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Alien Physicians and Their Admission into the United States—An Update

ALLEN E. KAYE*

A previous article, co-authored by this writer in the December 1978 issue of the San Diego Law Review, *surveyed the then new requirements on alien physicians to pass medical and English competency examinations, and discussed various means by which these requirements might be circumvented. This article discusses the interim implementation of these requirements.*

INTRODUCTION

It was previously noted[1] that two new pieces of legislation amending the Immigration and Nationality Act (Act) and taking effect in the same year[2] had caused a considerable amount of confusion concerning the eligibility of alien physicians[3] entering the United States as either immigrants or nonimmigrants or changing status once here. The purpose of the original article was to dispel

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1. Kaye, Danilov & McDonald, *Alien Physicians and Their Admission into the United States*, 16 SAN DIEGO L. REV. 61 (1978).

2. Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, 90 Stat. 2243; Health Services Extension Act of 1977, Pub. L. No. 95-83, 91 Stat. 383.

3. The author prefers to use the term "alien physicians" instead of the more frequently used but misleading term "foreign medical graduates." Foreign medical graduates include a large population of physicians who are not affected by the immigration laws because they are citizens, or permanent resident aliens, who have obtained their medical degrees abroad.

some of this confusion. Unfortunately, due to recent developments, this confusion remains.

Admission as Immigrants

An alien seeking to immigrate to the United States for the purpose of performing skilled or unskilled labor under the third, sixth, or nonpreference categories is statutorily ineligible to receive a visa and is excludable from admission into the United States unless he obtains a labor certification.[4]

Schedule A, Group I Precertification

Schedule A generally sets forth occupations predetermined to be inadequately supplied with United States workers, and further determines that similarly employed United States workers will not be adversely affected by hiring aliens to fill these jobs. It was previously mentioned that the United States Department of Labor intended to reinstate physicians and surgeons on the *Schedule A* precertification list.[5] On December 19, 1980 the Employment and Training Administration of the United States Department of Labor published these new regulations relating to the labor certification process for the permanent employment of aliens in the United States, including specific provisions relating to alien physicians.[6]

The first part of paragraph (2) of *Schedule A*, Group I is limited to Health Manpower Shortage Areas.[7] Included in this category are primary care, psychiatry and vision care services.[8] The sec-

4. Immigration and Nationality Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (Supp. IV 1980).

5. Kaye, Danilov & McDonald, *supra* note 1, at 67; *see* 20 C.F.R. § 656.10 (1978) (previous regulations); 20 C.F.R. § 656.10 (1982) (current regulations). A labor certification under *Schedule A* is also known as a precertification or a blanket labor certification.

6. 45 Fed. Reg. 83,926-47 (1980).

7. 20 C.F.R. § 656.10(a)(2) (1982). Included under Group I, subsection (a)(2) of *Schedule A* are:

> alien graduates of medical schools who will be employed as physicians (or surgeons) in a geographic area which has been designated by the Secretary of the Department of Health and Human Services (HHS) as a Health Manpower Shortage Area for the alien's medical speciality, or has been identified otherwise by the Secretary of HHS as having an insufficient number of physicians in the alien's medical specialty, in accordance with section 906 of the Health Professions Educational Assistance Act of 1976.

8. 45 Fed. Reg. 57,002-100 (1980); 46 Fed. Reg. 25,774-885 (1981); 47 Fed. Reg. 25,828-909 (1982). Primary care includes the following medical specialties: general and family practice, general internal medicine, general pediatrics and obstetrics/gynecology. A Vision Care Health Manpower Shortage Area is a shortage area for an opthalmologist.

ond part of subsection (a)(2) of *Schedule A*[9] lists areas having insufficient numbers of physicians for particular specialty groups in each of nine groups of specialties.[10] Contained in the lists are Health Service Areas (HSAs) having a specialty physician-to-population ratio substantially (at least one standard deviation) below the United States average for all HSAs.

Physicians wishing to obtain certification that the location of their intended employment is an area in need of physicians of their medical specialty (and, therefore, to qualify for a *Schedule A* labor certification) must provide certain information to the appropriate Department of Health and Human Services (HHS) Regional Health Administrator.[11] The Regional Health Administrator will then certify whether that particular location is or is not in a shortage area applicable to that particular medical specialty.[12] This certificate can then be used to file third and sixth preference[13] petitions with the Immigration and Naturalization Service (INS).

To qualify for a subsection (a)(2) *Schedule A* certification, the Department of Labor also requires alien physicians to satisfy or be exempt from the Visa Qualifying Exam (VQE) requirement.[14] These exemptions are similar to those exempting alien physicians from section 212(a)(32) of the Act,[15] with the exception of alien

9. 20 C.F.R. § 656.10(a)(2) (1982).

10. *See* DIVISION OF HEALTH PROFESSIONS ANALYSIS, BUREAU OF HEALTH PROFESSIONS, HEALTH RESOURCES ADMINISTRATION, REPORT NOS. 81-9-1 to 89-9-9 (Feb. 17, 1981).

11. 20 C.F.R. § 656.22(c)(2)(iii) (1982).

12. *Id.* Certificates granted by the Regional Health Administrator are valid only for the individual named in the certificate and only for the period of time specified, generally one year. EMPLOYMENT AND TRAINING ADMINISTRATION, UNITED STATES DEP'T OF LABOR, LABOR CERTIFICATION 6 (1981).

13. Immigration and Nationality Act § 203(a)(3), (6), 8 U.S.C. § 1153(a)(3), (6) (Supp. IV 1980).

14. 20 C.F.R. § 656.20(d) (1982). The VQE is an examination designed to test medical competency.

15. The Act states:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> . . . .
>
> (32) Aliens who are graduates of a medical school not accredited by a body or bodies approved for the purpose by the Commissioner of Education (regardless of whether such school of medicine is in the United States) and are coming to the United States principally to perform services as members of the medical profession, except such aliens who

physicians of national renown. These physicians are exempt from the VQE requirement by section 101(a)(41) of the Act;[16] however, the Department of Labor has not seen fit to similarly exempt them with respect to their eligibility for labor certifications. The Department of Labor's position is that it would adversely affect the wages and working conditions of similarly employed United States workers if permanent labor certifications were issued for jobs to be filled by aliens not otherwise exempt from the VQE requirement and of merely national renown, absent passage of the VQE.[17] The Department noted that section 101(a)(41) applies to "the requirements for visa petitions while the congressional finding that physicians exist in sufficient quantity in this country is of general applicability."[18] Some commentators have taken strong exception to the legality of the Labor Department's position in

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> have passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health, Education and Welfare) and who are competent in oral and written English. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) and to nonpreference immigrant aliens described in section 203(a)(7). For the purposes of this paragraph, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners Examination if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date . . . .

