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Skyler G. Cruz

Loyola University Chicago, School of Law

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HAVE FOREIGN PHYSICIANS BEEN MISDIAGNOSED? A CLOSER LOOK AT THE J-1 VISA

Skyler G. Cruz[†]

Introduction

A foreign medical graduate, or foreign physician, typically has one viable option to enter the United States as a nonimmigrant to practice medicine, the J-1 (“Exchange Visitor”) visa. Unlike other nonimmigrant visas that are available to professionals, students, and workers,¹ the Exchange Visitor visa requires foreign physicians to leave the United States for a minimum of two years upon expiration of the visa.² Given that the goal underlying the Exchange Visitor visa since its inception has been to promote understanding of the American culture abroad, this note explores how the J-1 visa became the dominant nonimmigrant visa utilized by foreign physicians. Moreover, this note suggests that the Exchange Visitor visa is not well suited for foreign physicians, and in leaving this group with few alternatives, foreign physicians have been misdiagnosed by U.S. immigration law. Part I explores the origins of the Exchange Visitor visa and the legislative history that shaped it into its present form. Part II discusses the J-1 visa as it operates today, with a particular focus on foreign physicians. Part III examines the impact that the two-year foreign residency requirement has upon the foreign physician exchange visitor. Part IV offers a comparison of U.S. immigration policy regarding foreign physicians to that of Australia and Canada. Finally, Part V analyzes the policy underlying the J-1 Visa.

I. Legislative History

A. The Smith-Mundt Act

The Exchange Visitor concept can be traced back to 1948, when Congress enacted the United States Information and Educational Exchange Act, commonly known as the Smith-Mundt Act.³ The purpose behind the Smith-Mundt Act was to “promote mutual understanding between the American people and people of other countries ‘to correct misunderstandings about the United States abroad.’”⁴ Underpinning the movement to create an Exchange Visitor visa was a sentiment amongst members of Congress that “the policies and actions of the United States

[†] Skyler G. Cruz 2005 Juris Doctor candidate at Loyola University Chicago School of Law. He would like to thank his family, friends, and wife for their support. He would also like to thank Dr. David M. Liu, M.D. for introducing him to this issue.

¹ See generally, 8 U.S.C. § 1101(a)(15) (2004).

² 8 U.S.C. § 1101(a)(15)(J); 8 U.S.C. 1182(j) (2004).

³ Inna V. Tachkalova, *The Hardship Waiver of the Two-Year Foreign Residency Requirement Under Section 212(e) of the INA: The Need for a Change*, 49 AM. U. L. REV. 549, 552 (1999).

⁴ Naomi Schorr & Stephen Yale-Loehr, *The Odyssey of the J-2: Forty-Three Years of Trying Not to Go Home Again*, 18 GEO. IMMIGR. L.J. 221, 224 (2004).

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are often misunderstood and misrepresented abroad” and that an “understanding of our motives and our institutions can come only from a knowledge of the political principles which our history and traditions have evolved and of daily life in the United States.”⁵

Integral to the Exchange Visitor program was the requirement that Exchange Visitors return abroad to share their experiences in the United States upon expiration of the visa.⁶ To insure that Exchange Visitors promptly departed from the United States upon expiration of their visas, Section 201 of the Smith-Mundt Act was adopted. Section 201, which later became the basis for the J-1 visa, provided that “students, trainees, teachers, guest instructors, professors, and leaders in the fields of specialized knowledge or skill” were admitted into the U.S. as non-immigrant visitors.⁷ Absent from the list of persons eligible under the Smith-Mundt Act is the foreign physician.

B. Immigration and Nationality Act and Amendments

In 1956, prompted by what was essentially perceived of as a loophole in Section 101(a)(15) of the Immigration and Nationality Act of 1952 (which had replaced the Smith-Mundt Act), Congress amended Section 101(a)(15) to more strictly enforce the requirement of Exchange Visitors to depart the United States.⁸ This amendment prohibited Exchange Visitors from applying for any immigrant and nonimmigrant visa prior to fulfilling their duty to return home.⁹ Prior to the 1956 amendment, many Exchange Visitors either departed to Canada and immediately returned, or applied for a private bill which would allow them to stay.¹⁰ Legislators became concerned that this behavior was compromising the goals of the Act.¹¹ Indeed, President Eisenhower was so distressed by this phenomenon that he wrote a letter to the Senate urging Congress to address the problem.¹² When Congress responded in 1956 by amending Section 101(a)(15), the statute was changed such that the Exchange Visitor was not only required to depart upon expiration of the visa, but that the visa holder had to depart to a cooperating country or countries for a minimum aggregate of two years.¹³ The two-year residency requirement had to be fulfilled before the Exchange Visitor was eligible to obtain any immigrant or nonimmigrant visa, or adjust to perma-

⁵ S. Rep. No. 80-573, at 1 (1947), quoted in, Schorr & Yale-Loehr, *supra* note 4, at 224.

