# Change of Employers by the Foreign Medical Graduate

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## Introduction

In the typical physician interested government agency waiver case, both the employer and foreign medical graduate (FMG) expend considerable time, money, and resources applying for a waiver of the foreign residence requirement of INA §212(e), as well as H-1B petition and change of status. 2 Indeed, the passage from J-1 to H-1B can be a journey fraught with danger and pitfalls. Ideally, once the waiver and nonimmigrant petition processes are complete, the healthcare facility employer and the foreign medical graduate physician will want to relax and look forward to a non-eventful three years of obligatory service by the physician. Unfortunately, circumstances often arise which cause the FMG to seek a change of employers before the completion of the three-year waiver period required by INA §214(l). In practical experience, the change from one employer to another can be a difficult and risky transition for the FMG. This article examines some commonly recurring factual situations, the existing legal authority concerning physician change of employers, and potential attorney conflicts of interest.

## Legal Authority

Foreign medical graduates who enter the United States as exchange visitors for the purpose of obtaining graduate medical education are required by INA §212(e) to return to their home country for 24 months of residence before applying for U.S. permanent residence, or before applying for many nonimmigrant benefits. 3 INA §214(l) provides for a waiver of the foreign residence requirement in exchange for a three-year commitment of service by the FMG to a federally designated medical shortage area. In crafting §214(l), Congress foresaw that circumstances may arise which require a change of employers and work locations, and provided that if "extenuating circumstances" exist, the physician may be allowed to change his employment situation. 4 The INS issued regulations that prescribe the circumstances under which the Bureau of Citizenship and Immigration Services (BCIS) will approve the transfer of employment from one employer to another, while reaffirming the physician's §212(e) waiver. These regulations, appearing at 8 CFR §212.7(c)(9)-(11) are excerpted and paraphrased in the footnotes. 5

## Common Factual Situations Leading to a Change of Employers for the Foreign Medical Graduate

The following are some common recurring fact patterns that the author has encountered in practice:

### The Exploitative Employer

Unfortunately, some employers of foreign medical graduates have proven to be less than honorable in their employment practices. Some employers view the FMG's three-year tenure as involuntary servitude, presenting an opportunity for windfall profits to the employer. Those employers may engage in the following practices, which if proven by the FMG should constitute proof of extenuating circumstances:

***Require the sub-specialty trained physician to engage in sub-specialty practice, in violation of a commitment to serve 40 hours per week in primary care.*** 6 The employer may attempt to skim the higher compensation of the sub-specialty practice while compensating the FMG at the lower primary care physician rate of compensation provided for in the employment contract. Often, an FMG engaging in an active sub-specialty practice will have difficulty devoting 40 hours per week to a primary care practice. Failure to fulfill the 40-hour requirement is a status violation for the FMG and is typically a violation of the §212(e) waiver terms and conditions by the employer and FMG.

***Require the FMG to work outside the HHS designated shortage area.*** Some employers with multiple facility locations will, upon the arrival of the FMG, almost immediately impose on the physician employee to work outside of the intended area of employment. These work locations may include areas outside of any HHS designated shortage area or may be areas not identified in the I-129H petition. This "bait and switch" scheme strongly suggests fraud by the employer, who may have intended from the beginning to sponsor the FMG for a §212(e) waiver based on service to a shortage area, intending all along to employ the FMG in a non-designated area. Of course, neither the FMG nor the immigration attorney should ever conspire with an employer to further such ends.

***Nonpayment of compensation.*** Some employers have simply refused to pay the FMG according to the employment contract and according to the requirements of the Labor Condition Application. 7 Employer failure to pay the FMG according to the employment contract, the Labor Condition Application or the I-129H petition, results in a hardship to the FMG and should constitute extenuating circumstances, justifying an application for change of employers under §212.7(c)(9)(iv). 8 Anecdotally, it appears that instances of employer exploitation occur less frequently than just a few years ago. This could be the result of increased sophistication and heightened scrutiny by the state and federal interested government agencies which process and issue physician waivers. In other words, many of the bad apples are already well known to the agencies, and the agencies can refuse to issue waiver recommendations for employers who have abused the waiver programs in the past.

The FMG should immediately contact his or her immigration attorney once a pattern of employer misconduct or noncompliance becomes apparent. The sooner such conduct can be addressed, the better chances the FMG will have of obtaining relief in the form of a new job and a BCIS approved transfer to a new qualifying employer.