Immigration and Nationality Act § 212(a)(32), 8 U.S.C. § 1182(a)(32) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1612, 1620. The Secretary of Health, Education and Welfare has determined the VQE to be equivalent to parts I and II of the National Board of Medical Examiners Examination (NBMEE). Graduates of medical schools outside the United States (including Puerto Rico) and Canada (except for graduates of the American University Medical School in Beirut, Lebanon) are not eligible to take parts I and II of the NBMEE.

It is interesting to note that aside from prostitutes and criminals, physicians are the only classification of persons that Congress has seen fit to specifically exclude from admission to the United States.

16. The amended Act provides that "[t]he term 'graduates of a medical school' means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine." Immigration and Nationality Act § 101(a)(41), 8 U.S.C. § 1101(a)(41) (Supp. IV 1980).

17. Correspondence between Attorney Richard D. Steel, the author, and officials of the United States Department of Labor (on file with author).

18. *Id.* Included in the congressional findings and declaration of policy in section 2(c) of Public Law 94-484 is the statement that "[t]he Congress further finds and declares that there is no longer an insufficient number of physicians and surgeons in the United States such that there is no further need for affording preference to alien physicians and surgeons in admission to the United States under the Immigration and Nationality Act." Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, § 2(c), 90 Stat. 2243, 2243.

this regard. The Department of Labor is deliberately setting up a stricter requirement than has Congress in section 101(a)(41).

Schedule A, Group II Precertification

Included under Group II of *Schedule A* are "[a]liens . . . of exceptional ability in the sciences or arts including college and university teachers of exceptional ability who have been practicing their science or art during the year prior to application and who intend to practice the same science or art in the United States."[19] The standards for qualifying under Group II of *Schedule A* are set out in section 656.22(d) of title 20 of the Code of Federal Regulations. This section makes clear that, as far as the Labor Department is concerned, aliens qualifying for precertification under *Schedule A*, Group II must have international acclaim.[20]

Determinations as to whether or not aliens qualify for *Schedule A*, Group II precertification are made by the INS in connection with the adjudication of an I-140 (third or sixth) preference petition.[21] INS can, however, request an advisory opinion of the Department of Labor.[22] If the physician (or surgeon) is of international renown, he would both be exempt from the VQE requirement under section 656.20(d) and qualify for a *Schedule A*, Group II certification. He would also be exempt from the VQE requirement of section 212(a)(32) of the Act because of section 101(a)(41).[23]

Individual (job offer) Labor Certification

Individual labor certification exists as a viable alternative to precertification. The alien physician's employer must demonstrate that s/he has attempted unsuccessfully to recruit United States workers through such efforts as advertising, the job service system, and by other specified means, and that s/he would be willing to pay the prevailing wage for the position offered.[24]

19. 20 C.F.R. § 656.10(b) (1982).
20. 20 C.F.R. § 656.22(d) (1982). Thus doctors who might not qualify under Group I of *Schedule A* because they are not practicing in an area in which their specialty is in short supply might qualify under Group II if they can properly document exceptional ability. *See id.*
21. *Id.* § 656.22(h).
22. *Id.* § 656.22(h)(1).
23. *See supra* note 17.
24. 20 C.F.R. §§ 656.20, .21 (1982).

Again, the VQE requirement under section 656.20(d) must be met.

Labor Certification for Physicians in other than Physician Occupations

In the previous article it was stated that "[i]n response to the new medical competence requirement, some alien physicians doubtless considered filing for labor certification in occupations other than those of physician or surgeon" to avoid the VQE requirement and that the Department of Labor anticipated this possibility.[25] A now obsolete publication of the Department of Labor, the Operating Instructions Handbook,[26] discussed this possibility in detail and how such applications should be processed. The successor publication to the Operating Instructions, the Technical Assistance Guide (TAG),[27] merely states that a physician (or surgeon) who will work strictly in research or teaching with no patient care, or a physician who will be employed in another occupation, is exempt from the VQE requirement.[28] This establishes a much more lenient standard than that set out in the Operating Instructions Handbook.

Three reported decisions of administrative law judges of the United States Department of Labor concerning appeals from denials of applications for alien employment certifications for alien physicians who did not meet the VQE requirement are noteworthy in this regard.

In *University of Vermont*,[29] the employer filed an application for alien employment certification for an assistant professor of medicine. The alien had received a medical degree in Australia. She then specialized in internal medicine and nephrology. Since May 1976, the alien's position as a clinical professor of medicine included patient care as part of her teaching responsibilities.

The administrative law judge noted that while the alien worked for the employer both before and after her appointment as an assistant professor, practicing medicine had been an important part of her job responsibilities.[30] He pointed out that the requirements of a clinical professorship necessitated patient care responsibilities. The judge concluded that "this position possesses a

25. Kaye, Danilov & McDonald, *supra* note 1, at 69.

26. UNITED STATES DEP'T OF LABOR, OPERATING INSTRUCTIONS HANDBOOK, LABOR CERTIFICATION PROGRAM FOR IMMIGRANT WORKERS (1977).

27. *See* EMPLOYMENT AND TRAINING ADMINISTRATION, UNITED STATES DEP'T OF LABOR, LABOR CERTIFICATION (1981).

28. *Id.* at 36.

29. 3 ILCR (MB) 1-929 (May 12, 1982).

30. *Id.* at 1-932.

significant clinical component. Doctor and teacher roles appear to merge. And Employer has not clearly shown that these functions may be so characterized as to avoid the [Certifying Officer's] application of regulations concerning physicians."[31] Therefore, the appeal was denied.

In *University of Puerto Rico*,[32] the school submitted an application for alien employment certification on behalf of an assistant professor in radiation oncology. The position involved teaching, research and patient care duties. The application for certification had been denied because the alien failed to comply with the then existing VQE requirement.[33] One of the employer's arguments on appeal before the administrative law judge was that since the job offer did not involve direct patient care, this regulation was not applicable to the alien. The judge stated that a labor certification cannot be utilized to circumvent the VQE requirement if the alien will be performing the services of a physician. He stressed, however, that this job was "assistant professor in radiation oncology," and that the alien's current duties included teaching and research only.[34] Section 212(a)(32), excluding aliens coming to the United States principally to perform services as members of the medical profession, is inapplicable to a university faculty member not directly involved with patient care.[35] The appeal was granted in this case.

The employer in *Ancora Psychiatric Hospital*[36] filed an application for alien employment certification for the alien as a physician. The application was denied since the alien had not

31. *Id.* at 1-933. The judge also noted that the employer did not timely utilize 20 C.F.R. §§ 656.10(b) and 656.22(d) giving the impression that *Schedule A*, Group II precertification might have been more successful. That approach could have been used immediately and a third preference petition could have been filed by the employer with the INS, bypassing the Labor Department, and claiming eligibility for blanket labor certification as an alien physician of international renown with exemption from the VQE requirement of section 656.20(d) of the Department of Labor and section 212(a)(32) of the Act. *See supra* note 23 and accompanying text.

