Student (with Economic Hardship Employment Authorization)
- 27. Asylee or Refugee

IV. Options of Last Resort

- Consider any of the other designated categories of employment authorization described at 8 CFR §274a.12(a).

APPENDIX B—A CHECKLIST OF PERMANENT IMMIGRATION OPTIONS FOR DOCTORS**I. Employment-Based Options**

- 1. Extraordinary Ability (Employer-Sponsored)
- 2. Extraordinary Ability (Self-Sponsored)
- 3. Outstanding Professor/Researcher
- 4. Schedule A, Group II (Exceptional Ability)
- 5. Conventional Labor Certification
- 6. “Special Handling” Labor Certification
- 7. Reduction-in-Recruitment Labor Certification
- 8. National Interest Waiver (M.D. 5-year Plan) – Employer-Sponsored (pursuant to INA §203(b)(2)(B)(ii))
- 9. National Interest Waiver (M.D. 5-year Plan) – Self Sponsored (pursuant to INA §203(b)(2)(B)(ii))
- 10. National Interest Waiver (NYSDOT) – Employer-Sponsored (pursuant to INA §203(b)(2)(B)(i))
- 11. National Interest Waiver (NYSDOT) – Self-Sponsored (pursuant to INA §203(b)(2)(B)(i))
- 12. Schedule A, Group I (RN)
- 13. Schedule A, Group I (Physical Therapist)

II. Family-Based Options

- 14. Family-Based Permanent Residence (Sponsored by USC or LPR Spouse)
- 15. Family-Based Permanent Residence (Sponsored by USC or LPR Parent)
- 16. Family-Based Permanent Residence (Sponsored by Adult USC Child)
- 17. Family-Based Permanent Residence (Sponsored by Adult USC Brother or Sister)

III. Other Options

- 18. Diversity Visa Lottery
- 19. Investor (EB-5)
- 20. Asylum-Based Permanent Residence

APPENDIX C—A CHECKLIST OF KEY QUESTIONS FOR DOCTORS SEEKING WORK VISAS

I. Personal/Career Plans

- 1. What are your short-term career plans (*i.e.*, next 3 years)?
- 2. What are your long-term career plans?
- 3. If you do not have a U.S. job offer in your field, how do you plan to support yourself and what are your proposed activities in the U.S. for the next year?

II. Current/Proposed Employment

- 4. Do you have an offer of full-time or part-time employment in the U.S. in your field of professional expertise?
- 5. Do you have an offer of employment at a worksite located in a Health Professional Shortage Area (HPSA) or Medically Underserved Area (MUA)?
- 6. Does your job offer create a legal employer – employee relationship (*i.e.*, IRS Form W-2 payroll employment) or an independent contractor relationship (*i.e.*, IRS Form 1099 self-employment)?
- 7. What is the approximate percentage mix of duties of your proposed employment – allocated among clinical, teaching, research, and other duties?
- 8. Are you currently engaged in research or clinical activities that are funded in whole or in part by any U.S. Federal Government Agency?
- 9. Are you currently engaged in research or clinical activities of particular interest to any U.S. Federal Government Agency?

III. Past Employment

- 10. Have you had 3 or more years of full-time teaching or research experience?
- 11. Have you ever engaged in “moonlighting” employment while in the U.S.?
- 12. Have you ever engaged in employment (including self-employment) within the U.S. that was not authorized in advance in writing by U.S. immigration authorities?

IV. Immigration Credentials

- 13. Do you have currently valid ECFMG Certification?
- 14. Have you taken and passed Parts I and II of FLEX or all 3 parts of USMLE or NBME?

V. Professional and Educational Credentials

- 15. What are your principal research interests?
- 16. What are your principal areas of clinical expertise?
- 17. Do you hold a full and unrestricted medical license in any U.S. state or foreign country?
- 18. How quickly can you obtain required medical licensure in the state of your intended employment?
- 19. Have you completed, in whole or in part, specialty or sub-specialty training or Board Certification in any recognized Medical Specialty in any country?
- 20. Have you received any awards, scholarships, grants, prizes, or similar merit-based recognition for your educational or professional achievements since the age of 16?
- 21. How many peer-reviewed publications have you completed and published?

- 22. How many invited presentations at professional conferences have you completed?
- 23. Have you been an invited reviewer or editor of articles for professional/scientific journals in your field?

VI. Immigration/Personal History

- 24. Are you married? If you are not married, do you have plans to get married in the next year or two? Do you have any children?
- 25. Do you or your spouse have any close family members (living or deceased) who already hold U.S. citizenship or LPR status (close family members include: spouse, fiancé(e), parent, grandparent, brother, sister, brother-in-law, sister-in-law, or child)?
- 26. Have you ever been in the U.S. in J-1 or J-2 Exchange Visitor Status?
- 27. Have you, or has anyone on your behalf, ever applied for a waiver of the J-1 two-year home country residency requirement?
- 28. Have you, or has anyone on your behalf, ever filed an I-129 (Petition for Nonimmigrant Worker), I-140 (Immigrant Visa Petition), I-130 (Family-Based Immigrant Visa Petition), or ETA 750A (Labor Certification)?
- 29. Have you ever been refused a visa at a U.S. Consulate, refused entry to the U.S. or been placed in secondary inspection when seeking entry to the U.S.?
- 30. Have you ever had any difficulties with U.S. immigration or consular officials anywhere in the world?
- 31. Have you ever provided any inaccurate information (spoken or written) to any U.S. immigration or consular office?
- 32. Have you ever failed to maintain full compliance with all applicable U.S. immigration laws?
- 33. Have you ever had any difficulties with the police or law enforcement authorities in any country in the world?
- 34. Do you or your close family members have reason to fear mistreatment or persecution if you were to return to your country of nationality or last residence?
- 35. Would you or your close family members experience extreme hardship if you were to return to your country of nationality or last residence?
- 36. Could your spouse or fiancé(e) qualify for E-2 Treaty Investor status with a suitable investment in a "qualified U.S. business enterprise"?

VII. Spouse/Fiancé(e) Questions

- 37. Repeat all of the questions above with respect to the doctor's spouse or fiancé(e).