## The Malcontented Foreign Medical Graduate

Some employees will be chronically unhappy wherever they are. Complaints about working conditions, call coverage, compensation, location, lack of support from co-professionals, inability to gain experience in their sub-specialty, or separation from family members are

common. These types of conditions can exist even where extenuating circumstances, creating a hardship for the employee, do not exist. In counseling employee clients, it will be important to determine whether any circumstances actually exist that would support a petition for change of employers under §212.7(c)(9)(iv). If the immigration attorney is convinced that such a petition would not be approved, then it may be best to counsel the FMG to be patient, and to carry out his or her medical duties in good faith, to the end of the three-year obligation period. I often remind my FMG clients that successful completion of the three-year period is their gateway to a future medical career in the United States. If the FMG can bear with the inconveniences of the three-year obligation period, then he or she can ultimately relocate to a more favorable location. It is important to keep in mind that the filing of a change of employers petition under §212.7(c)(9)(vi) may cause the breakdown of the existing employment relationship, it invites the scrutiny of BCIS, and can result in the loss of H-1B status and the §212(e) waiver. The inconveniences suffered by the FMG may not be worth the risk of filing the case.

## The Employment Contract Dispute

It is not uncommon for physicians and their employers to experience contract disputes. These disputes usually concern compensation or scope of employee duties. Whether a contract dispute may constitute an extenuating circumstance, justifying a change of employers, depends on the facts of each case. In the case of a substantial dispute, it will usually be wise to advise either the employer or employee to retain separate counsel who will have expertise in physician compensation employment agreements. Differences in positions concerning the contract should be reduced to writing. Demands concerning the contract obligations should be stated in writing from the party's contract attorney. Ultimately, if the contract dispute results in the termination of the employment relationship, the FMG may need to submit copies of attorney correspondence to substantiate a claim of extenuating circumstances, and also to prove that the FMG has acted in good faith to resolve the contract dispute. The employer will want to protect its eligibility to pursue foreign medical graduate waivers in the future, and thus written correspondence between attorneys is probably the best way to document the bona fides of the employer's position in the contract dispute.

Ultimately, BCIS may be reluctant to determine which party is justified in the employment contract dispute. However, where the FMG has acted reasonably and in good faith to resolve the contract dispute, BCIS should be willing to approve the request for change of employers, where it is clear that the original employment relationship will not continue, and where the FMG has obtained a offer of new employment in a qualifying HHS designated shortage area.

## Employer Financial Difficulty; Inability To Pay Compensation

Some employers, although originally acting in good faith, will not be able to meet the financial obligations of the employment contract. This may be the result of unforeseen economic conditions. Most waiver programs place strict requirements on the employing facilities to provide medical care to all patients regardless of ability to pay. Declining Medicare and Medicaid reimbursements have caused considerable financial difficulty for many healthcare employers. In addition, the prevailing wage levels required for H-1B physician employees can be a burden for financially strapped employers.

An employer's inability to pay the FMG's salary should constitute a clear extenuating circumstance, as it causes a hardship to the FMG. In many cases, the employer will be glad to provide documentation of its inability to pay. Such documentation should serve as adequate supporting evidence for a change of employer petition.

### Facility Closure

Where the employer facility has closed, documentation of such closure, combined with a petition by a new employer for a job within a qualifying HHS shortage area, should serve as the basis for approval of a new employer petition.

### Family Medical Condition

An FMG or a member of his family may develop a medical condition that requires treatment that is not available in the area where the FMG is serving the three-year obligation. In such circumstances, adequate documentation of both the condition and the unavailability of medical treatment should serve as proof of hardship, and should serve as the basis of approval of a change of employers petition.

## The New Employer Petition

Once it is obvious that the original employment relationship has terminated, or will not survive or needs to be terminated, the FMG must have a new job offer and a new employer willing to employ the FMG in an HHS designated shortage area under the terms of H-1B employment and the provisions of INA §214(l). Several issues recur in these petitions.

### Extension Of Status

Ideally, counsel should seek to keep the FMG in the United States while the new employer and extension of status are adjudicated. Eligibility for extension of status under 8 CFR §214.1(c)(4) is dependent in large measure on whether the original employment has ceased or continues.

***Cessation of employment***--Events may cause cessation of the initial employment prior to the filing of a new employer petition. The initial employer may abruptly close a facility, file bankruptcy, or cease doing business altogether. The FMG may be forced to terminate employment in order to avoid participating in employer misconduct. In these circumstances, the cessation or continuation of employment by the FMG is beyond his control.