32. 2 ILCR (MB) 1-701 (May 5, 1981).

33. 20 C.F.R. § 656.21(a)(6) (1978) (currently codified at 20 C.F.R. § 656.20(d) (1982)).

34. 2 ILCR (MB) at 1-704.

35. *Id.* Therefore, 20 C.F.R. § 656.21(a)(6) (1982) is inapplicable and the alien need not comply with the VQE requirement.

36. 3 ILCR (MB) 1-948 (May 27, 1982).

complied with the VQE requirement.[37] On appeal, the employer asserted that the alien was not working as a general practitioner but as a family problems counselor.

The judge upheld the denial of the labor certification because the employer had designated the job as being performed by a physician,[38] and section 656.21(a)(6) of title 20 of the Code of Federal Regulations applies to just such a position, making no distinctions based on specialization.[39]

EXCLUSIONS, WAIVERS, EXEMPTIONS AND ALTERNATIVE GROUNDS OF ADMISSION FOR ALIEN PHYSICIANS WHO DO NOT TAKE AND PASS THE VQE

Alien physicians who do not satisfy the VQE and English competency requirements are not entirely excludable from admission into the United States. Some alien physicians are statutorily exempt from or not subject to these requirements.[40] Others may obtain waivers or use other alternative methods of obtaining admission into the United States. Listed below are some of the categories under which an alien physician may still seek admission into the United States as an immigrant under the third,[41] sixth[42] or nonpreference[43] categories without passing the VQE or satisfying the English language competence requirements.[44]

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37. 20 C.F.R. § 656.21(a)(6) (1978) (currently codified at 20 C.F.R. § 656.20(d) (1982)).

38. 3 ILCR (MB) at 1-951.

39. *Id.* at 1-948.

40. Aliens who are graduates of medical schools accredited by a body or bodies approved for that purpose by the United States Secretary of Education (formerly Commissioner of Education), regardless of whether the medical schools are located within the United States, are statutorily exempt from the VQE and English competence requirements. Immigration and Nationality Act § 212(a)(32), 8 U.S.C. § 1182(a)(32) (Supp. IV 1980). Currently, only medical schools in the United States (including Puerto Rico) and Canada are so accredited by the Liaison Committee on Medical Education. This is the only body approved for the purpose of accreditation by the United States Secretary of Education. Memorandum by Dr. Ray L. Casterline, Executive Director of the Educational Comm. for Foreign Medical Graduates (ECFMG) (Aug. 17, 1977). The INS takes the position that the term "graduates of a medical school" as defined in section 101(a)(41) of the Act includes only aliens who have graduated from medical schools in a foreign state or have qualified to practice medicine in a foreign state. 54 INTERPRETER RELEASES 352 (1979). Therefore, alien graduates of United States medical schools are not subject to the VQE and English competence requirements.

41. Immigration and Nationality Act § 203(a)(3), 8 U.S.C. § 1153(a)(3) (Supp. IV 1980).

42. *Id.* § 203(a)(6), 8 U.S.C. § 1153(a)(6).

43. *Id.* § 203(a)(7), 8 U.S.C. § 1153(a)(7).

44. The previous article listed fifteen categories encompassing those alien physicians who could immigrate to the United States principally to perform services as members of the medical profession without passing the VQE or satisfying

Alien Physicians Coming Principally to Perform Services as Members of the Medical Profession

Subsection 41 of section 101(a) of the Act defines the term "graduates of a medical school," specifically excluding aliens of national or international renown in the field of medicine.[45] These aliens, therefore, are not subject to the VQE and English competence requirements of section 212(a)(32).[46]

In the previous article it was pointed out that the INS had as yet failed to establish criteria, specified by regulation, for determining which physicians were of national or international renown. This has not been remedied. The INS often uses those standards listed in the Code of Federal Regulations to determine whether aliens qualify for *Schedule A*, Group II labor certifications as aliens of exceptional ability in the arts or sciences and to determine whether an alien is of national or international renown.[47] These standards, however, are used to determine whether an alien is of *international* acclaim for labor certification purposes, while an alien of only *national* renown is also exempt from the VQE requirement by section 101(a)(41).

An interesting case in this area is *In re Medical University of South Carolina for Hubert Clive Meredith*.[48] The Medical University of South Carolina filed a petition for the beneficiary as an assistant professor in radiology. The petition was denied because the District Director concluded that the beneficiary had not passed parts I and II of the NBMEE or the VQE.[49] On appeal, counsel for the petitioner contended that the beneficiary was a physician of national or international renown, exempting him from the provisions of section 212(a)(32) of the Act. Submitted

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the English competency requirement. Kaye, Danilov & McDonald, *supra* note 1, at 70-74. The following discussion focuses on new developments in this area.

45. *Id.* § 101(a)(41), 8 U.S.C. § 1101(a)(41) (Supp. IV 1980).

46. *See id.* § 212(a)(32), 8 U.S.C. § 1182(a)(32) (Supp. IV 1980); *see also* Matter of Medical University of South Carolina, 17 I. & N. Dec. 266 (1978). While there was no discussion at all of the VQE requirement in this case, the Regional Commissioner may have assumed that since the beneficiary was qualified under Group II of *Schedule A* he would also qualify for an exemption from the VQE requirement under section 101(a)(41) as an alien of international renown in the field of medicine.

47. 20 C.F.R. § 656.22(d) (1982).

48. No. A21 092 383 (May 23, 1979) (unpublished decision of Acting INS Regional Commissioner, Southern Region, Atlanta).

49. *See* 8 C.F.R. § 204.2(e)(2) (1978).

with the appeal were various letters and affidavits attesting to his national and international renown.

The record indicated that the beneficiary received his medical degree in England in 1954. In 1974, he received a diploma from the Royal Australian College of Radiologists. He authored six articles appearing in medical journals in New Zealand, Australia, England and the United States. Letters from his peers in the United States, New Zealand, England, and Australia indicated that he was a physician of international renown.

The Acting Regional Commissioner addressed two interrelated issues in deciding this case: first, whether the beneficiary would qualify for precertification under *Schedule A*, Group II and, second, whether the beneficiary was excludable from the United States under section 212(a)(32) of the Act.[50] After considering the documentary evidence submitted, it was concluded that in view of the beneficiary's national and international reputation in his specialty, the term "graduate of a medical school" did not apply and therefore section 212(a)(32) did not apply to him.[51] The Acting Regional Commissioner then followed the guidelines for qualification found in section 656.22(d) of title 20 of the Code of Federal Regulations and stated that "it now has been determined that the beneficiary does have the international reputation and widespread acclaim required."[52] After a brief consideration of some of the other factors, he concluded that an alien of beneficiary's stature was qualified for precertification under Group II of *Schedule A*. Thus, the denial decision of the District Director was withdrawn and the third preference petition approved.