⁶ Schorr & Yale-Loehr, *supra* note 4, at 226.

⁷ *Id.* at 225.

⁸ *Id.* at 226-27.

⁹ Tachkalova, *supra* note 3, at 554.

¹⁰ Schorr & Yale-Loehr, *supra* note 4, at 227.

¹¹ Tachkalova, *supra* note 3, at 554.

¹² Schorr & Yale-Loehr, *supra* note 4, at 227.

¹³ *Id.* at 228.

ment resident alien status.¹⁴ Further, Congress only provided waivers of the two-year residency requirement under a limited set of circumstances.¹⁵

C. Mutual Educational and Cultural Exchange Act

In 1961, as part of a program to consolidate the various laws concerning educational and cultural aspects of exchange programs, Congress passed the Mutual Educational and Cultural Exchange Act (the "Fullbright-Hayes Act").¹⁶ The Fullbright-Hayes Act replaced the Smith-Mundt Act as the program for Exchange Visitors entering the United States.¹⁷ It was with the enactment of the Fullbright-Hayes Act that subsection J was added to Section 101(a)(15) of the INA. Subsection J, which was specifically created for the Exchange Visitor, built upon the groundwork established by the 1948 Smith-Mundt Act. The J visa permitted an alien to enter the U.S. as a "student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description . . ." ¹⁸ with the additional requirement that the visitor "be a resident of a foreign country which he has no intention of abandoning."¹⁹ At that time, the J visa had not been specifically designated for use by foreign physicians.

At the same time Section 101(a)(15) was amended to include the J visa, INA section 212(e) also underwent reform. Section 212(e) had required Exchange Visitors to return to a cooperating country upon expiration of their visa, a requirement that had proved overly burdensome.²⁰ As amended, Section 212(e) no longer obligated the Exchange Visitor to return to a cooperating country, but only to be "physically present in the country of his nationality or last residence, or in another foreign country" for a minimum aggregate of two years.²¹ Despite the amendment of Section 212(e), the two-year residency requirement for Exchange Visitors remained a mandatory component of the visa program. Although Congress did preserve the waivers it had implemented with the amendment in 1956, waivers were rarely granted and the Exchange Visitor was generally required to depart the United States upon expiration of the visa.²²

D. Health Professionals Educational Assistance Act

The Fullbright-Hayes Act solidified the Exchange Visitor as a distinct category under the INA. While the Act clearly defined the persons eligible to obtain

¹⁴ *Id.*

¹⁵ *Id.* at 231.

¹⁶ *Id.* at 232.

¹⁷ Tachkalova, *supra* note 3, at 552-53.

¹⁸ Pub. L. No. 87-256, § 109(b), 75 Stat. 527, 534-35 (1961), quoted in, Schorr & Yale-Loehr, *supra* note 4, at 233.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*; Pub. L. No. 87-256, § 109(c).

²² Schorr & Yale-Loehr, *supra* note 4, at 234.

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the J-1 visa, it still did not give any mention to foreign physicians. Indeed, it was not until Congress enacted the Health Professionals Educational Assistance Act (“HPEA”) of 1976 that Foreign Physicians began to use the J-1 visa as the predominant method for entering the United States.²³

Prior to the enactment of the HPEA, Foreign Physicians faced few restrictions to entering the U.S. to practice medicine.²⁴ Indeed, by the mid-1970’s, Foreign Physicians accounted for approximately “21 percent of the total number of practicing physicians.”²⁵ Yet in 1976, with the enactment of the HPEA, Congress imposed new requirements upon the entry of Foreign Physicians and effectively ended the period of unfettered entry enjoyed in previous years.²⁶

While Congress has amended Section 101(a)(15) from time to time since the Fullbright-Hayes Act was enacted in 1961, it has remained the primary statute governing Exchange Visitors to the present day.²⁷ Although the Act has been amended over the years, its purpose of increasing “mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchanges” to develop “lasting and meaningful relationships”²⁸ has survived.