Where employment with the original employer has ceased, prior to the filing of a new employer petition, BCIS may exercise its discretion under 8 CFR §214.1(c)(4) to approve an extension of status and a new employer petition. 9 In such cases, counsel for the FMG should clearly document all the circumstances surrounding the cessation of employment. Where these circumstances were beyond the control of the FMG, and the FMG is otherwise eligible for relief under 8 CFR §214.1(c)(4), BCIS should be urged to approve the extension of status, without requiring the FMG to depart the United States to reapply for a visa. The Service/BCIS has

typically approved such requests for extension of status. 10 ***Continuation Of Employment--*** Where possible, it is probably most prudent that the FMG continue in the original employment, at least up to the time that the new employer petition is filed, and ideally until BCIS finally approves the new employer petition and request for extension of status. Thus, if BCIS is not convinced that extenuating circumstances exist which justify a change of employer, it may deny the new petition. BCIS may also invoke 8 CFR §212.7(c)(9)(vi), and hold that the FMG has left the original employer prior to completion of the three-year obligatory period of service, and may hold that the waiver is revoked. 11 In cases where the FMG has terminated employment with the original employer, it is unsettled whether the original petition survives. If, in the meantime, the original employer notifies BCIS and withdraws the original I-129H petition, it is clear that the FMG will not be able to resume employment with the original employer. 12 Thus, the most conservative strategy is for the FMG to continue in employment with the original employer, through the approval of the new petition, where he or she has the option to do so. Continuation of original employment is often made more difficult by the need of the new employer for the FMG's services, and the possibility that the new job offer may not be available indefinitely. Also, the conditions that create the extenuating circumstances and hardship may not be tolerable to either the original employer or the FMG.

## Portability

Pursuant to the portability provisions of the Act, an H-1B employee may begin employment with the new H-1B employer upon the filing of a petition by the new employer. INA §214(m) permits H-1B employment upon the filing of an I-129H petition, provided all statutory requirements are met. A question exists as to whether the FMG and the new employer should rely on the H-1B portability provisions to allow the FMG to begin new employment before the new employer petition is approved. If the petition is not approved and the FMG is not able to resume employment with the original employer, then the §212(e) waiver is likely to be lost, and the FMG may be required to depart the United States.

In general, the most prudent practice is to wait until the new employer petition is approved before the FMG begins work with the new employer. In some cases, such as where the original employing facility has closed, and where the facts suggest a strong likelihood of new employer petition approval, the FMG may not run a great risk in beginning employment with the new employer. In these circumstances, the immigration attorney will be well advised to advise all the parties in writing concerning the potential risk if the petition is not approved.

## Premium Processing

Premium processing under INA §286(u) and 8 CFR §103.2(f) is available to expedite the processing of the new employer petition to within 15 days. However, there may be some risk associated with premium processing of these types of cases. In spite of Service/BCIS statements to the contrary, and without the benefit of empirical data, some practitioners have observed that requests for premium processing seem to lead to service center requests for additional evidence in all but the most routine cases. Requests for additional evidence in change of employer cases may lead to heightened scrutiny and a greater chance of denial.

The decision to utilize premium processing or portability in FMG change of employer cases should be made after consideration of all the factors bearing on the potential approval of the case. In all cases, the decision should be made with the informed participation of the client.

## Support and Consent From The Interested Government Agency

The BCIS regulations do not expressly require prior approval or consent of the interested government agency (IGA) that made the original waiver recommendation. 13 However, if time permits, it is typically wise to seek the consent of the IGA, and it is helpful to include an IGA support and consent letter in the new employer petition package. The stated policies of many IGAs require notification of any change in physician employment, and some IGAs reserve the right to approve or deny the change. Ultimately, BCIS has sole discretion to approve or deny the new employer petition. 14 At a minimum, the IGA should be notified of any change of physician employment, the policies of the IGA should be consulted concerning FMG change of employment, and these policies should be complied with as closely as possible. An IGA always has standing to notify the Department of State and BCIS in cases of waiver policy noncompliance. A complaint from the IGA can result in a BCIS notice of intent to revoke the §212(e) waiver and the initiation of removal proceedings.

## The Petition and Supporting Evidence

8 CFR §212.7(c)(9)(vi)(B) lists the evidence that must be provided with the new employer petition.

The new H-1B petition shall be accompanied by the documentary evidence generally required under §214.2(h) of this chapter, and the following additional documents:

(1) A copy of Form I-797 relating to the waiver and nonimmigrant H status;

(2) An explanation from the foreign medical graduate, with supporting evidence, establishing that extenuating circumstances necessitate a change in employment;

(3) An employment contract establishing that the foreign medical graduate will practice medicine at the health care facility named in the new H-1B petition for the balance of the required 3-year period; and

(4) Evidence that the geographic area or areas of intended employment indicated in the new H-1B petition are in HHS-designated shortage areas.

