



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-189451

December 15, 1977

The Honorable Adam Benjamin, Jr.  
House of Representatives

Dear Mr. Benjamin:

This is in response to your request for an interpretation of Public Law No. 94-484, as it applies to medical doctors who are aliens, but who were living and working in the United States at the time the law was enacted. Specifically, you ask whether it was the intent of Pub. L. No. 94-484 to impose new standards on those previously qualifying to enter the United States to practice medicine, and whether it was intended to force such professionals to depart by applying the law retroactively.

Title VI of the Health Professions Educational Assistance Act of 1976 (Pub. L. No. 94-484, 90 Stat. 2243) deals with limitations on immigration of foreign medical graduates. Section 212(a) of the Immigration and Nationality Act (8 U.S.C. § 1182(a) (1970)) lists classes of aliens who are ineligible to receive visas and are excluded from admission into the United States. Section 601(a) of the 1976 Act (90 Stat. 2300-61), which became effective on January 10, 1977 (by virtue of section 601(f)), added to 8 U.S.C. § 1182(a) a new class of aliens to be excluded:

**"(32) Aliens who are graduates of a medical school and are coming to the United States principally to perform services as members of the medical profession, except such aliens who have passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health, Education, and Welfare) and who are competent in oral and written English. The exclusion of aliens under this paragraph shall apply to special immigrants <sup>7</sup> <sup>8</sup>, to nonpreference immigrant aliens described in section 203(a)(8) [8 U.S.C. § 1153(a)(8)], and to preference immigrant aliens described in section 203(a)(3) and (6) [8 U.S.C. § 1153(a)(3) and (6)]."**

(8 U.S.C. § 1182(a)(32) has since been further amended by Pub. L. No. 95-83, as will be discussed below. Although some aliens who would have been affected by section 1182(a)(32), as originally enacted, will be exempt from it by virtue of Pub. L. No. 95-83, the essential requirements of section 1182(a)(32) remain in effect and the following discussion, unless otherwise noted, applies to section 1182(a)(32) as originally enacted and as amended.)

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Pursuant to 8 U.S.C. § 1182(a)(32), the Secretary of Health, Education, and Welfare (HEW) established the Visa Qualifying Examination (VQE) as equivalent to parts I and II of the National Board of Medical Examiners Examination (NBME). Dr. Felipe S. Chua, your constituent, has expressed concern that the requirement to take NBME or the VQE would be applied to alien physicians who were already in the United States at the time the law was changed and who had previously passed the Educational Commission on Foreign Medical Graduates Examination (ECFMG) or the Federal Licensure Examination (FLEX). According to Dr. Chua, many of these alien doctors have resided in this country for a number of years. He describes them as having "long applied for their visas, as far back as 1969 or earlier, whose applications have been approved by the Immigration and Naturalization Service, but who are waiting for their visa number assignments - - -."

Dr. Chua says that these doctors "took and passed those licensing tests [FLEX and ECFMG] with the clear understanding that those were the main legal requirements to practice medicine in this country," and he believes that they should not now be required to take the NBME or the VQE. He has requested that the FLEX be considered by HEW as the equivalent of parts I and II of the NBME.

First, as mentioned above, the effect on many alien physicians of 8 U.S.C. § 1182(a)(32) (as amended by Pub. L. No. 94-484) has since been mitigated or removed by the 1977 amendments to Pub. L. No. 94-484 and to the Immigration and Nationality Act, which were made by Pub. L. No. 95-83 (91 Stat. 383, 87, August 1, 1977).

