APPALACHIAN REGIONAL COMMISSION
A Proud Past, A New Vision

November 7, 2000

MEMORANDUM FOR The Federal Co-Chairman
ARC General Counsel

SUBJECT: OIG Report 01-2(H)—Women's Wellness Center, Montgomery, AL

Enclosed is a copy of our report dealing with the scheduled employment of Dr. S. Maheshwari and the resulting disputes that led to a change of employers by the J-1 physician. The situation involved a series of disagreements between the intended employer and the J-1 physician, noncompete clauses, and introduction of a Physician Recruitment Agreement, which essentially was a third-party loan to the J-1 physician to cover first-year operating expenses and salary.

Hubert N. Sparks
Inspector General

Enclosure

cc: Charles Lail, Alabama Dept of Health

1666 CONNECTICUT AVENUE, NW WASHINGTON, DC 20235 (202) 884-7675 FAX (202) 884-7691

NOVEMBER 7, 2000

OIG REPORT 01-2(H)

SPECIAL REPORT

Cleveland Avenue OB/GYN Association (Women's Wellness Center) Montgomery, Alabama

PURPOSE

The purpose of our review was to ascertain the facts, as possible, and the status of employment of a J-1 Visa Waiver physician that had been sponsored by the Women's Wellness Center, Montgomery, Alabama.

SUMMARY

A J-1 physician and employer had reached an impasse prior to the start of employment over terms of an initial employment agreement; a related loan agreement between the J-1 physician and a third party whereby the J-1 physician would essentially finance her practice, including salary; and a proposed revision to the employment agreement, which added practice at an ineligible location and a noncompete clause. In addition to issues between the employer and employee pertaining to contract terms and financing arrangements, implementation of the noted agreements and proposed revisions would have placed the parties in violation of ARC program guidelines and possibly the regulations of other Federal and state programs. It is our conclusion that the Government's interest would be best served by placement of the J-1 physician at an eligible location in line with an employment agreement that is consistent with the regulations of all interested parties. Based on available information, it appears that actions by the involved parties, subsequent to our field visits in conjunction with a state official, provide a basis for achieving this objective and that a transfer in line with program requirements is achievable.

We also concluded that ARC should review the type of financing arrangements intended in this case to determine if they are consistent with program intent or regulations and, as a minimum, require employers and employees to provide ARC with contractual amendments or agreements (loans) involving third parties.

BACKGROUND

As of our review, the J-1 physician had not started employment and a dispute had arisen between the employer and employee over the employment agreement with the employer, a separate loan agreement with a third party health care provider, and proposed revisions to the employment agreement. The issues, which were unique, as respects our prior dealings with, and reports about, the J-1 Visa Waiver program, are discussed below. In some instances, available

documentation identifies positions and actions; but for some important issues, conversations between the parties is the only information source; and, as noted, recollections of the parties differ widely on some issues.

Discussions and actions, with respect to employment of a J-1 physician, were initiated in mid-1999 and culminated with an employment agreement being signed in August 1999. The employment agreement noted the physician's office location as Wetumpka, Elmore County, Alabama, an eligible site in the Appalachian Region. This agreement, which was approved by state and ARC officials, contained standard language with the exception of a productivity clause allowing the employer to terminate the J-1 physician if collections were insufficient. While we do not object to productivity clauses, we believe such clauses should better identify the criteria for determining insufficient collections or productivity so that all parties understand expectations and potential actions.

The employer said that the initial intention was to have a J-1 physician to work in Montgomery, Alabama; and their preference was an OB/GYN, since this was their practice specialty. When they learned that stationing a J-1 physician in Montgomery was not possible, they were inclined to terminate their interest but were persuaded that a practice in Wetumpka, utilizing a primary care physician, was feasible and could be used as a research component of their practice.

The initial request from the employer for ARC approval of a J-1 Visa Waiver recommendation was dated September 24, 1999, and noted that a clinic was open in Wetumpka, the difficulty in obtaining an American physician to staff the clinic, and the intention to use the J-1 physician at the Wetumpka office. The letter notes the employment agreement incorporates and does not modify or amend any of the terms of the physician's J-1 Visa Policy Affidavit and Agreement and that the employee has read, fully understands, and will comply with the ARC Federal Co-Chairman's J-1 Visa Waiver Policy.

Subsequent to completion of the employment agreement, the J-1 physician returned to New York City to complete training and await approval of the J-1 Visa Waiver and H-1B work certification.