Evidence of extenuating circumstances and hardship should be obtained from third party sources. At least one service center (Nebraska) has indicated that it will give little or no weight to the FMG's individual, unsubstantiated statements concerning extenuating circumstances or hardship. The evidence should include copies of all correspondence between the employer and the FMG that documents the circumstances creating the need for a change of employment. Evidence of facility closure should be included. If the employer has filed for bankruptcy, a copy of the Notice

of Bankruptcy and Automatic Stay can be obtained either from the Bankruptcy Court or the debtor's attorney.

# Service Center Adjudications of Change of Employer Petitions

Based on anecdotal information, it appears that the Texas, California, and Vermont Service Centers have routinely approved FMG change of employer petitions without much difficulty or fanfare. However, recent experience indicates that officers at the Nebraska Service Center are aggressively scrutinizing these cases and are strictly applying the §212.7(c) regulations. The following are some excerpts from a recent request for additional evidence from a FMG change of employer case filed at the NSC:

In accordance with 8 CFR part 212.7(a)(9)(vi)(B)(2); [sic] an explanation from a foreign medical student claiming extenuating circumstances to warrant early termination of his or her previously approved employment must be accompanied by supporting evidence to corroborate the explanation, i.e., the alien's own testimony is of itself not sufficient. Therefore, please submit third party evidence that the beneficiary should be excused from completing her employment contract with (employer), such as an affidavit of specific facts from the (employer) and/or from a state health official of (State). If hardship to the beneficiary is claimed, the evidence must establish that such hardship was caused by unforeseen circumstances beyond her control. 8 CFR part 212.7(a)(9)(iv) (sic) specifies that "the burden of establishing eligibility for a favorable exercise of discretion rests with the foreign medical graduate…."

8 CFR part 212.7(a)(9)(vi)(D), [sic] provides that a foreign medical graduate who has been granted a waiver of the 2-year requirement of section 212(e) and who has obtained H-1B status under Pub.L. 103-416 but who fails to properly notify the Service of any material change in the terms and conditions of his or her H-1B employment by having his or her employer file an amended or a new H-1B petition shall again become subject to the 2-year requirement and shall also become subject to deportation….. Unless these material changes in the terms and conditions of her H-1B employment were approved by the Service, or unless evidence is submitted to establish that she did everything that she could to have amended and new petitions filed on her behalf for authorization of her amended and new employment conditions, the record would thus indicate that the beneficiary is subject to the sanctions of this regulation. Please submit evidence that this is not the case.

In the above case, the claim of extenuating circumstances was based on employer misconduct. Difficulties were encountered because the employment relation was breaking down and the employer was reluctant to provide a statement corroborating the allegations of the FMG, given such statement would have been against the self-interest of the employer and would have been an admission of noncompliance with the §212(e) waiver obligations. It is absurd for BCIS to expect that an offending initial employer will file an amended petition to inform BCIS of his or her own misconduct.

Regardless of which service center has jurisdiction, the FMG change of employer petition and supporting evidence should be prepared and filed with thorough attention given to the requirements of 8 CFR §212.7(c)(9). Each element in the regulations should be clearly addressed. Where possible, requests for additional evidence should be avoided by providing in the initial filing all available evidence of extenuating circumstances and hardship to the FMG.

# The Duty to Notify of Changed Circumstances

Within the regulations concerning change of employers, the INS mingled requirements concerning a continuing duty of the FMG and an employer to notify BCIS of any material change in the terms and conditions of the H-1B employment. Section 212.7(c)(9)(vi)(D) places the burden of notification on the FMG and requires that the FMG must seek to cause the employer to file an amended or new petition in the event of a change in the terms and conditions of employment.

This requirement is different from 8 CFR §214.2(h)(11)(i)(A), which places the burden on the petitioner for notification of changed circumstances in H-1B employment. 15 Attorneys should be aware that in adjudicating a change of employer petition, and before approving a new petition, BCIS may require the FMG to demonstrate previous compliance with the notification requirements of §212.7(c)(9)(vi)(D). 16 In any circumstance where the important terms or conditions of employment have changed, or will change, the regulations place the burden on the FMG to cause BCIS to be notified. In other words, prior to approving a petition for a change to a new employer, BCIS may invoke this regulation and may require the FMG to show that he or she attempted to cause the original employer to notify BCIS of any changes in the terms or conditions of employment. This can be difficult for the FMG, who does not have standing to file an I-129H petition. There is little an FMG can do to force an employer to file an amended petition. This may be especially true where there is a current dispute between the parties, or where the change in terms or conditions of employment may be the result of employer misconduct, regulatory noncompliance, or breach of contract.
Where the FMG has acted in good faith, it is unfair for BCIS to saddle the FMG with a burden to notify it of a change of circumstances. The FMG is without the standing to file an amended petition, and it may be difficult for the FMG to prove employer misconduct.