II. The J-1 Exchange Visitor Visa

The Exchange Visitor program is administered by the Office of Exchange Coordination and Designation (“Department”) in the Bureau of Educational and Cultural Affairs and is an important component of U.S. immigration law.²⁹ In 2003, nearly 322,000 persons entered as Exchange Visitors to study, teach, or conduct research in the U.S., and brought with them more than 41,000 spouses and children.³⁰

²³ Robert D. Aronson, *Immigration Strategy and Practice for Foreign Physicians*, IMMIGR. BRIEFINGS (March 1991), “Legislative Background: The HPEA’s Amendments to the INA.”

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* Aronson has identified four basic policy elements behind the HPEA: 1) there was a concern over the escalating numbers of Foreign Physicians in the U.S., which Congress worried was affecting employment opportunities for U.S. physicians; 2) there was a high degree of geographical mal-distribution in that disproportionate numbers of Foreign Physicians were practicing in certain metropolitan locations, which gave rise to allegations that Foreign physicians were neglecting to work in physician shortage areas; 3) there was concern over the substantive quality of Foreign Physicians in terms of their medical competence, as well as their ability to speak English and culturally relate to patients; and 4) there was a concern that the immigration of Foreign Physicians was causing a depletion of physicians in other countries.

²⁷ U.S. STATE DEPARTMENT, EXCHANGE VISITOR (J) VISAS, OVERVIEW—ABOUT THE EXCHANGE VISITOR PROGRAM, at http://travel.state.gov/visa/tempvisitors_types_scholars.html.

²⁸ *Id.*

²⁹ *Id.*

³⁰ OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SECURITY, 2003 YEARBOOK OF IMMIGRATION STATISTICS, 78 (2004), available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>.

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A. Qualifications

To qualify for the Exchange Visitor visa, a foreign national must demonstrate to the consular officer that she meets the threshold requirements. This includes proof that the applicant plans to remain in the United States for a temporary, specific, and limited period, evidence of sufficient funds to cover expenses while in the United States, and “evidence of compelling social and economic ties abroad and other binding ties,” to insure the applicant’s return abroad at the end of the visit.³¹ Once a foreign national has demonstrated that she can satisfy these requirements, she must then be eligible under one of the prescribed Exchange Visitor categories.

B. Categories

The current categories under which an individual may obtain an Exchange Visitor visa are as follows: au pair, camp counselor, student (college/university), student (secondary), government visitor, international visitor (reserved for U.S. Department of State use), alien physician (Foreign Physician), professor, research scholar, short-term scholar, specialist, summer work/travel, teacher, and trainee.³² While some of the program categories have been added since the Smith-Mundt Act was passed in 1948, many of the original categories have been maintained.

C. Sponsorship

In addition to meeting the criteria of the available Exchange Visitor categories, the foreign national must obtain sponsorship from a State Department designated sponsoring organization.³³ Generally, an Exchange Visitor will need sponsorship from a U.S. employer in order to obtain the visa.³⁴ The Department classifies the various sponsoring organizations as either public or private, and each of the Exchange Visitor categories falls within those classifications.³⁵ The public sector designation includes the professor, research scholar, short-term scholar, specialist, teacher, government visitor, international visitor, and both student categories.³⁶ The private sector designation includes the au pair, camp counselor, summer work or travel, trainee, and Foreign Physician categories.³⁷ The distinction between an Exchange Visitor entering through a public or private sponsor is important because this will often determine whether the Exchange Visitor is subject to the two-year foreign residency requirement.

³¹ Exchange Visitor (J) Visas, *supra* note 27 at “Qualifying for an Exchange Visitor Visa.”

³² *Id.* at “Overview—About the Exchange Visitor Program.”

³³ *Id.*

³⁴ Ernest R. Larkins, *Coming to America: International Students Face a Labyrinth of Income Tax Issues*, 15 CONN. J. INT’L L. 47, 54 (Winter/Spring 2000).

³⁵ Exchange Visitor (J) Visas, *supra* note 27 at “Qualifying for an Exchange Visitor Visa.”