In what was, in effect, a belated and rather limited "grandfather clause," the 1977 amendments to the Act provided that an alien who is a graduate of a medical school would be considered to have passed the VQE if the alien (1) on January 9, 1977, was a doctor of medicine fully and permanently licensed to practice medicine in a state, (2) held, on that date, a valid specialty certificate, and (3) was, on that date, practicing medicine in a state.[53] This provision applies to both aliens seeking permanent entry

50. *In re* Medical University of South Carolina *ex rel.* Hubert Clive Meredith, No. A21 092 383, at 3 (May 23, 1979) (unpublished decision of Acting INS Regional Commissioner, Southern Region, Atlanta). As the second question largely controls the first, the Regional Commissioner addressed it before reaching the issue of precertification. *Id.*

51. *Id.* at 4.

52. *Id.* at 3.

53. Health Services Extension Act of 1977, Pub. L. No. 95-83, § 307(q)(3), 91 Stat. 383.

and aliens seeking entry under the temporary "J" exchange visitor program.

Section 5 of the recent amendments to the Act[54] substantially expands the grandfather clause. It eliminates the requirement that aliens hold a specialty board certificate.[55] The specialty board requirement is a voluntary rather than a mandatory requirement in the medical profession, and the House Immigration Subcommittee was assured that full and permanent medical licensure by a state is a sufficient qualification to permit alien physicians to practice medicine.[56] In addition, the date in the grandfather clause was advanced from January 9, 1977 to January 9, 1978, because the VQE was not available to be administered until September 1977.[57]

Section 101(a)(27) of the Act has been amended to permit certain alien physicians who (1) had graduated from a medical school or had qualified to practice medicine in a foreign state, (2) were fully and permanently licensed to practice medicine in a state on January 9, 1978,[58] and were practicing medicine in a state on that date, (3) entered the United States as nonimmigrants on "H" or "J" visas before January 10, 1978,[59] and (4) have been con-

54. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 5(a)(1), 95 Stat. 1611, 1612.

55. Specifically, section 5(a)(1) amends section 212(a)(32) of the Immigration and Nationality Act to waive the requirement of successful completion of parts I and II of the NBMEE or the equivalent in the case of an alien who was licensed and practicing medicine in the United States on January 9, 1978, without regard to whether or not the alien had a valid specialty certificate issued by a medical specialty board. Therefore, the third requirement prescribed by section 601(a) of the Health Planning and Health Services Extension Act of 1977 (Pub. L. No. 95-83), that is, that the alien physician must also have held on January 9, 1977 a valid specialty certificate issued by a constituent board of the American Board of Medical Specialties, was repealed.

56. H.R. REP. No. 264, 97th Cong., 1st Sess. 17 (1981).

57. *Id.*

58. Alien physicians who passed the Federation Licensing Examination (FLEX) prior to January 9, 1978 but did not have a license as of then would not be considered to come under the provisions of section 101(a)(27)(H) or section 212(a)(32) since the INS has taken the position that "the clear words of the law state that the alien physician must have actually been licensed on or before January 9, 1978." Meeting between liaison committee of American Immigration Lawyers Association (AILA) and staff of Andrew J. Carmichael, Jr., INS Assistant Commissioner for Adjudications, March 16, 1982 in Washington, D.C..

59. The INS has taken the position that "in order to qualify under this provision the foreign medical graduate must have entered as an "H" or "J" nonimmigrant. Obtainment of "H" or "J" status after entry is not qualifying." *Id.* The INS later explained that had Congress intended to include those that changed status to

tinuously present in the United States in the practice or study of medicine since the date of such entry to be treated as "special immigrants" and thus, to become permanent residents without regard to numerical restrictions, the English competence and VQE requirements, or labor certifications.[60] "It [was] the Committee's intent that brief, temporary trips abroad (for example, to visit family) should not be construed to break the continuous presence or practice requirements for an alien to benefit under these provisions.[61] Section 5(d)(2) of the bill provided that alien physicians who qualify under such provisions may adjust their status to that of a permanent resident without regard to the restrictions of section 245(c) of the Act which bar adjustment to those who engage in unauthorized employment in the United States.[62] Alien physicians who are subject to the two-year foreign residence requirement will not, however, benefit from the amendments to section 101(a)(27) since section 212(e) was not amended.[63]

INS statistics reveal that approximately 2,700 alien physicians may be afforded relief under this provision.[64] These are nonimmigrant foreign medical graduates who entered the United States

"H" or "J" they would have followed the language of the 1976 Act in which provisions relating to alien physicians specifically referred to those that entered as exchange visitors or had their status changed to "J". On INS inquiry, the House committee reportedly stated "that's what the law says." *Id.*

60. Those alien physicians who were licensed in a state and were practicing in a state on January 9, 1978 and subsequently left the United States are within the exemption from the VQE requirement of section 212(a)(32). Those still in the United States might qualify as special immigrants if they entered as "H" or "J" nonimmigrants. As for those who left before January 9, 1978 the INS has taken the position that, based upon the wording of the statute, these alien physicians would not qualify since they were not practicing on that date. An alien physician who left the United States, for example, on December 15, 1977 and returned January 15, 1978 to resume the practice which he left, would not be considered as having been absent by the INS. The departure, not meaningfully interruptive of physical presence, could not logically be interruptive of practice. *See id.* On March 23, 1982, the INS published, as an interim rule, changes implementing the provisions of the Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611. *See* 47 Fed. Reg. 12,133 (1982) (interim INS rule revising 8 C.F.R. § 245.1(b)).

61. *See* H.R. REP. NO. 264, 97th Cong., 1st Sess. 23 (1981); *see also* 47 Fed. Reg. 12,133 (1982) (interim INS rule revising 8 C.F.R. § 245.1). Part 245, section 245.1(c) states, in part, that "temporary absences from the United States of 30 days or less do not interrupt the continuous presence requirement during which the applicant was practicing or studying medicine. Temporary absences authorized under the Service's advance parole procedures will not be considered interruptive of continuous presence when the alien applies for adjustment of status." To the extent this provision constrains discretionary determinations of what interrupts continuous physical presence, it does not seem to fully carry out the intent of Congress and may be subject to successful challenge in the courts.

62. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 5(d)(2), 95 Stat. 1611, 1614 (1981); *see also* 47 Fed. Reg. 12,133 (1982).