Nonetheless, where a change in the terms and conditions of the initial H-1B employment has occurred, the FMG or his or her attorney may wish notify the employer in writing of the existence of such circumstances. Express demand for amelioration of the circumstances should be made and a request that the employer file an amended petition under §212.7(c)(9)(vi)(D) should be made in writing. Such documentation will be important once the FMG seeks BCIS approval for a change of employers.

# Attorney Conflicts of Interest

FMG physician change of employer cases are rife with potential for attorney conflicts of interest. This is especially true where the immigration attorney represented both the employer and FMG

in the initial §212(e) waiver and H-1B cases. Conflicts of interest between the employer and FMG can consist of:

* **Compensation disputes:** *Example*: The employer may not be paying the full salary of the FMG, as per the contract. This may involve a violation of the attestations of the ETA-9035 Labor Condition Application;

* **Employment contract disputes:** *Example*: The FMG may not be showing up for work on time or may not be working a full 40 hour week;

* **Noncompliance with §212(e) waiver terms and conditions:** *Example*: The employer may be imposing on the FMG to perform duties which are outside the scope of authorized employment;

Often the immigration attorney is made aware of the existence of these types of disputes when he or she receives a telephone call from one party or the other. Usually, the call from the FMG begins with this question:

"Can I change employers before I complete my three years? My employer has asked me to go to the hospital in another county during the day to perform gastroenterology studies and I don't think I am supposed to be doing that, since my waiver requires me to do primary care 40 hours per week."

Or the call from the employer presents this question:

"Dr. Jones never gets to the clinic before 9 a.m. and he is usually the first one out the door before 5 p.m. The nurses are going crazy because they can't get him to see more than 20 patients a day, and he is not generating enough income to cover his salary. In addition, he has received several calls at the clinic from out of state and I think he is looking for another job."

In situations like the above circumstances, the immigration attorney must be immediately sensitive to the potential for conflicts of interest. If there is a dispute between parties concerning obligations under the employment contract, I often advise clients that I am not an expert in employment law or physician compensation agreements. In the case of serious disagreements, both parties should be advised to seek separate counsel to advise them of their rights and obligations under the employment contract. If it appears that the FMG may eventually resort to a change of employers, and if the immigration attorney originally represented both parties in the waiver and H-1B case, it is best to advise all parties of the existence of a conflict of interest and advise that they seek separate immigration counsel.

Where the employment relation has broken down, it may be necessary for the FMG to attack, criticize, or disparage the conduct of the employer, in order to prove the extenuating circumstances case under 8 CFR §212.7(c)(9). This presents a clear conflict of interest for the immigration attorney who has previously represented both parties. The FMG needs independent counsel who can unabashedly represent the interest of the FMG against the interests of the employer. Likewise, the employer has an interest in preserving its eligibility to sponsor §212(e) waivers in the future. The employer needs to be able to protect itself against U.S. Department of

Labor enforcement actions for alleged violations of the attestations of the Labor Condition Application. In such cases, the immigration attorney who originally represented both parties must quickly step out of the way and advise both parties to seek independent business and immigration counsel.

On the other hand, extenuating circumstances may exist where both employer and FMG have acted in good faith. For example, employer facility closure or financial inability to pay the FMG's salary may both be the result of business or economic exigencies that are beyond the control of the parties. In such cases, the employer may wish to cooperate and support the FMG in the request for approval of change of employers. In these cases, the immigration attorney may be able to ethically represent the FMG in preparing and presenting the change of employers petition.

# Conclusion

The transition from one employer to another before the end of the three-year period of obligatory service can be a treacherous journey for the FMG. Close attention should be paid to the regulations at 8 CFR §212.7(c)(9)(iv) through (11). The immigration attorney must be aware of potential conflicts of interest between the medical facility employer and the FMG. The employer has an interest in preserving its eligibility to sponsor §212(e) waiver cases in the future. The FMG must attempt to achieve a change of employers while preserving the validity of the original §212(e) waiver. Any thing less than careful and expert representation from the immigration attorney can result in considerable damage to the parties.