³⁶ *Id.*

³⁷ *Id.*

D. The Two-Year Foreign Residency Requirement

Specifically, an Exchange Visitor is subject to the two-year requirement imposed by INA Section 212(e) if the following conditions exist:

[1] The program in which the exchange visitor was participating was financed in whole or in part directly or indirectly by the United States government or the government of the Exchange Visitor's nationality or last residence; [2] The exchange visitor is a national or resident of a country designated as requiring the services of persons engaged in the field of specialized knowledge or skills in which the exchange visitor was engaged for the duration of their program; [3] the exchange visitor entered the United States to receive graduate medical education or training.³⁸

Of the various work categories outlined in the J-1 visa, the Foreign Physician is the only profession specifically referenced in INA Section 212(e) as subject to the two-year foreign residency requirement. While the two-year foreign residency requirement poses difficulties for most Exchange Visitors, Foreign Physicians often face the most hardship of those holding J-1 visas.³⁹ Many Foreign Physicians remain in the U.S. for several years during their training and develop significant ties,⁴⁰ whereas a camp counselor may only be in the U.S. for a summer. Because Foreign Physicians often reside in the U.S. for extended durations, many marry U.S. citizens and have children.⁴¹ Nevertheless, as Exchange Visitors, Foreign Physicians must still fulfill their foreign residency requirement unless they qualify for a waiver.

E. J-1 Visa for Foreign Physicians

While the majority of Foreign Physicians who enter the U.S. under the J-1 visa will be obligated to fulfill the two-year requirement pursuant to INA Section 212(e), this is not always the case. Even within the Foreign Physician category a distinction has been drawn for the purposes of the two-year requirement. Essentially, only those physicians receiving "graduate medical education or training," as opposed to physicians engaged in programs involving observation, consulting, teaching or research are subject to INA Section 212(e).⁴² Graduate medical education or training has been generally defined as "consisting of residency or fellowship programs that involve patient care services."⁴³ Therefore, Foreign Physicians not engaged in graduate medical education or training and thus not engaged in patient care are not subject to the two-year residency requirement.

Despite the existence of the two-year residency requirement, the J-1 Exchange Visitor visa is the predominate method for Foreign Physicians to enter the United

³⁸ *Id.*

³⁹ Bruce A. Hake, *Hardship Waivers for J-1 Physicians*, IMMIGR. BRIEFINGS (Feb. 1994).

⁴⁰ *Id.*

⁴¹ Tachkalova, *supra* note 3, at 551.

⁴² Aronson, *supra* note 23.

⁴³ *Id.*

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States.⁴⁴ To facilitate entry of Foreign Physicians, the U.S. Department of State has designated the Educational Commission for Foreign Medical Graduates (“ECFMG”) as the private sector visa sponsor for all J-1 Exchange Visitor physicians who participate in clinical training programs.⁴⁵ The ECFMG requires the foreign national to fulfill several requirements before being approved for a J-1 visa. The requirements include having passed Step 1 and Step 2 Clinical Knowledge of the United States Medical Licensing Examination (“USMLE”), possession of a valid Standard ECFMG Certificate, a contract or an official letter of offer for a position in a program of graduate medical education or training that is affiliated with a medical school, and a Statement of Need from the Ministry of Health of the country of most recent legal permanent residence to provide written assurance that the country needs physicians trained in the proposed specialty and/or subspecialty.⁴⁶

Once the general requirements have been met and the Foreign Physician has entered the U.S., the physician must maintain J-1 status by applying to the ECFMG for renewed visa sponsorship, typically on an annual basis, whereby the Foreign Physician’s eligibility is reevaluated.⁴⁷ The duration of participation for J-1 physicians in graduate medical education is the “time typically required” to complete the program.⁴⁸ However, the maximum length of time a Foreign Physician will be admitted to stay in the U.S. is seven years.⁴⁹

Although the J-1 visa is the primary nonimmigrant visa used by Foreign Physicians to practice medicine in the U.S., it is worth noting that it is not the only nonimmigrant visa utilized. In addition to the J-1 nonimmigrant visa, a Foreign Physician may be eligible for such nonimmigrant visas as the L, O, or H1-B visas. Of the various nonimmigrant visa options, the H-1B and J-1 visas are the most common.⁵⁰ Yet, for various reasons, the H-1B visa has fallen into disuse by Foreign Physicians over the years. One of the primary benefits of exchange visitor status is that it allows Foreign Physicians to engage in graduate medical training programs that by their nature involve patient care services.⁵¹ In contrast, the H-1B visa limits patient care much in the same way that the J-1 visa limits patient care for Foreign Physicians engaged in research, consultation, and the like.⁵² Additionally, the H-1B visa, unlike the J-1 visa, is subject to annual numerical

