Health Care Goes Global: Recruiting and Employing International Medical Graduates

BY VINH DUONG AND NORA KATZ

It is not uncommon in our ever evolving global economy for professionals to take their skills and expertise from one country to another. Medicine was one of the first professions to go global, and today approximately one in four physicians practicing in the U.S. obtained their medical education outside the U.S. Despite this fact, many hospitals and employers are reluctant to recruit and hire international medical graduates (IMG) who have completed their residency training in the United States for fear of being bogged down in the complex world of immigration sponsorship. While hiring IMGs may require more planning and attention to detail than hiring U.S.-born physicians, by having a basic understanding of the issues and challenges involved with recruiting J-1 and H-1B physicians, employers can identify talented, employable physicians and determine the optimal immigration strategy.

When recruiting IMGs, employers must first identify the IMG’s U.S. immigration status, that is, the status that allows the IMG to work or train in the United States. IMGs who are training in the United States generally hold either J-1 or H-1B status. The J-1 visa category allows an individual to participate in work and study exchange programs and is often used by IMGs seeking to complete residency or fellowship training in the U.S. J-1 visa holders are required to return to their home country or country of last legal residence for two years following completion of their exchange program as a condition of participating in their program unless they can acquire a waiver of this requirement.¹

There are four types of waivers that an IMG may submit to the U.S. Department of State in order to waive the two-year foreign residence requirement: persecution; exceptional hardship to a U.S. citizen or lawful permanent resident spouse or child; request by an interested U.S. government agency; request by a designated state health department or its equivalent.² IMGs who believe that they will be persecuted based on their race, religion, or political opinion if they return to their home country can apply for persecution waiver. Additionally, an IMG with U.S. citizen or lawful permanent resident spouse or child who would experience exceptional hardship if the IMG departs the U.S or if the U.S. citizen or lawful permanent resident spouse/child(ren) were required to return to the IMG’s home country, may apply for a waiver. More commonly, J-1 waivers based on a request by an interested U.S. government agency or state health department are available to physicians who agree to work in a health professional shortage area or a medically underserved area/population for a minimum of three years.³

Unlike J-1 visa holders, physicians who work or train in H-1B status do not face geographical restrictions on where they can work. However, this visa category presents its own set of issues for employers. Each year, the U.S. Citizenship and Immigration Services sets aside 65,000 H-1Bs for employers to sponsor foreign workers (H-1B cap), plus an additional 20,000 H-1Bs for foreign workers who possess at least a U.S. master’s degree. Once these visas have been assigned, employers must

1 Immigration and Nationality Act § 212(e)(iii), 8 U.S.C. § 1182(e)(iii).  
2 22 C.F.R. § 41.63(a)(2).  
3 22 C.F.R. § 41.63(e).

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wait until the following April to file an H-1B for an employee. Some employers, however, are exempt from the H-1B numerical cap, meaning that their employees are not counted against the 65,000 H-1B visas available each fiscal year. Exempt employers can sponsor an unlimited number of employees for H-1B visas with immediate start dates. When recruiting a physician who is currently in the U.S. in H-1B status, the employer must determine if the physician is currently employed by a cap-exempt or cap subject employer, and whether the new employer itself is subject to the H-1B cap. The following employers are exempt from the H-1B cap:

- institutions of higher education,
- nonprofit entities related to or affiliated with an institution of higher education,
- nonprofit research organizations, and
- government research organizations.4

Many physicians training in the U.S. will have cap-exempt H-1Bs because they are completing their residencies or fellowships at nonprofit teaching hospitals affiliated with institutions of higher education. These IMGs were not counted against the H-1B cap when they received their initial H-1Bs. When such a physician moves from one cap-exempt employer to another cap-exempt employer, the new employer can hire the physician for an immediate start date without worrying about the H-1B cap. For example, an IMG who is completing his or her residency at a nonprofit teaching hospital affiliated with an institution of higher education will be able to begin a fellowship immediately with a different nonprofit teaching hospital affiliated with an institution of higher education without being subject to the H-1B cap.

Similarly, when a cap-subject employer seeks to hire a physician currently working at another cap-subject employer, the physician will not be counted against the H-1B cap again and can start working immediately. The purpose of the H-1B cap is to limit the number of new H-1B visas given out each year. Since employees at cap-subject employers have already been counted against the cap once before, they are not counted again when moving to new employers. Most H-1B physicians who have previously been counted against the H-1B-cap work for private, for-profit employers.

A more challenging situation occurs when a physician is currently employed by a cap-exempt employer, but will move to a cap-subject employer, such as when a physician completes his or her residency at a teaching hospital associated with a college or university and is hired by a private, for-profit employer. In this situation, a cap-subject employer can file a cap-subject H-1B petition, but should be aware that in recent years the limited number of H-1B visas available have been allocated almost immediately because the number of petitions filed has exceeded the annual allotment. This means that employers must apply as soon as H-1Bs become available on April 1 in order to give the physician the best chance at securing a visa. If the employer is successful in securing a visa in April, the physician will not be able to commence working until October 1. Given that most residents complete their training on June 30, this creates an inconvenient three-month gap.

In order to avoid numerical limits of the H-1B cap and secure an earlier start date, cap-subject employers can place their physicians “at” one of the exempt entities mentioned above. The immigration agency guidance allows for cap exemption when an otherwise cap-subject employer places an employee “at” a cap-exempt entity, such as a university or a nonprofit entity related to or affiliated with a university.5 The employee is able to secure a cap-exempt H-1B based on his or her work at the exempt entity and can then use the same H-1B visa to also work for the cap-subject employer. There must be a logical nexus between the physician’s job duties at the cap-subject entity and the mission, objective, or function of the cap-exempt entity. In determining whether the physician’s work “at” an exempt entity qualifies, the government considers the affinity between the H-1B employee and the purpose, function or objective of the exempt entity, whether the exempt entity will benefit from the H-1B employee’s work, the existence of agreements or mutual arrangements between the exempt entity and the employer, and the physical location where the H-1B employee will work. Many private hospitals and employers have existing relationships with cap-exempt entities and find it easier to place physicians at such an entity than to try their luck with the H-1B cap and wait for a cap-subject H-1B state date in October.

With careful and strategic planning, health care employers can recruit and hire talented IMGs already working and training in the United States and fill a much needed shortage in a specific specialty. In order to determine what steps need to be taken to ensure that such an IMG secures valid immigration status to start working, employers should first identify the IMG’s immigration status. Once the IMG’s immigration status has been verified, employers can determine whether they satisfy the requirements to qualify the physician for a J-1 waiver, cap-exempt H-1B, or a cap-subject H-1B. By planning ahead and thinking strategically about how to meet the requirements for each visa category, employers will find that immigration sponsorship does not need to deter the recruitment and hiring of talented international physicians.

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