63. *See* Immigration and Nationality Act § 212(e), 8 U.S.C. § 1182(e) (1976); *see also* 47 Fed. Reg. 12,133 (1982).

64. *See* H.R. REP. NO. 264, 97th Cong., 1st Sess. 23 (1981).

and have been practicing medicine or have been enrolled in a program in the study of medicine. It is expected that INS will keep statistics on the number and location of special immigrants who adjust their status under this provision so that the House committee may review the situation.[65] The House committee felt that the equities established by these alien physicians in the way of community ties and close families, in addition to their role as "shock troops" in a decade of medical care shortages, served to emphasize the need for an enlarged grandfather clause to benefit them.[66]

Alien Physicians Not Coming Principally to Perform Services as Members of the Medical Profession

Under the terms of section 212(a)(32), an alien medical school graduate wishing to enter the United States as a third, sixth or nonpreference immigrant but not immigrating principally to perform services as a member of the medical profession is not subject to the VQE and English competency requirements. This is, however, a difficult standard to meet.[67]

For example, the petitioner in *In re E. I. du Pont de Nemours & Co. ex rel. Benjamin Ramirez-Cervantes*[68] sought to employ the beneficiary as a medical consultant in industrial hygiene and toxicology. The original labor certification issued in this case classified the beneficiary's position as a toxicologist. Counsel for the petitioner and beneficiary then advanced an amended labor certification which classified the beneficiary as an industrial hygienist.

65. *See id.*

66. *See id.* These provisions reflected, in part, a desire by the committee to deal with the various problems presented in individual private immigration bills to provide relief for alien physicians. The committee believed that these remedial changes provide appropriate relief in a blanket fashion. As a result, unless extraordinary and unforeseen hardships can be demonstrated, the committee will be reluctant to approve private immigration bills in the future concerning foreign medical graduates. *Id.*

67. *See, e.g., In re* Medical College of Georgia *ex rel.* Kasim, No. A20 666 766 (Feb. 1, 1980) (unpublished decision of District Director, Atlanta, Georgia) (pathologist performing services as laboratory director and assistant professor of pathology held to be within the ambit of the medical profession); *see also* Matter of Sheikh, 17 I. & N. Dec. 634 (1980) (epidemiologist not excused from VQE requirement by District Director; the Regional Commissioner reversed, finding the position of professor of environmental epidemiology not strictly an occupation for physicians and not involving the performance of services in the medical profession within the meaning of section 212(a)(32)).

68. No. A21 678 020 (Oct. 29, 1979) (unpublished decision of INS Regional Commissioner, Eastern Region).

However, the MA7-50B form (Job Offer for Alien Employment) described the job to be performed as medical consultant-industrial hygiene and toxicology, and required that the beneficiary possess an M.D. degree. In a letter accompanying the labor certification, the certifying officer of the Department of Labor told counsel that, pursuant to section 656.21(a)(6) of title 20 of the Code of Federal Regulations, there was no need for the beneficiary to demonstrate passing the VQE since he would not be involved in direct patient care.

The District Director acknowledged that the Department of Labor distinguished between foreign medical graduates involved in direct patient care and those not so involved, but stated that section 204.2(e)(2) of title 8 of the Code of Federal Regulations and section 212(a)(32) of the Act "make no such distinctions and very boldly refer to foreign medical graduates coming 'principally to perform services as a member of the medical profession.' "[69] It was his contention that where a petitioner requires the beneficiary to possess an M.D. degree and where the services to be performed are in the general field of medicine, that beneficiary is required to pass the VQE or show that he is exempt from it, regardless of whether or not patient care is involved. Since this was not demonstrated, the sixth preference petition was denied.[70]

On appeal before the Regional Commissioner, counsel for the petitioner argued that the beneficiary was not coming to the United States "principally to perform services as a member of the medical profession" and, therefore, was not excludable pursuant to section 212(a)(32) of the Act. He argued that the intent of Congress was to limit the admission of aliens coming to perform direct patient care which included general and specialized practices relating only to the direct treatment of patients. The second argument advanced was that the beneficiary was, by virtue of affidavits presented, (all of which highly recommended him as a man of unique skills in the field of toxicology), a person of sufficient renown to be exempt from the requirements of section 212(a)(32).

The Regional Commissioner concluded that the fact that the beneficiary was required to have an M.D. degree did not make him excludable for not having passed parts I and II of the NBMEE or VQE. Without addressing whether or not the beneficiary could be considered a person of national or international renown, it was determined that the beneficiary would primarily be employed in research so that the exclusion provisions of section 212(a)(32) do not apply. Accordingly, the appeal was sustained,

69. *Id.* at 2.
70. *Id.* at 3.

the decision of the District Director reversed and the petition approved.

ADMISSION AS NONIMMIGRANTS

Listed below are new developments concerning some of the nonimmigrant visa classifications that can be used by an alien physician to seek admission into the United States to perform medical services without passing the VQE or satisfying the English language competency requirements.

Temporary Visitor for Business (B-1)

The Foreign Affairs Manual of the United States Department of State provides that an alien who is studying at a foreign medical school and seeks to enter the United States temporarily to take an "elective clerkship" at a United States medical school's hospital, without remuneration from that hospital, is classifiable as a B-1 temporary visitor for business.[71] An "elective clerkship" affords practical experience and instruction in the various disciplines of medicine under the supervision and direction of faculty physicians at a United States medical school's hospital as part of the alien's medical school education.

Distinguished Merit and Ability (H-1)

Under section 101(a)(15) of the Act, an alien physician may be classified H-1 if he is coming to the United States to perform services as a member of the medical profession "pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency."[72] Any patient care activities by the beneficiary must be incidental to the alien physician's teaching or research at or for the educational or research institution or agency.[73] Of course, these limitations would not apply to the classification of an alien physician as an H-1 nonimmigrant if he were not coming to the United States to perform services as a member of the medical profession.[74] The Eng-

71. 9 DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, pt. II, § 41.25 n.4.2(n) (1980).
72. Immigration and Nationality Act § 101(a)(15)(H)(i), 8 U.S.C. § 1101(a)(15)(H)(i) (1976).
73. *See* 8 C.F.R. § 214.2(iii) (1982).
74. *See In re* Technicon Instruments *ex rel.* Elkin Simson, No. NYC-N-54599

lish language competence, VQE, and permanent labor certification requirements do not apply to alien physicians coming to the United States on "H" nonimmigrant visas.