Under the 1977 amendments, aliens who are graduates of a medical school which is accredited by a body or bodies approved for the purpose by the Commissioner of Education, whether or not the school is in the United States, are not subject to the requirements of the 1976 amendments. 8 U.S.C. § 1182(a)(32), as amended by section 307(c)(1), Pub. L. No. 95-83. Aliens who are of national or international renown in the medical profession are also exempt from the requirements of the 1976 amendments. Section 602(c), Pub. L. No. 94-484, as added by section 307(c)(3), Pub. L. No. 95-83. In addition, alien physicians who, on January 9, 1977 (the day before the 1976 amendments took effect), were doctors of medicine licensed to practice in a State, held valid specialty certificates issued by a constituent board of the American Board of Medical Specialties and were practicing medicine in a State, are considered to have passed parts I and II of the NBME. Section 602(a), Pub. L. No. 94-84, as added by section 307(c)(3), Pub. L. No. 95-83. Dr. Chua, in his May 3, 1977, letter to you, described himself and those for whom he speaks, as "foreign medical graduates who are practicing in the State of Indiana, who compose majority of the specialists in the medical field in this area." It

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is quite possible, therefore, that they fall within the specified exceptions and need not comply with the new examination requirements of the 1976 amendments. However, each alien physician's status would have to be determined individually by the Immigration and Naturalization Service. If, for example, Dr. Chua or any of his colleagues were not board certified as specialists, they would not be exempt from the examination requirement under the third exemption cited above, although they might still fall within the first or second exemptions. Therefore, we will address the merits of Dr. Chua's contentions, as expressed in your letter.

In enacting Pub. L. No. 94-484, we believe the Congress did indeed intend that a new and higher standard for admission of foreign medical graduates (FMGs) to practice medicine in this country be imposed. In the Report by the House Committee on Interstate and Foreign Commerce on H. R. 5546, 94th Cong., it was said that:

"The large influx of foreign medical graduates is of particular importance because virtually all testimony presented to the committee on the issue of FMGs questioned the quality of care provided by graduates of foreign medical schools both in terms of their ability to relate to their patients and their medical competence. The practice of medicine requires the subtle interpretation of the psychologic status of the competent performance of professional duties [sic]. The quality of care provided by individuals who do not speak the English language well, let alone understand the subtle nuances of the American culture, regardless of their medical competence, must be questioned.

\* \* \* \* \*

"Relatively uncontrolled entrance into the United States medical care system by foreign medical graduates of widely varying training, background, and competence is severely diluting the quality of the United States health-care system. Even by the crudest measures of input, process, and certification examinations, it is apparent that many FMGs do not come close to the minimal standards set for United States medical graduates." H.R. Rep. No. 94-266, 53, 54 (1975).

Similarly, the Senate Committee on Labor and Public Welfare found that the large-scale influx of FMGs poses a problem for the United States in terms of the quality of medical care provided by them. The Senate Committee referred specifically to the possibility that the medical education of FMGs might not be equal to that found in American medical schools and mentioned also the language and cultural barriers noted by the House Committee. S. Rep. No. 94-887, 210 (1976). (In fairness to the

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FMGs, many of whom may, of course, be excellent doctors, both reports also cited as a problem the foreign policy issue raised when the United States accepts, as immigrants, FMGs from developing countries which lack adequate medical care for their own populations. Id; H. R. Rep. No. 94-266, supra, 50).

Finally, in this regard, section 601 of the 1976 Act was described as follows by the Conference Committee reporting this year on a bill to amend it (the bill that became Pub. L. No. 95-83, discussed supra):

"Amendments to the Immigration and Nationality Act made last year were intended to put to a halt abuses of provisions of that Act whereby thousands of alien graduates of foreign medical schools who were ill-trained by United States standards were entering this country in order to practice medicine." S. Rep. No. 95-349, 27 (1977).

Thus, the 1976 amendments were intended to limit the immigration of FMGs. To accomplish this, the FMGs are required to take an examination equivalent to that taken by most United States medical graduates, the NBME. S. Rep. No. 94-887, supra, 80.

Dr. Chua contends, however, that the new requirement should apply only to those prospective immigrants "who are outside the United States, who are only in the process of applying for admission into this country." He says that the FMGs who are now in the United States and have already "chosen to be a permanent member" of this nation should not be subject to the new requirements. You suggest that the language in 8 U.S.C. § 1182(a) (32), to the effect that the exclusion applies to FMGs who "are coming to the United States" to practice medicine, precludes its application to FMGs already in the United States.