Contact was maintained between employer and employee between mid-1999 and mid-2000 when the J-1 Visa Waiver and work certification were approved and the J-1 physician returned to Alabama to start employment. During the latter part of 1999, discussions had been held between the employer and employee about financing her medical practice and office expenses. According to the employee, she understood that the employer would arrange a loan with Baptist Health to cover first year costs. She said she believed this would be a loan between the employer and Baptist Health, a nonprofit medical center in Montgomery, Alabama. The employer stated that the J-1 physician had always been fully informed that the loan was to be between the J-1 physician and Baptist Health and that it was up to the J-1 physician to cover her expenses since the employer did not intend to assume expenses after the start-up costs associated with obtaining space and equipment.

The J-1 physician said she was unaware that she was responsible for any loan repayments until she met with Baptist Health officials in mid-2000. Despite being so informed, she signed a Physician Recruitment Agreement with Baptist Health on June 21, 2000. This agreement was essentially a one-year loan guarantee of up to $250,000 between the J-1 physician and Baptist Health. The amount of monthly guarantee payments to the J-1 physician would be the difference

between the monthly collections and the average monthly guarantee of $20,833. The employer was not a signee of this agreement.

The employer and the employee agreed that the $250,000 was intended to cover the J-1 physician's $130,000 salary noted in her employment agreement with Women's Wellness Center and to reimburse the employer for all other expenses, e.g., nurse/receptionist, equipment, supplies, rent, phones, etc., in connection with the first year's operation of the Wetumpka office that exceeded monthly collections. In essence, the J-1 physician was financing her employment and practice and was liable for repayment of any guarantee payments. The employer would not be directly paying the $130,000 salary noted in the employment agreement and in documentation submitted to the Immigration and Naturalization Service and US Department of Labor.

Also, both parties agreed that the loan agreement was a condition of employment and, without the J-1 physician agreeing to such an arrangement, the employment process would have been teminated.

The employer noted that they had leased space in late 1999 in Wetumpka, had the space renovated and partitioned as a medical office, and purchased equipment. They estimated expenditures to date as about $50,000. We confirmed the existence of the space through a site visit.

Both parties agreed that, prior to the start of employment, the J-1 physician voiced objections with the employment agreement between the J-1 physician and Women's Wellness Center and the recruitment agreement, e.g., loan agreement between J-1 physician and Baptist Health. The issues pertained to the loan agreement, productivity clause in the employment contract, and moonlighting. Both parties agreed that the J-1 physician raised the objections after discussing the two agreements she had signed with other J-1 physicians and an attorney she contacted to review the agreements. Specific issues are discussed below; but, essentially, the J-1 physician insisted on agreement revisions prior to start of employment and the employer refused to make the recommended revisions. A second employment agreement was drafted, which indicated a start of employment as August 18, 2000; but this draft agreement did not incorporate the changes requested by the J-1 physician and was not signed. Also, this draft revision contained language not compatible with state or ARC guidelines.

As of our visit on October 3 and 4, 2000, the employer and employee were at an impasse. The employer had notified INS that the J-1 physician had failed to report for work and recommended termination of the J-1 Visa Waiver. The J-1 physician had initiated efforts to locate another position in Elmore County, Alabama, and believed the requirement that she obtain a loan to finance her salary and other expenses was inappropriate and/or illegal. The J-1 physician noted she had also recently signed an employment agreement with another employer in Wetumpka, Alabama.

Subsequent to our visit, both parties signed letters releasing the other party from any clinical or legal obligations. State officials noted a prospective alternate employer confirmed that an employment agreement had been signed by the J-1 physician, and this employer was in the process of preparing the necessary transfer documents for review by state and ARC officials.

KEY ISSUES

--Initial Employment Agreement

The employment agreement, signed on August 24 and 25, 1999, by the employer and employee, was basically a standard agreement with the exception of a productivity clause that noted the employee had to maintain the net collections necessary to cover employee's minimum salary and all associated costs, whether direct or indirect. The production requirement was to be determined by the employer. Since initial office start-ups often result in early losses while a patient base is established, the absence of any time parameters for implementation provided the employer with an easily established basis for removal, if desired.

However, our primary objection related to an amendment to the employment agreement, which added a noncompete clause. This amendment, copy attached as Exhibit 1, which was provided to us by the J-1 physician, included the provision that the J-1 physician would not directly or indirectly engage in the practice of primary care or internal medicine within a 50-mile radius of either the Wetumpka or Montgomery offices of the employer and the noncompete covenant shall remain in full force and effect for 3 years from the date the employee leaves her position with the Women's Wellness Center.