Temporary Worker in Short Supply (H-2)

Section 101(a)(15)(H) prohibits alien medical graduates coming to practice in the United States from entering as H-2 nonimmigrants (temporary workers in short supply).[75] Because section 101(a)(41) expressly removes aliens who are of national or international renown in the field of medicine from inclusion in the term "graduates of a medical school" these renowned physicians could qualify for H-1 or H-2 visas although neither coming to teach or to conduct research nor coming at the invitation of a public or nonprofit educational or research institution or agency.[76]

A recent decision, *In re William B. Krissoff*,[77] discussed at length the subject of alien physicians seeking to enter the United States on H-1 or H-2 nonimmigrant visas. In this case petitions to classify the beneficiary as a person of distinguished merit and ability pursuant to section 101(a)(15)(H)(i) or a temporary worker pursuant to section 101(a)(15)(H)(ii) were denied and certified to the Regional Commissioner for review.

The petitioning California corporation was a private medical clinic engaged in providing services in orthopedic surgery. The

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(Nov. 11, 1977) (unpublished decision of INS Regional Commissioner, Eastern Region), in which an H-1 petition was denied for an alien physician who was to be involved in the development of instrumentation to provide automated chemical analysis in the field of medicine, air and water pollution and assist in the manufacturing of such instrumentation for a profit-making corporation. The Regional Commissioner found that sufficient evidence had been presented which would clearly establish that the beneficiary would be coming to the United States not as a member of the medical profession to perform duties involving patient care and/or research or teaching, but as an advisor to the director of the petitioning corporation which was involved in the manufacturing of advanced scientific instrumentation. Therefore, the District Director's decision was withdrawn and the H-1 petition approved.

75. Immigration and Nationality Act § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii) (1976), provides that:

> (15) The term "immigrant means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> . . . .
>
> (h) an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such services or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession.

76. *See* Immigration and Nationality Act § 101(a)(41), 8 U.S.C. § 1101(a)(41) (Supp. IV 1980).

77. No. SFR-N-22008, 21913 (Feb. 12, 1982) (unpublished decision of INS Regional Commissioner, Western Region).

beneficiary was recruited to perform duties described as orthopedic surgery and the supervision of medical students; the duties as described involved direct patient care. The petitioning organization was not a public or private nonprofit educational or research institution in the United States seeking the beneficiary's services to teach or conduct research. However, counsel for the petitioner contended that the beneficiary was an alien of national or international renown in the field of medicine and therefore eligible for the nonimmigrant classification sought in the petition.

The Regional Commissioner stated that documentary evidence should be available which would support any claim of national or international renown in the field of medicine. Presenting and/or publishing papers, and the receipt of awards in connection with them are not, in and of themselves, sufficient evidence of national or international renown, according to the Regional Commissioner. The Regional Commissioner noted that the accomplishments must be followed by praise and honors of national or international significance. In the case at bar, the petition and supporting evidence failed to establish such acclaim and honors. The services to be performed did not appear to be such that they required someone of national or international renown in the field of medicine, although they would require a skilled orthopedic surgeon with knowledge of sports medicine. Such skill and knowledge, however, did not necessarily equate to renowned stature and therefore the petitioner failed to establish that the beneficiary was of national or international renown in the field of medicine.[78]

EXCHANGE VISITOR (J-1)

The VQE Requirement—Exemptions and the Substantial Disruption Waiver

On or after January 10, 1978, exchange visitors (J-1 visa holders) coming to the United States to participate in a program under which they will receive graduate medical education or training

78. The Regional Commissioner appears to conclude that an alien of national or international renown in the field of medicine must be coming to the United States to perform services requiring someone of national or international renown in the field of medicine. This appears to impose a higher standard than that called for by both section 101(a)(15)(H)(i) and case law interpreting it.

must meet the statutory requirements of section 212(j)(1).[79] One of these requirements is passing the NBMEE or VQE.

An alien physician who has not passed the VQE, does not qualify for the licensed and practicing-medicine-in-a-state exemption, and is not a graduate of an accredited medical school may still enter the United States on an exchange visitor visa to receive medical education or training under the procedure set out in section 212(j)(2)(A).[80]

In recognition of the role played by alien physicians in hospital staffing, a temporary provision was included in the 1977 legislation allowing for a waiver of the VQE and English competency requirements until December 31, 1980. The waiver was contingent upon a determination that there would be a "substantial disruption of medical services" as a result of the alien's inability to participate in the program.[81] Waivers generally require an agreement by the requesting hospital to phase down the total number of alien physicians used by ten to twenty percent a year.[82] The waiver provision was further extended at the end of 1980 for an additional year.

Certain geographic areas, medical specialties, and hospitals, however, are still dependent on alien physicians to serve essential health care needs of their communities.[83] The gradual phase-down of reliance on alien physicians, in fact, was literally at a stalemate in the first two years after legislation was passed.[84] Then, five years after the 1976 amendments, Congress was again compelled to address the problem.

In order to avoid serious health care crises in states and localities which continue to be heavily dependent on alien physicians,[85] the House Committee on the Judiciary believed that a limited ex-

79. Immigration and Nationality Act § 212(j)(1), 8 U.S.C. § 1182(j)(1) (Supp. IV 1980), *as amended by* Immigration and Nationality Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1612. But see *supra* text accompanying notes 54-66 for a discussion of the grandfather clause.

80. *See* Immigration and Nationality Act § 212(j)(2)(A), 8 U.S.C. § 1182(j)(2)(A) (Supp. IV 1980), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 5(a)(3), 95 Stat. 1611, 1613.

81. *Id.*

82. Memorandum of Dr. Ray L. Casterline, Executive Director of ECFMG (May 24, 1978).

83. *See* H.R. REP. No. 264, 97th Cong., 1st Sess. 14 (1981).

84. *See id.*

85. The preponderance of waiver requests have been submitted on behalf of institutions in New York City, which were granted 187 of the total 239 waivers granted in 1980. *Id.* In this respect, a May 1979 report of the New York Health Planning Commission revealed that the alien physician is critically needed to staff health facilities in major United States cities as well as state mental hospitals. The report listed states particularly depending on alien physicians including: Connecticut, New Jersey, New York, Illinois, Delaware, Maryland, Michigan, and Ohio.

tension of the "substantial disruption" waiver authority was justifiable, but that prolonged delays on the part of certain localities and institutions in phasing down reliance on alien physicians could not be tolerated.

For this reason, section 5 of the recent amendments to the Act provides for an extension of the substantial disruption waiver provision for two years, until December 31, 1983.[86] The bill also includes strict planning, reporting, and monitoring requirements for those hospitals requesting waivers on behalf of alien physicians.[87] The purpose of these requirements was to strongly encourage participating hospitals to develop and implement plans to replace alien physicians.[88] It was the opinion of the House committee that this would be the last extension of the waiver provision and that maximum resources should be utilized during this "grace period" to foster the goal of the 1976 Health Professions Educational Assistance Act—to assure quality health care service for the nation.[89]

Two-Year Foreign Residence Requirement

Section 212(e) of the Act makes an alien physician ineligible to apply for an immigrant visa, for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or (L) until he "has resided and been physically present in the country of his nationality or last residence for an aggregate of at least two years following departure from the United States."[90] This requirement applies whether he was admitted to the United States on or after January 10, 1977, as an exchange visitor to receive graduate medical education or training or whether he acquired this status on or after that date for that purpose.[91] Also subject to the two-year foreign residence requirement were those aliens who were previously admitted as exchange visitors (or who acquired this status after admission), who participated in a funded program, or whose

The report went on to state that substantial numbers of alien physicians were associated with specialties such as pathology, anesthesiology and psychiatry. *Id.*

86. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 5(b)(7), 95 Stat. 1611, 1613.

