



REPORT OF REVIEW

J-1 WAIVER PROGRAM MERIT MEDICAL GROUP RICHLANDS, VIRGINIA

OIG Report 95-8(H)
December 8, 1994

BACKGROUND AND OBJECTIVE

The review was undertaken as part of a survey of J-1 waiver program operations in the Appalachian region and to address concern reported to the Appalachian Regional Commission with respect to compliance with program requirements.

The objective of this review was to determine physician and employer compliance with ARC J-1 policies requiring that physicians provide primary care practice 40 hours per week in an Appalachian Health Professional Shortage Area (HPSA).

RESULTS

Our review, which was confined to a review of available records, three interviews, and an unscheduled and unannounced field visit to the Honaker, Virginia medical office of Merit Medical Group, did not disclose any credible evidence of violations of ARC program requirements, including substantive practice at an undesignated area. However, we noted that the employment agreement of December 22, 1993, between the J-1 physician and employer contains a restrictive covenant (noncompete clause) that substantially reduces the potential for the J-1 to remain in the area after completion of the 2-year waiver period.

DETAILS

The President, Merit Medical Group, on April 26, 1994, requested ARC to support a J-1 waiver for a physician who would practice, as an internist/primary care physician, a minimum of 40 hours per week in the HPSAs of Honaker and Lebanon, Russell County, Virginia.

The J-1 applicant had previously signed the J-1 Visa Waiver Policy Affidavit and Agreement on December 7, 1993; and ARC forwarded a request for waiver to the United States Information Agency (USIA) on August 22, 1994. USIA recommended on September 2, 1994, that the Immigration and Naturalization Service (INS) grant the waiver.

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REPORT OF REVIEW

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MERIT MEDICAL GROUP
RICHLANDS, VIRGINIA

OIG Report 95-7(H)
December 8, 1994

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On August 1, 1994, the Director, Office of Primary Care Development, Virginia Department of Health, had notified ARC that, based on a conversation with the President of Merit Medical Group, the intended schedule of the J-1 physician was Monday, Wednesday, Thursday, and Friday (9:00 AM to 2:00 PM) at Honaker, Virginia, and Monday, Wednesday, Thursday, and Friday (2:00 PM to 5:00 PM) and Tuesday (9:00 AM to 5:00 PM) at Lebanon, Virginia.

On September 8, 1994, the J-1 physician and employer returned the required notarized ARC J-1 Physician Reporting Form. This form noted the start of employment as July 18, 1994, and the work locations as Honaker and Lebanon, Virginia.

FIELD VISIT AND INTERVIEWS

On November 30, 1994, at 2:00 PM, we made an unscheduled visit to the Honaker, Virginia office of the Merit Medical Group. The sign on the door noted the November office hours as 9:00 AM to 5:00 PM, Monday through Friday; and the J-1 physician was on duty.

The J-1 physician said that he started work in July 1994 and that almost all of his time is now spent at the Honaker, Virginia office since the patient workload has been increasing and another physician is assigned to the Lebanon, Virginia office. He said he has privileges at the Lebanon Hospital and sees some patients in Lebanon, Virginia. He said he did very little work in Richlands, Virginia, where the main office of the Merit Medical Group is located. He noted he was at the Honaker office from around 9:00 AM to 4:30 PM each week day.

The J-1 inquired as to what a HPSA stood for; and I briefly explained the program, including requirements for service in the HPSA and the need to notify the state agency and ARC if substantial work was performed in a non-HPSA such as Richlands, Virginia.

Also, the J-1 was at ease during our brief discussion despite the unscheduled visit by a representative of the ARC's Office of Inspector General.

On December 5, 1994, a telephone interview was held with the President, Merit Medical Group. This official said that the J-1 physician initially divided his time more evenly between Honaker and Lebanon, Virginia; but due to patient workload, he was now spending most of his time at Honaker. He said that the J-1 spent very little time in Richlands seeing an occasional patient and, in view of our inquiry, he was going to emphasize to the J-1 the need to practice almost exclusively in a HPSA.

I noted that, although the J-1 was apparently practicing in a HPSA, notification to the state office about the reapportionment of time toward the Honaker clinic would be appropriate; and if there were any substantive changes in the future, including practice outside of Russell County, the state should be notified.