We do not agree that the 1976 amendments impose new standards on "those previously qualifying to enter the United States to practice medicine." The affected alien physicians were not permitted to enter the United States for the purpose of practicing medicine. They were admitted as nonimmigrants, for limited time periods and, typically, for study, research, or teaching. They evidently intend to become immigrants but, until they have been granted that status, their right to remain in the United States is contingent upon compliance with the terms of their admission as nonimmigrants.

Perhaps some discussion of the immigration system as it applies to FMGs would be helpful. Generally, under the Immigration and Nationality Act, as amended (8 U.S.C. § 1101 et seq. 1/), the right to reside permanently in the

1/The Act was substantially amended in 1976, by Pub. L. No. 94-571, 90 Stat. 2703. Those amendments became effective January 1, 1977. Generally, they have no direct effect on the FMGs. The following discussion describes present law.

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United States is represented by the grant of an immigrant visa. Entry for various temporary purposes requires a nonimmigrant visa. There are numerical limitations on the total number of aliens who may be granted immigrant visas annually, as well as on the number of aliens from individual foreign states who may receive immigrant visas annually. 8 U.S.C. §§ 1151, 1152.

Within the overall numerical limitation, immigrant visas are first allocated in the order of six preference priority categories. There are also limits on the number of visas which can be issued within each preference category annually. Visas remaining available after allocation among the six preference priority categories (and one other special category) may then be issued on a nonpreference basis to other qualified immigrants in the chronological order in which they qualify. 8 U.S.C. § 1153.

The new law applies to FMGs who are in the third or the sixth preference categories, who are "special immigrants" as defined in 8 U.S.C. § 1101(a)(27)(A), or who are nonpreference immigrants. The third preference category is for--

"\* \* \* qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States, and whose services in the professions, sciences or arts are sought by an employer in the United States." 8 U.S.C. § 1153(a)(3).

The sixth preference category is for--

"\* \* \* qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States." 8 U.S.C. § 1153(a)(6).

Generally, nonimmigrant aliens are admitted to the United States only for a temporary period for certain specified purposes and are expected to return to the country of their permanent residence. They have no right to remain beyond the period of authorized entry (unless they acquire permanent residence status). They cannot engage in activities inconsistent with the purpose of their admission and they are subject to expulsion for not complying with the time limits or the conditions and purposes of their entry. 1 Gordon & Rosenfield, "Immigration Law and Procedure" (rev. ed. 1976) § 1.32.

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With regard to the status of the FMGs--

"Many FMGs first enter the U.S. on an 'exchange visitor' visa or 'J-visa' [so-called because it is authorized by section 101(a)(15)(J) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(J)]. This program was intended to assist developing nations by facilitating the education of their students, including medical students, in the United States. The program has evolved into a means for U.S. hospitals to acquire inexpensive physician services." S. Rep. No. 94-887, supra 211.

Exchange visitors are nonimmigrants. One who is in the United States as a nonimmigrant may apply for "adjustment of status" to that of an immigrant:

"(a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255.

Aliens seeking adjustment of status from nonimmigrant to immigrant may first apply for preference classification. Based on their professional skills, FMGs would be eligible for either third or sixth preference classification.

Under the numerical limitation system, the chances of receiving an immigrant visa could be considerably enhanced if the applicant is classified in a preference category. However--

"\* \* \* qualification as a member of a preference group does not assure an immigrant of immediate consideration. Some preferences (e.g., the third, and sixth) may be currently oversubscribed, and the maximum allocations for some countries (e.g. Italy and the Philippines) are usually exhausted by the early steps on the preference ladder. Thus, in many instances the approval of a visa petition [i. e., a petition for preference classification] may entail a sojourn on a waiting list for the appropriate preference." 1 Gordon and Rosenfield, "Immigration Law and Procedure" (rev. ed. 1976) § 3.7a (hereinafter cited as Gordon and Rosenfield).