87. *Id.*

88. H.R. REP. No. 264, 97th Cong., 1st Sess. 14 (1981); *see also* 47 Fed. Reg. 12,132 (1982); 8 C.F.R. § 214.2(j)(2)(ii) (1982) (interim INS rule revision).

89. H.R. REP. No. 264, 97th Cong., 1st Sess. 15 (1981).

90. Immigration and Nationality Act § 212(e), 8 U.S.C. § 1182(e) (1976).

91. *See id.*

field of specialized knowledge or skill was on the exchange-visitor skills list.[92] Section 212(e) also makes waivers of the two-year foreign residence requirement on the basis of a "no-objection" statement from the government of the alien's country of nationality or last residence unavailable to those alien physicians who were, after January 10, 1977, admitted as exchange visitors to receive graduate medical education or training or who acquired this status thereafter.[93]

Upon a favorable recommendation by the Director of the United States Information Agency (USIA),[94] waivers are still available in three situations: (a) after a satisfactory showing of exceptional hardship to the alien's United States citizen or permanent resident spouse or child; (b) after a satisfactory showing of inability to return to the alien's country of nationality or last residence because the alien would be subject to persecution on account of race, religion or political opinion; or (c) pursuant to a request by an interested government agency.[95] However, an exchange visitor already participating as of January 9, 1977 in an exchange visitor program involving graduate medical education or training, who had then obtained a waiver or was not then subject to the foreign residence requirement of section 212(e), and who proceeds abroad temporarily and is returning to the United States to continue to participate in the same or a related program continues to be exempt from the foreign residence requirement.[96] Additionally, alien physicians coming to the United States for the purpose of observation, consultation, teaching, or research are not auto-

92. *See* 22 C.F.R. § 41.65 (1982). For the exchange-visitor skills list, see 37 Fed. Reg. 8099-177 (1972), *supplemented by* 43 Fed. Reg. 5910 (1978).

93. *See* Immigration and Nationality Act § 212(e), 8 U.S.C. § 1182(e) (1976). Section 248 of the Act was also amended by the Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 10, 95 Stat. 1611, 1617, to preclude a change of nonimmigrant status for an alien physician classified as an exchange visitor who came to the United States or acquired such classification thereafter in order to receive graduate medical education or training even if he received a waiver of the two-year foreign residence requirement. *See also* 47 Fed. Reg. 12,134 (1982) (interim INS rule revising 8 C.F.R. § 248.2).

94. On August 24, 1982, the President changed the name of the International Communication Agency (ICA) back to the United States Information Agency (USIA), the name by which it was formerly known before its reorganization effective April 1, 1978. Pub. L. No. 97-241, 96 Stat. 273, 291 (1982).

95. *See* Immigration and Nationality Act § 212(e), 8 U.S.C. § 1182(e) (1976).

96. State Department policy provides that:

> An exchange visitor who leaves the U.S. temporarily for any reason and who needs a new visa or a revalidation of his current visa to reenter the U.S., to enable him to continue participation in the program in which he was last authorized to participate with no change in program objective shall not be subject to the two-year foreign residence requirement by reason thereof.

Memorandum issued by Department of State (June 12, 1972) (on file with author).

matically subject to the two-year foreign residence requirement under section 212(e), unless they participated in a funded program or their country listed their skill or occupation on the exchange-visitor skills list.[97]

Section 101(a)(27) of the Act has been amended to provide special immigrant status to certain alien physicians who had entered the United States as nonimmigrants on "H" or "J" visas before January 10, 1978 without regard to numerical restrictions, labor certification or the restrictions of section 245(c) of the Act.[98] Many observers at first assumed that the two-year foreign residence requirement of section 212(e) would not apply to these alien physicians, but a close study of the amended provisions showed that this requirement still remained. Then the International Communication Agency (ICA), currently USIA, announced that a foreign medical graduate who met the requirements of the current version of section 101(a)(27) of the Act, and who was subject to the two-year foreign residence requirement of section 212(e) of the Act, and who entered the United States for education or training on or before January 9, 1977 might obtain a waiver of the two-year foreign residence requirement in an expedited manner if certain conditions were met. In particular, the alien must obtain a statement from his embassy in Washington, D.C. declaring that the government of his nationality or permanent legal residence has no objection to a waiver of the foreign residence requirement.[99] The same announcement stated that foreign medical graduates entering the United States between January 10, 1977 and January 9, 1978 (for whom "no-objection" waivers are, by statute, inapplicable) and who meet the requirements for special immigrant status must apply directly to the USIA for a recommendation if they desire to perfect that status.[100] Each case is to be reviewed on an individual basis and the USIA will consider whether it wishes to act as an interested government

97. 22 C.F.R. § 514.13(a)(8)(ii) (1982). For the definition of "graduate medical education or training," see 22 C.F.R. § 514.1 (1982). Alien physicians subject to the two-year foreign residence requirement through such participation or listing of their skill or occupation are eligible for waivers under section 212(e) on the basis of "no-objection" statements as well as for the three other types of waivers described above.

98. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 5(d)(1), 95 Stat. 1611, 1614.

99. 47 Fed. Reg. 8106 (1982).