⁴⁴ *Id.*

⁴⁵ ECFMG J-1 Visa Sponsorship Fact Sheet, at <http://www.ecfmg.org/evsp/j1fact.html>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Rob Paral, *Health Worker Shortages & the Potential of Immigration Policy*, 3 IMMIGR. POL’Y IN FOCUS, Issue 1, 6 (Feb. 2004), available at <http://www.aifl.org/ipc/ipf0204.pdf>.

⁵⁰ *Id.*

⁵¹ Tachkalova, *supra* note 3, at 552-53.

⁵² *Id.*

limitations. Indeed, it was widely reported that the cap of 65,000 H-1B visas for 2005 was reached on October 1, 2004, the first day of the 2005 fiscal year.⁵³

III. Waivers for the Two-Year Requirement

Although the majority of Foreign Physicians will depart the U.S. upon completion of their programs, some physicians are able to waive the two-year residency requirement under INA Section 212(e). Such waivers can be obtained under five separate bases: 1) a “no objection” statement, 2) exceptional hardship,⁵⁴ 3) persecution, 4) the Conrad program,⁵⁵ or 5) through an interested government agency.⁵⁶ Interested government agency waivers are generally granted for Foreign Physicians on the basis of “[a]cademic research of perceived importance to the U.S.; [the e]xistence of an employer/employee relationship with a federal agency; and [for c]ommunity-based medical service in a medically underserved area.”⁵⁷

Foreign Physicians who enter the United States as J-1 Exchange Visitors “can receive permission to remain in the country as employment-based immigrants if they commit to practicing in areas with health care shortages. These physicians thus represent Congress’ overt effort to place foreign-trained doctors into areas with acute health care needs.”⁵⁸ Because many Foreign Physicians are unable to satisfy the requirements of other waiver categories, the commitment to work in a medically underserved area is often one of the most viable options utilized. However, a Foreign Physician must fulfill a five-year service commitment in the medically underserved area before being eligible to obtain permanent resident status.⁵⁹

IV. Comparative Approaches

The U.S. is not unique in its implementation of specific policies regarding the immigration of Foreign Physicians. Whether immigration laws are designed to entice or discourage the entry of Foreign Physicians, many nations have tailored laws regulating their entry. An examination of some of the approaches taken by

⁵³ Betsy Cooper & Jennifer Yau, *Immigration Reform Tied to Homeland Security Bill*, Migration Info. Source (Nov. 1, 2004), at <http://www.migrationinformation.org/USfocus/display.cfm?ID=268#2>.

⁵⁴ See generally, Tachkalova, *supra* note 3, at 557, for a thorough analysis of the hardship waiver (noting in particular that the “process of obtaining a hardship waiver . . . is expensive and time consuming, and the outcome is always uncertain”).

⁵⁵ See Paral, *supra* note 49, at 7 (discussing the Conrad 20 program, which allows state governments to recommend waivers of the two-year foreign residency requirement for physicians who practice in medically underserved areas).

⁵⁶ U.S. STATE DEPARTMENT, INSTRUCTIONS FOR APPLYING FOR A WAIVER OF THE TWO-YEAR FOREIGN RESIDENCE REQUIREMENT PERTAINING TO EXCHANGE VISITORS ON THE J-1 VISA, at http://www.travel.state.gov/visa/tempvisitors_info_waivers2.html (last visited Jun 11, 2005).

⁵⁷ Robert D. Aronson, *Foreign Physicians within the Health Care System: Immigration Strategies and Procedures: Part 2* (Mar. 1996).

⁵⁸ Paral, *supra* note 49, at 6.

⁵⁹ Robert D. Aronson, *National Interest Waiver Eligibility for International Medical Graduates*, 283 JAMA 1746, 1747 (2000).

