HIRING IMMIGRANT DOCTORS

Changes During the COVID-19 Pandemic and Beyond

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The shortage of physicians in the U.S. continues to grow, with recent studies estimating that by 2033 there will be a shortage of 139,000 physicians nationally. The COVID-19 pandemic has magnified this urgent need for more doctors, especially in rural and lower-income areas where some hospitals lacked enough doctors to treat patients infected with COVID-19 during the height of the pandemic.

Foreign-born doctors make up over 25% of all doctors in the U.S., making them a vital resource for hospitals and clinics looking to alleviate this shortage and fully serve patient's needs. To tap into this talent pool and successfully recruit, hire, and retain immigrant doctors, employers need to be aware of the special immigration restrictions and options that apply to them. These issues are discussed below, along with two significant changes to J-1 waiver programs for immigrant doctors brought about by the COVID-19 pandemic.

CONRAD 30 J-1 WAIVER PROGRAM

All immigrant doctors who come to the U.S. for their graduate medical training are required to return to their home country for two years after completing their program unless they get a J-1 waiver. One of the most effective ways to recruit physicians to underserved practice sites is by using the Conrad 30 J-1 waiver program. This program makes 30 spots available each year for healthcare providers to hire immigrant doctors to work in specified physician shortage areas in each state. To get a J-1 waiver the immigrant doctor must sign a contract to work for at least three years at the specified facility. For this reason, many immigrant doctors completing their graduate medical training specifically seek out hospitals and clinics that offer Conrad waiver sponsorship, since they need it to remain in the U.S.

In some states, Conrad waivers are highly competitive in large measure because they offer such a solid means to recruit and hire physicians for difficult to fill positions. For employers, this program offers unique benefits, allowing foreign-born doctors to make critical contributions to rural communities looking to fill gaps in their medical workforce. Another major benefit of this program is that it obligates the immigrant doctor to work for at least three years at the specified clinic or hospital. The hope is that the program will bring new doctors into these communities, where they will ultimately stay longer than three years to address the growing local healthcare needs.

HHS CLINICAL J-1 WAIVER PROGRAM

The U.S. Department of Health and Human Services (HHS) also administers a J-1 waiver program similar to the Conrad 30 program discussed above. Prior to the COVID-19 pandemic, only Federally Qualified Health Centers (FQHC) could sponsor applicants for this type of J-1 waiver, which greatly limited its use. Other

non-FQHC medical facilities had to rely primarily on the 30 waivers per state provided annually by the Conrad waiver program. But in the midst of the COVID-19 pandemic, HHS made a sweeping change to its guidelines, allowing any medical facility located in a Health Professional Shortage Area with a score of 7 or higher to file a J-1 waiver for as many primary care doctors as the facility needs. This change significantly altered the recruiting environment for hospitals, private practices, and other non-FQHC medical facilities, since it effectively eliminated the annual limit of 30 J-1 waivers per state set by the Conrad waiver program. Now employers have the opportunity to hire as many primary care physicians as needed in states like Minnesota, Texas, Georgia, and others where there are frequently more applicants than there are Conrad waiver spots available. Employers also no longer need to wait for state health departments to open up their application periods each year, as they can file applications to HHS at any time.

Another major change caused by the COVID-19 pandemic allows immigrant doctors who are completing their three-year service requirement under the Conrad 30 or HHS waiver programs to work remotely by providing telehealth services. Previously, U.S. Citizenship and Immigration Services (USCIS) and the Department of State (DOS)—the two government agencies that adjudicate J-1 waiver applications—were silent as to whether telehealth services could be used to meet the three-year full-time service requirements under the J-1 waiver programs, leaving employers and doctors who wanted to provide telehealth services in a precarious position.

While this new policy provides much needed guidance to employers seeking to hire immigrant doctors to provide telehealth services, it is set to end when the Public Health Emergency declared on January 27, 2020, ends. It is difficult to envision USCIS and DOS reversing course on the use of telehealth services in J-1 waiver programs after the end of the Public Health Emergency, especially in light of the rapidly growing use of telehealth services by healthcare providers for non-COVID related services. This burgeoning acceptance of the use of telehealth for J-1 waivers, coupled with the major expansion in the availability of HHS clinical J-1 waivers discussed above, opens up significant new avenues to hire and retain more immigrant doctors to work in medically underserved areas remotely.

NATIONAL INTEREST WAIVER

Similar to the J-1 waiver programs discussed above, an immigrant physician can qualify for permanent residence (a "green card") in the U.S. by working in a medically underserved area of the country for five years. U.S. immigration law deems this work to be in the national interest and will therefore waive the usual requirement that an employer test the labor market before sponsoring an employee for a green card. This program further incentivizes immigrant doctors to work in medically underserved areas—or remain at their practice site in the case of a doctor completing their three- year J-1 waiver service obligation—since they can qualify for permanent residence upon completing a total of five years of service. It is a good option for hospitals and clinics looking to fill openings on a long-term basis.

CAP-EXEMPT H-1BS

Each year 85,000 new H-1B visas are available through a lottery system run by USCIS. While employers may enter immigrant physicians into the lottery, the uncertainty and shrinking chance of winning the lottery, even during the major labor market disruptions caused by COVID-19, make this an unattractive hiring strategy. (For a more in-depth discussion of the H-1B lottery, see the article "Four Ways to Beat the H-1B Lottery Blues" in the Spring 2020 edition of *USLAW Magazine*.)

But some employers do not need to use the H-1B lottery process and may instead apply for H-1B status for employees at any time. These "cap-exempt" employers are primarily universities and their affiliated nonprofit organizations, as well as nonprofit research organizations.

Employers who are subject to the cap can also take advantage of this by hiring these employees part-time. For example, a specialty clinic can hire a physician currently teaching at a university in H-1B status for a part-time position, without having to go through the cap. Similarly, a cap-subject employer can place an employee at a cap-exempt entity full time. For example, a physician staffing company can place its physicians at a nonprofit university hospital full time, without having to go through the cap.

In addition, doctors who receive a J-1 waiver through the Conrad 30 program get a lifetime exemption from the H-1B cap. This allows employers to freely hire these doctors without going through the lottery.

O-1 VISAS

Employers looking to hire extremely accomplished doctors with lengthy CVs can get O-1 visas. These visas are available to a small percentage of doctors who are nationally or internationally renowned in their field. They are a good way for employers to hire accomplished medical researchers, businesspeople, surgeons, and inventors, among others. O-1 visa status is beneficial to employers for several reasons, one being that it does not have an annual quota. Second, it is beneficial because employers may also use these visas to hire doctors who are subject to the two-year home residency requirement discussed above.

TREATY BASED VISAS

Special provisions based on international treaties also exist for employers to hire doctors from Canada, Mexico, Australia, Chile, and Singapore. For example, under the USMCA (formerly NAFTA), U.S. employers can readily hire doctors from Canada or Mexico for teaching or research positions.

The expansion of HHS clinical J-1 waivers and acceptance of the use of telehealth for J-1 waivers are welcome changes that will help alleviate the shortage of doctors in the U.S., but more needs to be done. This requires both an understanding of the many ways to hire immigrant doctors, as well as innovative approaches to serving patient's needs and delivering care. Through this article we hope we have contributed to this effort by providing a basic overview of how to hire immigrant doctors and the changes during the COVID-19 pandemic, and that it will prove useful in the years to come as the COVID-19 pandemic recedes and we begin to craft a path forward.

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