100. *Id.*

agency[101] to recommend a waiver of the two-year foreign residence requirement.[102]

It has been argued that it is inequitable for the USIA to act as an interested government agency for those alien physicians who entered the United States as exchange visitors between January 10, 1977 and January 9, 1978, but not to extend the same treatment to those alien physicians who entered the United States as exchange visitors on or before January 9, 1977 and are unable to obtain "no-objection" certificates or the other three types of waivers.[103] The fact that the former group could not avail themselves of "no-objection" certificates but that the latter could is not deemed a valid or equitable basis for distinguishing the two groups. If the House Judiciary Committee intended to provide relief in this situation, it can only be surmised that the plight of those alien physicians who entered on or before January 9, 1977 as exchange visitors was inadvertently not addressed.[104]

The USIA has taken this matter under consideration and has discussed it with the House Subcommittee on Immigration.[105] In addition, the American Immigration Lawyers Association plans to discuss this matter further with the House subcommittee.[106] If the subcommittee agrees that the USIA acting as an interested government agency for the category I and II alien physicians would be in furtherance of congressional intent, it is assumed

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101. *Id.*; *see also* 22 C.F.R. § 514.31(c)(1) (1982). Where the USIA acts as an interested government agency it can do so on a humanitarian basis rather than by using the higher standard of whether the waiver would be in the public interest, which is the standard to be used by interested federal agencies other than USIA. *Id.*

102. The ICA apparently pointed out to the House Immigration Subcommittee that alien physicians who entered between January 10, 1977 and January 10, 1978 as exchange visitors could not avail themselves of the special immigrant status provided by section 5(d)(1) of Public Law 97-116 since "no-objection waivers" were not available to them and the other three types of waivers were very difficult to obtain. The House subcommittee expressed its approval for the ICA to act as an interested governmental agency in these cases in furtherance of congressional intent in enacting the waiver provisions. Meeting between liaison committee of the American Immigration Lawyers Ass'n (AILA) and C. Normand Poirier, Deputy General Counsel, United States Information Agency (USIA) and staff, Washington, D.C., (July 1, 1982).

103. The situation commonly arises in two categories of alien physicians who entered as exchange visitors prior to January 10, 1977: 1) where the alien's country refuses even to respond to a request for a "no-objection" statement, and 2) where the alien's country affirmatively says that it objects to the issuance of such statement (as many countries do).

104. *See supra* notes 66-69 and accompanying text.

105. Meeting between liaison committee of AILA and C. Normand Poirier, Deputy General Counsel, USIA and staff, Washington, D.C., (July 1, 1982).

106. *Id.*

that the USIA would then take appropriate action.[107]

Limitations on Length of Stay

USIA regulations discuss the conditions under which alien physicians who were issued exchange visitor visas for graduate medical education or training *prior* to January 10, 1978 will be permitted to continue their education or training in the United States.[108] Those who came to the United States *on or after* January 10, 1978 for graduate medical education or training on exchange visitor visas, or acquired this status after coming here, were formerly subject to the limitations on stay of section 212(j)(1)(D).[109]

Under this section alien physicians who were in the United States for graduate medical education or training were allowed to remain for two years with a possible extension of one additional year.[110] The recent amendment to the Act now allows these alien physician exchange visitors to remain for the time typically required to complete the medical education or training programs for which they entered the United States, as determined by the Director of USIA, based on criteria established in coordination with the Secretary of Health and Human Services.[111] This duration is limited to seven years unless the alien physician can make a satisfactory demonstration that the country to which he will return has an exceptional need for an individual trained in his specialty.[112] Allowance is also made for one change in program not later than two years after entry.[113]

107. *See supra* note 101 and accompanying text. It would seem that the USIA could act here without specific congressional approval on a humanitarian basis.

108. 22 C.F.R. § 514.13(a)(9) (1982).

109. Immigration and Nationality Act § 212(j)(1)(D), 8 U.S.C. § 1182(j)(1)(D).

110. *Id.*

111. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 5(b)(5), 95 Stat. 1611, 1612. Note that the USIA has now amended its regulations in 22 C.F.R. § 514.13 (1982) to correspond to this amendment of section 212(j)(1)(D). *See* 47 Fed. Reg. 44,726-28 (1982) (interim rule effective Jan. 1, 1983, unless sooner revoked or modified).

112. Pub. L. No. 97-116, § 5(b)(5), 95 Stat. 1611, 1612.

113. *Id.* The INS position is that, as a general rule, the absolute total is seven years, not from the time of the allowed change in the program. However, if an alien physician is close to passing his Board exams the INS will probably be lenient. There would be probable exceptions on a case-by-case basis. This will also probably be covered by new regulations. Meeting between liaison committee of the AILA and staff of Andrew J. Carmichael, Jr., INS Assistant Commissioner for Adjudications, Washington, D.C., Mar. 16, 1982.

The USIA, which has primary responsibility for administering the exchange visitor visa program, recommended this provision to the house committee on the ground that three years is not sufficient time to complete most medical specialty training programs.[114] The average training time requirement for all medical specialty certifying boards is four-and-one-half years.[115] The Acting General Counsel of USIA testified before the House Immigration Subcommittee that prior provisions of law were undermining the foreign policy objectives of the exchange visitor program as it related to doctors:

> The role of the United States as the recognized leader among nations in providing advanced medical education is being seriously undermined. The only results can be a retreat from the leadership position the United States has held in the worldwide medical education and training, a diminution of U.S. assistance to developing nations and to the health of the peoples of the world.[116]

The former requirement that extensions for a third year must be at the written request of the government of the alien's nationality or last residence was also eliminated.[117]

Additional testimony from USIA and the Department of State before the committee showed that the number of alien physicians entering the United States for the purpose of medical training had decreased from 5,090 in 1977 to 2,020 in 1980, and that countries such as Venezuela and Panama had expressed anxiety over the unavailability of continuous medical specialty training in the United States.[118] There was unanimity that these alien physicians provide an "influential role in their communities politically and culturally upon their return from the United States."[119]

While recognizing the leading role of the United States in this area, the committee noted "the flagrant abuse of the exchange program during the past decade" and sought to alleviate possible "brain drain" from various countries.[120] In order to assure that doctors complied with the terms of their admission, the Immigration and Nationality Amendments of 1981 require each doctor to sign an affidavit submitted to INS each year stating that he is in good standing in the program of graduate medical education or training in which he is participating and that he will return to his home country to practice medicine upon completion of his pro-

114. H.R. REP. No. 264, 97th Cong., 1st Sess. 15, 22 (1981).
115. *Id.* at 15.
116. *Id.* at 15-16.
117. Pub. L. No. 97-116, § 5(b)(5), 95 Stat. 1611, 1612.
118. H.R. REP. No. 264, 97th Cong., 1st Sess. 16 (1981).
119. *Id.*
120. *Id.*

gram.[121] The committee strongly urged that INS and USIA work closely to assure compliance with this provision.[122] The committee also stated that it intends to monitor the annual report submitted to Congress to this end.[123]

CONCLUSION

The author's experience has shown that most alien physicians wishing to come to the United States on immigrant visas through the third or sixth preference categories or on nonimmigrant visas to perform services as members of the medical profession will have to comply with the VQE requirement. The exclusions, waivers, exemptions, alternative grounds of admission, and other types of nonimmigrant visas which can be used for those who do not take or pass the VQE are available only to a limited number of qualified alien physicians. However, all of these possibilities should be carefully studied by the alien physician or his advisor.

121. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 5(b)(6), 95 Stat. 1611, 1613.
122. H.R. REP. No. 264, 97th Cong., 1st Sess. 16 (1981).
123. *Id.*