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nations of similar backgrounds will give an indication of where in the spectrum of open and closed borders the U.S. falls in welcoming foreign physicians. Moreover, at a time when immigration reform is at the forefront of political discussion, this analysis may shed light on how the U.S. can realize sound immigration policy for Foreign Physicians.

A. Canada

Canada is a particularly interesting study because of its growth as a migration destination in recent decades.⁶⁰ In Canada, much like in the U.S., physicians are a regulated profession.⁶¹ In Canada, each of the ten provinces and three territories are generally responsible for their own regulated professions.⁶² Therefore, a Foreign Physician wishing to practice medicine in Canada must comply with the laws and regulations set forth in the particular province in which he or she desires to reside. Additionally, the Foreign Physician must comply with Canadian immigration laws.

To practice as a physician in the province of British Columbia, for example, all physicians must be registered with the College of Physicians and Surgeons of British Columbia.⁶³ To register with the College of Physicians and Surgeons of British Columbia, a physician must be a graduate in medicine from a World Health Organization (“WHO”) recognized medical school or a university approved by the Council of the College of Physicians and Surgeons of British Columbia.⁶⁴ The physician must also hold the appropriate medical degree.⁶⁵ In addition, the physician (i) must have successfully completed the national practical and written examinations, (ii) be registered as a Licentiate of the Medical Council of Canada, (iii) obtain certification in the physician’s specialty by completing the educational requirements and examinations of either The Royal College of Physicians and Surgeons of Canada or of the College of Family Physicians of Canada, (iv) have successfully completed two to five years of accredited post-graduate residency training at an approved hospital, and (v) be eligible to reside and work in Canada.⁶⁶

To work in Canada, a foreign physician must obtain a temporary work visa. While priority is given to Canadian physicians, foreign physicians may be considered for underserved communities.⁶⁷

⁶⁰ Brian Ray, Canada: Policy Legacies, New Directions, and Future Challenges, MIGRATION INFO. SOURCE (May 2002), at <http://migrationinformation.org/Profiles/display.cfm?ID=20>.

⁶¹ Work Destinations, Types of Regulated Occupations, at http://workdestinations.org/paged_category_drilldown.jsp?categoryId=44&lang=en (last modified Jun. 11, 2005).

⁶² *Id.*

⁶³ Work Destinations, Physician [General, Family, Specialist and Surgeon] – British Columbia, at http://workdestinations.org/view_profile.jsp?occupationUserDatumId=4950&profileUserDatumId=4992&lang=en (last modified Jun. 22, 1005).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ PROVINCIAL HEALTH SERVICES AUTHORITY, at <http://www.phsa.ca/Careers/PsychiatryInBC/Immigration+Information.htm> (last visited June 12, 2005).

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The underserved community will submit an application on behalf of the foreign physician to Human Resources Development Canada (“HRDC”) after the College of Physicians and Surgeons of British Columbia has issued a letter confirming the physician’s eligibility for British Columbia registration. If the community’s request is approved by HRDC, the community will be issued a confirmation of employment and file number for the physician. This number will be forwarded to the physician who can then contact the nearest Canadian Consulate to apply for a temporary work visa. Once the physician has worked in British Columbia for 12 months, he or she may choose to apply for permanent resident status. The physician must have a work visa that is valid longer than 12 months before applying for permanent residency. Once the temporary employment confirmation letter has been received, the physician can file an application with the nearest Canadian Consulate for permanent resident status.⁶⁸

B. Australia

Foreign physicians “can enter Australia on a temporary or permanent basis to fill positions in the medical workforce that cannot readily be filled by a suitably qualified Australian doctor.”⁶⁹ There are essentially two ways in which this may be done. First, “when a state or territory health department considers that there are not enough physicians available to provide adequate health care services in a specific locality, or in a particular specialization, they can declare a position in that locality or specialization an ‘area of need’ position.”⁷⁰ Second, “a state or territory health department can simply identify positions which it supports being filled by” foreign physicians.⁷¹

The Temporary Medical Practitioner visa program governs the temporary migration of foreign physicians in Australia, and this program allows employers to recruit overseas doctors, especially in regional and rural areas, without detracting from the employment and training opportunities of Australian residents.⁷² Australian organizations (businesses, communities or Government agencies) may sponsor medical practitioners from overseas, on a temporary basis, to work in

⁶⁸ PROVINCIAL HEALTH SERVICES AUTHORITY, GENERAL IMMIGRATION INFORMATION FOR FOREIGN PHYSICIANS, at <http://www.phsa.ca/Careers/PsychiatryInBC/Immigration+Information.htm> (last visited Jun. 11, 2005).