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The procedure for an alien in the United States seeking adjustment from nonimmigrant to immigrant status with the benefit of a preference classification is first to file a petition with the Attorney General (who administers these provisions through the Immigration and Naturalization Service (INS)) for the preference status. (Exchange visitors, unless they meet certain conditions, may not apply for permanent residence in the United States until they have left this country for at least 2 years. 8 U.S.C. § 1182(e). Presumably, the FMGs who are exchange visitors and who seek adjustment of status have satisfied these conditions.)

The application for an immigrant visa will not be considered until the petition for preference (referred to as a "visa petition") has been adjudicated. 8 C.F.R. §§ 245.1(d), 245.2(a)(2) (1977). An alien who is granted preference status, however, is given a priority on the waiting list for visas which relates back to the date he filed his petition for preference status. 8 C.F.R. § 245.1(g)(2).

Once the visa petition, for preference status, is granted, the applicant for adjustment of status still may not submit his application for an immigrant visa unless a visa will be "immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a)(3), quoted *supra*. Availability of a visa for an applicant for adjustment of status is determined by reference to the waiting list in the same manner as availability of a visa for a prospective immigrant outside the United States. 8 U.S.C. § 1255(a)(2); 8 C.F.R. § 245.1(g). If both are in the same preference category, they are competing, in effect, for the same limited number of visas.

Approval of a petition for preference status does not in itself assure a nonimmigrant alien of the right to remain in the United States until an immigrant visa becomes available. 1 Gordon and Rosenfield (Supp. 1976) § 3.5a. Moreover, approval of an application for an immigrant visa, when one does become available, is by no means automatic, even for an applicant with preference status. The applicant must still meet the requisite qualifications, and the visa application may be denied. *Lee v. INS*, 541 F.2d 1383 (9th Cir. 1976).

An applicant for adjustment of status is "\* \* \* assimilated to the position of an applicant for entry to the United States. He must comply with all entry requirements except documents." 2 Gordon and Rosenfield § 7.7e(1). This means that the same standards are applied in determining his eligibility for an immigrant visa as would be applied if the applicant were outside the United States at the time of his application. *Campos v. INS*, 402 F.2d 758 (9th Cir. 1968).

Immigrant FMGs--that is, those who, at the time the 1976 amendments pertaining to FMGs took effect, had been admitted to the United States for permanent residence--were not affected by the amendments. Only those

outside the United States and seeking to enter, or those inside the United States as nonimmigrants and seeking adjustment of status, were affected. By its terms, section 1182(a)(32) of title 8, United States Code (as added by Pub. L. No. 94-484), makes aliens falling within its exclusionary standards ineligible to receive visas, whereas immigrants already hold visas. Nonimmigrants, it is true, hold nonimmigrant visas, but to convert their status to that of immigrant, they must apply for immigrant visas, thus bringing into play the requirements of 8 U.S.C. § 1182(a)(32), making them ineligible to receive visas unless they pass the NBME or its equivalent and demonstrate English language proficiency.

The FMGs who are the subject of your inquiry are now in the United States and (according to Dr. Chua's letter to President Carter on this matter, a copy of which you provided) "have long applied for their visas," have had their applications approved, and are awaiting visa number assignments. In fact, however, as explained above, there is no significant waiting period between approval of a visa application and issuance of a visa, because a prospective immigrant already in the United States may not apply for an immigrant visa until a visa number assignment is available. 8 U.S.C. § 1255.

In consequence, we must assume that, contrary to the implication in Dr. Chua's letter, the FMGs with whom he is concerned have not had their applications for immigrant visas approved. Rather, they are here in non-immigrant status, such as that of exchange visitor, and are awaiting availability of visas. They presumably intend to apply for immigrant status when permitted to do so, which will be when immigrant visas become available for assignment.

Petitions for preference status, although they do not establish eligibility for issuance of a visa, are termed "visa petitions" by INS. 1 Gordon and Rosenfield § 3.5a. This terminology may be responsible for the confusion engendered by Dr. Chua's reference to the FMGs having had visa applications approved. Their "visa petitions," i.e., their petitions for preference classification, may have been approved but not their visa applications. We conclude, therefore, that the 1976 amendments do not have an impermissible retroactive effect.