The noncompete amendment was signed by the J-1 physician on August 24, 1999, notarized, and returned to the employer according to the J-1 physician. The signing date of August 24, 1999, was the same date noted on the signature page of the Employment Agreement. The J-1 physician related through the state program manager that the amendment had been faxed to her shortly after receipt of the proposed employment agreement and she apparently signed them concurrently.

The employer had signed the ARC Federal Co-Chairman's J-1 Visa Waiver Policy Procedures, which included a prohibition on noncompete clauses, on September 24, 1999. However, the employer vehemently denied any knowledge of the noncompete amendment provided us by the J-1 physician and denied having sent the noncompete amendment to the J-1 physician for signature.

Although we could not directly confirm the statements made, we cannot identify any reason for such an amendment to be prepared and/or signed by the J-1 physician unless it had been transmitted to her by the employer's office. A copy of the noncompete amendment was not available at the state or ARC offices.

--Physician Recruitment Agreement

Both parties noted a condition of employment established by the employer was that the J-1 physician needed to cover her operating expenses, and the J-1 physician was directed to Baptist Health for this assistance. The resulting guarantee agreement for up to $250,000 to cover first year operating expenses of the Wetumpka practice included use of funds for the J-1 physician's salary, other staff, and office expenses. The employer noted that up to $50,000 had been expended to establish the office and additional expenditures were not contemplated.

The loan was executed on June 21 and 27, 2000, between Baptist Health and the J-1 physician through a Physician Recruitment Agreement. This agreement essentially provided that Baptist Health would guarantee the J-1 physician up to $250,000 during the first year of practice and that monthly payments would be based on the difference between the guaranteed monthly minimum income of $20,833 and the physician's gross receipts for the month. At the end of the year, the physician had the option to repay the balance of guarantee payments or to have the unrepaid guarantee payments forgiven by continuance of her practice in the area for 48 months after the end of the guarantee period.

The agreement also notes that the J-1 physician will be acting as an independent contractor and cites the practice location as Montgomery, Alabama. A Baptist Health official said that Montgomery, rather than Wetumpka, was noted in the agreement because the employer's primary office was in Montgomery and the agreement could be changed, if necessary, to denote Wetumpka as the practice location.

Essentially, the loan agreement eliminated the need for the employer to fulfill the employment agreement obligation of a $130,000 salary to the J-1 physician and provision to furnish the physician the other services required to operate an office. Although the employment agreement notes the employer's authority to direct, control, and supervise the J-1 physician, the loan requirement essentially establishes the J-1 physician as an independent contractor responsible for financing her salary and al operating expenses. It was noted that the J-1 physician could receive a guarantee payment of up to $20,833 monthly from Baptist Health and she would divide this up by retaining $10,833 as her monthly salary and contributing the balance to the employer for other expenses. The J-1 physician would be responsible for paying the difference between the loan amounts received and the gross receipts turned over to Baptist Health.

Although the efforts of Baptist Health to encourage and assist physicians to locate in underserved areas is commendable, we do not believe the type of arrangements noted above, whereby the J-1 physician is in essence acting as an independent contractor and accepting the full risk of the practice, is fair nor in line with ARC procedures that require the J-1 physicians to be employed by a health care provider, who in turn would be responsible for paying a salary in line with prevailing wages and contributing to the other expenses of establishing a practice.

In this regard, the employer had notified the INS and the Department of Labor that the J-1 physician would be paid $130,000 annually by the employer although the noted arrangement provided for no direct salary outlay by the employer.

--Proposed Employment Agreement Revision

A draft revision to the initial employment agreement was prepared in August 2000. The purpose of this revision is unclear, although the J-1 physician said she understood the intent was to marry the initial employment agreement and the physician recruitment agreement (loan). However, the proposed revision does not address the physician recruitment agreement.

The proposed revised agreement reiterates most of the proposals in the initial employment agreement, including a salary of $130,000 annually, provision of other services, and productivity clause. Also, several changes were made that impact on ARC regulations.

The duties section was revised to reflect that the employee would practice for at least 40 hours per week in Wetumpka and/or Montgomery, Alabama, an ineligible location; a noncompete covenant was added prohibiting service in a 50-mile radius for 2 years after the end of employment; and a severability clause was added rendering the balance of the agreement enforceable if any portion of the agreement shall be void or unenforceable for any reason.

This draft agreement, which noted a date of August 18, 2000, was not signed by either party.