⁶⁹ AUSTRALIAN GOVERNMENT—DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, VISA OPTIONS FOR DOCTORS, *available at* http://www.dimia.gov.au/allforms/tmp/doctor_leaflet.pdf.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² AUSTRALIAN GOVERNMENT—DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, TEMPORARY MEDICAL PRACTITIONER VISA, at <http://www.imi.gov.au/doctors/doc-422-visa.htm> (last visited Jun. 11, 2005).

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Australia for up to four years.⁷³ The foreign physician's sponsor is usually expected to be the direct employer of the doctor.⁷⁴

There are also options available to a foreign physician that wishes to practice medicine in Australia without an Australian sponsor. There are special provisions in the Australian immigration laws designed to help communities in rural and regional areas of Australia gain access to much needed medical attention.⁷⁵ Where it is in the community's interests to have an overseas medical practitioner, the practitioner may be self-employed on a fee-for-service basis.⁷⁶ Additionally, a foreign doctor who wishes to establish a sole person practice in a regional area without sponsorship by an Australian employer may be sponsored by a local government body, community health provider or State government department, and although a foreign physician working in Australia under a Temporary Medical Practitioner visa is limited to a four-year stay under that visa, the foreign physician may apply for further visas to extend her stay.⁷⁷

Foreign physicians wishing to remain permanently in Australia can apply under the Employer Nomination Scheme or Regional Sponsored Migration Scheme visa subclasses.⁷⁸ These subclasses are designed to allow Australian employers to hire foreign physicians to fill positions that cannot be filled by Australian doctors.⁷⁹ Foreign physicians seeking permanent residence are required to satisfy the Australian Medical Council requirements for general registration, which includes an English test, multiple choice examination, and clinical assessment.⁸⁰

In all cases, foreign physicians wishing to enter into Australia must obtain some form of sponsorship, typically by an Australian employer, and they must be eligible to meet state or territorial medical board registration requirements.⁸¹ Further, the foreign physician must be able to meet normal immigration requirements in respect to good health and provide local police clearances in all countries in which they have lived for more than one year during the previous ten years.⁸²

V. Analysis: Foreign Physicians as Exchange Visitors

At the core of the Exchange Visitor idea are two central beliefs: first, that the culture, customs, and values of the United States are best understood through immersion within our borders. Second, the individuals who come to the United

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Aronson, *Foreign Physicians*, *supra* note 57.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

States as Exchange Visitors must return home to share that understanding with their fellow citizens.

Foreign Physicians were noticeably absent from the list of persons eligible to obtain an Exchange Visitor visa under the Smith-Mundt Act of 1948.⁸³ This is not to say that a Foreign Physician could not obtain an Exchange Visitor visa at that time. However, it is quite reasonable to infer from the language of the statute that Foreign Physicians were not a group that the drafters had targeted for the Exchange Visitor visa. Over time, as the number of Foreign Physicians in the United States increased, a concern over a potential physician surplus grew as well.⁸⁴ This concern led to a growing pressure asserted by national organizations, such as the Association of American Medical Colleges, to limit the entry and stay of Foreign Physicians.⁸⁵

Under current immigration law, Foreign Physicians wishing to engage in patient care are generally limited to enter into the United States via the J-1 visa, subject to the two-year foreign residency requirement.⁸⁶ Yet, the policy behind this law is perplexing in several ways.⁸⁷ The premise of this policy is rooted in the notion that Foreign Physicians are a threat to the job security of U.S. physicians.⁸⁸ Thus, Foreign Physicians participating in programs that include a patient care component are strictly held to the two-year foreign residency requirement pursuant to INA Section 212(e). Yet, Foreign Physicians whose work does not contain a patient care component are not held to the residency requirement.⁸⁹ Although waivers of the two-year foreign residency requirement are available, they are generally hard to obtain and the requirement is rarely waived.⁹⁰

Proponents of this policy argue that the Exchange Visitor program is solid policy which allows Foreign Physicians to develop their skills and then utilize that knowledge and skill for the benefit of their homeland.⁹¹ Yet, this rhetoric only thinly veils the underlying fear held by Congress and U.S. physicians that

⁸³ Pub. L. No. 80-402, 62 Stat. 6 (1948).