CONCLUSION

Based on our survey, we concluded that the J-1 physician is in compliance with program requirements and, in the absence of additional information, consider this aspect of our review closed.

EMPLOYMENT AGREEMENT

The employer/J-1 agreement included the following restrictive covenant.

"As part of the consideration for the Corporation hiring the Physician, it is expressly agreed that upon termination of this Agreement, for any reason whatsoever and at any time, the Physician shall not, for a period of twenty-four (24) months thereafter engage in the practice of medicine or surgery within a radius of fifty (50) miles from any of the offices maintained by the Corporation as of the date of said termination. In this regard, it is acknowledged that the Corporation presently maintains medical offices in Richlands, Honaker, Lebanon, and Tazewell, Virginia, and this restrictive covenant agreeing not to practice medicine within twenty-four (24) months from the date of termination shall encompass an area of a radius of fifty (50) miles from each of those offices and any other offices as may be operated by the Corporation as of the date of such termination.

"The Corporation and the Physician recognize that this covenant not to complete is of mutual benefit to both parties and is supported by full and adequate consideration, and that the Corporation is entering into this employment arrangement or agreement on the condition that this Restrictive Covenant be enforceable for its entire term throughout the entire area described herein. The Physician acknowledges and agrees that the Restrictive Covenant contains restrictions that are reasonable and necessary for the protection of the Corporation's legitimate business interest, that the Corporation will suffer irreparable harm in the event of a breach of any of the provisions of this Restrictive Covenant, and that this Restrictive Covenant is reasonable both as to time and distance and is not injurious to the welfare of the Physician, his family, nor the surrounding community.

"The parties agree that in the event of any breach or attempted breach by the Physician of this Restrictive Covenant, that the Corporation shall be entitled to institute and prosecute proceedings at law or equity with respect to such breach, and to recover such costs, expenses, and reasonable attorneys fees and may be incurred by the Corporation in connection with such proceedings. The parties further recognize that because a remedy at law for any breach or attempted breach or attempted breach by the Physician shall be inadequate, that in addition to the foregoing, the Corporation shall be entitled to enjoin, without the requirement of any surety bond, the Physician from engaging in any conduct in violation of this Restrictive Covenant and may seek any other injunctive or equitable relief as may be appropriate in the event of any such breach or attempted breach.

"It is the intention of the parties that this Restrictive Covenant be enforceable to the fullest extent permitted by law. The invalidity or unenforceability of any portion of this Agreement shall not affect the validity or enforceability of any remaining portions herein. The parties agree that in the event a court of competent jurisdiction shall determine that any provision of this Restrictive Covenant is invalid or unenforceable under applicable law by reason

of the geographic or temporal scope of such provision or the extent of the restriction imposed upon the Physician's activities set forth herein, then the geographic or temporal scope of such provision or the extent of restriction imposed on his activities may be deemed modified by the court to reduce said geographic or temporal scope or the extent of such restriction upon the Physician's activities by such amount as is minimally necessary to render such provision, as so amended, not invalid or unenforceable under applicable law.

"The covenants herein on behalf of the Physician are of the essence of the employment arrangement and shall be construed as independent of any other provision of this Agreement, and the existence of any claim or cause of action against the Corporation, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement by the Corporation of this Restrictive Covenant."

Although specific dollar damages are not included, the noted potential legal actions would, in our opinion, seriously impact on the potential for J-1 physicians to stay in the area after completion of the 2-year J-1 waiver period.

Notwithstanding the employer's legitimate business interests, including recruitment and clinic start up costs and potential for reduced caseload if a J-1 physician stays in the area and opens a private practice, we believe that the accomplishment of a program objective to establish permanent medical providers in HPSA areas requires restrictions on the use of noncompete restrictive covenants. In most instances, the J-1 physicians' billings should be sufficient to offset employer expenses; and in some instances, contract provisions provide increased opportunities for employer recoupment of costs. For example, in this case, the J-1/employer contract is for 3 years, which affords an extra year for recovery of costs.

Thus, we recommend that ARC consider prohibition of restrictive covenants that preclude J-1 physicians from remaining in a HPSA subsequent to completion of the J-1 waiver period without the imposition of substantial monetary damages. The continuance of restrictive covenants guarantees that, in most cases, the need for short-term J-1s will continue unabated.


Hubert N. Sparks
Inspector General