--J-1 Physician Objections

After signing the employment agreement in July 1999 and the physician recruitment agreement on June 21, 2000, and reviewing the proposed revision to the employment agreement, the J-1 physician became concerned about her situation and sought legal assistance regarding the agreements. Based on legal advice, she made several recommendations with respect to changes in the proposed revision to the employment agreement.

These recommendations, which the J-1 physician said were provided to the employer in writing, included an employment agreement amendment that transferred liability for repayment of any guarantee payments from the employee to the employer, elimination of the noncompete clause in the proposed revised agreement, and revision of the productivity clause. The employer rejected these proposals and a subsequent request for a release from her initial employment agreement, according to the J-1 physician. The J-1 physician also noted that she had been informed by her attorney and by other J-1 physicians, who had similar type physician recruitment agreements, that their applicable employment agreements had been modified to transfer loan liability to the employer by having the J-1 physician obtain the loan from Baptist Health and essentially make a loan to their employer, who would assume responsibility for any necessary repayments to Baptist Health.

The employer said the J-1 physician did not present any recommendations for employment agreement changes in writing but had orally informed the employer that she wanted to terminate the physician recruitment agreement (loan), that the employer should assume all financial responsibility, that the productivity clause should be changed, and that the J-1 physician should be allowed to moonlight. The employer said they did not agree with these proposals. The employer believed that the J-1 physician had fully understood and accepted the method of financing and other conditions until advised otherwise by other J-1 physicians and her attorney. As a result, an impasse developed and actual employment was not started. We did not obtain any evidence that a specific work start date had been established.

The employer said he was unaware of any arrangement whereby the employer assumed liability for loan guarantee repayments; and, if this issue of an amendment transferring liability had been raised, he would probably have rejected it since he believed the J-1 physician needed to obtain assistance in line with the physician recruitment agreement loans. He also said that, since any loan guarantee repayments would be forgiven if the J-1 physician worked in the area for 4 years after the completion of the one-year guaranty period, he did not see a problem with the arrangement.

While forgiveness of the loan guarantee was possible under such circumstances, it would require a 5-year commitment by the J-1 physician rather than the 3-year J-1 waiver period.

With respect to the issue of employer acceptance of responsibility for any repayments in connection with physician recruitment agreement advances, we were unable to confirm the existence of such arrangements prior to issuance of this report.

--Recommendation to INS

On September 15, 2000, the employer notified INS that the J-1 physician had not reported to work and recommended that her J-1 Visa Waiver be terminated.

We notified INS on October 5, 2000, that, based on available information, we did not support a recommendation for termination of the J-1 Visa Waiver.

-- Status

During our field work, we were informed by the J-1 physician that she had signed an employment agreement with another health care provider to provide service in Wetumpka, Alabama. Subsequent to our field visits, we were informed that the parties to the initial employment agreement had agreed to essentially terminate this agreement and release each other from any responsibilities or liabilities thereto. Also, the loan guarantor orally agreed that the physician recruitment agreement could be terminated. Consequently, the process of relocating the J-1 physician to an eligible site and in accordance with program provisions is in process.

RECOMMENDATION

ARC should require employers and J-1 physicians to provide the applicable state officials with any supplemental or additional agreements made between employer and employee and/or employee and other third parties (e.g., loan agreements) in order to evaluate such agreements for compliance with program regulations and intent.

Hubert N. Sparks
Inspector General

Attachment

EXHIBIT 1

NON-COMPETE AGREEMENT

FOR GOOD CONSIDERATION, the undersigned jointly and severally covenant and agree not to compete with the business of Women's Wellness Center and its lawful successors and assigns.

The term "non-compete" as used herein shall mean that the Undersigned shall not directly or indirectly engage the practice of "Primary Care" or Internal Medicine, within a fifty (50) mile radius of the physical address of the location where Employee is actively employed and/or Employer's primary office or any satellite office, notwithstanding whether said participation be as an owner, officer, director, employee, agent, consultant, partner or stockholder (excepting as a passive investment in a publicly owned company).

This covenant shall remain in full force and effect for three years from the date that Employee leaves his/her position with Women's Wellness Center.

In the event of any breach, the Company shall be entitled to full injunctive relief without need to post bond, which rights shall be cumulative with and not necessarily successive or exclusive of any other legal rights.

This agreement shall be binding upon and inure to the benefit of the parties, their successors, assigns and personal representatives.

Signed this 24th day of August, 1989.

Witnessed:

Employee:

M.D.

MD, M.D.

GUSTAVE L J LAKE
Notary Public - State of New York
NO. 01LA2235525
Qualified in Kings County
My Commission Expires June 30, 2001