⁸⁴ Alison Huang, *Continuing Controversy over the International Medical Graduate*, 283 JAMA 1746, 1746 (2000).

⁸⁵ Saeid B. Amini, *Discrimination of International Medical Graduate Physicians by Managed Care Organizations: Impact, Law and Remedy*, 2 DEPAUL J. HEALTH CARE L. 461, 461 (Spring 1999).

⁸⁶ Aronson, *supra* note 23.

⁸⁷ See Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L.J. 967, 968 (Summer 2002) (noting the "fundamental tension underlying an immigration policy that facilitates the employment of noncitizen workers by U.S. employers and seeks to protect U.S. labor from competition by noncitizen workers").

⁸⁸ Aronson, *Foreign Physicians*, *supra* note 57.

⁸⁹ Additionally, Foreign Physicians who enter the U.S. on an H-1B visa, which does not have a two-year residency requirement, are also limited to work that does not involve patient care.

⁹⁰ Paul T. Wangerin, *A Beginner's Guide to Business-Related Aspects of United States Immigration Law*, 5 NW. J. INT'L L. & BUS. 844, 857 (Winter 1984) (observing that the two-year foreign residency requirement poses a serious problem for businesses and individuals who wish to use the Exchange Visitor visa to enter the U.S.).

⁹¹ *Korvah v. Brown*, 66 F.3d 809, 810 (6th Cir. 1995).

Foreign Physicians would otherwise take more desirable metropolitan jobs.⁹² Yet, these ideas do not stand up to the reality of the current situation in the United States.⁹³ The reality is that the United States is facing a shortage of health care practitioners.⁹⁴ Under the current regime, immigration law should be used as a tool to draw international talent to the United States to help alleviate the growing shortage of physicians,⁹⁵ not as a mechanism of insuring that U.S. jobs are not taken.

If the goal of the Exchange Visitor program is for foreign nationals to gain an increased understanding of the American way of life to share with their kin at home, then it must be questioned whether the current policy still achieves this goal. We cannot expect Foreign Physicians to have a favorable impression when our policy so strictly requires their departure and limits their ability to stay in the United States.

In examining the immigration policies of Canada and Australia regarding Foreign Physicians, it is clear that there are both similarities and differences in each approach. All three nations examined here readily accept the immigration of Foreign Physicians to work in medically underserved areas. Also, there appears to be a common principle established in these countries to protect local physicians' jobs while, at the same time, attempting to provide medical care in areas where there are shortages of medical professionals.

However, the main difference between Canada and Australia on the one hand, and the U.S. on the other, is that the United States does not offer any options other than waiver to the Foreign Physician to stay in the United States once his or her visa has expired. Both Canada and Australia offer viable means to Foreign Physicians to obtain subsequent visas or legal permanent residence. In contrast, the United States strictly enforces Section 212(e) which requires Foreign Physicians to depart from the United States upon the expiration of their visa for a minimum of two years. Only if the Foreign Physician in the United States agrees to work in a medically underserved area or under very limited circumstances may Foreign Physician qualify for an exemption from Section 212(e).

VI. Conclusion

It is clear after a review of the legislative history behind the Exchange Visitor visa that its original purpose, to increase mutual understanding between the people of the United States and people of other countries by means of educational and cultural exchanges, has remained intact. Yet, there can be no mistake that U.S. immigration law reflects a strong policy towards restricting the entry and stay of Foreign Physicians. Such a policy makes no sense in light of a growing need for health care professionals in the United States, particularly physicians. It is time for a reevaluation of our immigration policy with respect to Foreign Phy-

⁹² See Huang, *supra* note 84 at 1746 (noting that Foreign Physicians "practice in disproportionately high numbers in areas of the country that have been neglected by the U.S. health care system").

⁹³ *Id.*

⁹⁴ Paral, *supra* note 49 at 1.

⁹⁵ *Id.*

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sicians. While the Exchange Visitor is an important component of U.S. immigration law, Foreign Physicians have been misdiagnosed. Foreign Physicians should be taken out of the J-1 category and allowed to enter as H1-B or F visa holder with a patient care component. Alternatively, a new visa category should be created for Foreign Physicians to address the uniqueness of their situation and their importance to our nation.