The applications for immigrant status of the affected alien physicians had apparently not been approved at the time the new law took effect. As is the case with all aliens seeking immigrant status, whether present in the United States at the time of application or not, these alien physicians must meet the standards of the law in effect at the time their applications are considered for approval.

Evidently, the alien physicians have in many cases submitted applications to be classified in preference immigrant categories and these applications may have been approved. That approval gives the alien physicians

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priority on the waiting list for immigrant visas but does not assure approval of their applications for immigrant status. (The 1976 amendments do not affect preference classifications previously granted to alien physicians.)

Thus, to sum up, an FMG in the United States as a nonimmigrant seeking adjustment of status, and an FMG seeking admission to the United States as an immigrant, are in essentially the same position in terms of the immigration laws. Both are applying for permanent admission to this country and both are subject to the limited availability of immigrant visas.

The FMGs who are present in the United States and are seeking admission for permanent residence were admitted, typically as exchange visitors, on a temporary basis. While they were in the United States as nonimmigrants, but before they were entitled under the law to submit applications to become immigrant (because visa number assignments were not yet available), the new requirement for the grant of a visa to one intending to practice medicine in this country was enacted. All FMGs seeking immigrant visas, whether present in the United States or not (and whether seeking preference status or not) must now pass the NBME examination or its equivalent and must demonstrate competence in oral and written English.

A FMG, present in the United States only on the express condition that his stay be temporary, and seeking immigrant status, and a FMG not present in the United States but also seeking immigrant status, are competing, in effect, for the same limited number of immigrant visas. We see no basis for exempting the FMG who is here from the requirements for immigration which must be met by the FMG who is not here.

The same conclusion is implicit in the doctrine of immigration law, cited above, that an applicant for adjustment of status is assimilated to the position of an applicant for entry. The doctrine has been described as follows:

"The theory of the adjustment statute [8 U.S.C. § 1255] is that if the applicant were then outside of the United States seeking entry he would be admissible under the immigration laws. Therefore if the applicant is found inadmissible under the immigration laws he cannot be granted adjustment of status. \* \* \* the consideration of admissibility in an adjustment proceeding is substantially equivalent to such consideration by a consul [the State Department official who is vested with authority to grant or deny immigrant visas to applicants in foreign countries] in passing on an application for an immigrant visa." 1 Gordon and Rosenfield § 7.7b.

You suggest that, because 8 U.S.C. § 1182(a)(32) makes aliens who "are coming" to the United States ineligible to receive visas if they do not meet its requirements, aliens present in the United States at the time of enactment of that section should not be considered to be subject to its requirements. However, an applicant for adjustment of status has been held to be assimilated to the position of an applicant for entry even when the wording of the exclusion, like the wording of section 1182(a)(32) which you cite, is in terms of future entry into the United States. See Bloomfield v. Immigration and Naturalization Service, 404 F.2d 656 (9th Cir. 1968), cert. den. 394 U.S. 1013 (1969).

While Bloomfield was in the United States as a nonimmigrant, he applied for adjustment of status. When he submitted his application for adjustment of status, the Court found, he was not statutorily ineligible for admission under any provision of 8 U.S.C. § 1182. However, before processing of his application was complete, section 1182(a)(14) was amended. That section had formerly restricted immigration of aliens seeking to enter the United States to work, but did not apply to Bloomfield. As amended, however, it added a new requirement that aliens seeking to enter to work would be excluded unless they obtained employment certificates from the Secretary of Labor. Bloomfield did not have such a certificate, and his application for adjustment of status was denied.

8 U.S.C. § 1182(a)(14) refers to aliens "seeking to enter the United States." It was assumed to be applicable to Bloomfield's application for adjustment of his status to that of a permanent resident, notwithstanding the fact that he was in the United States when he applied. Although this particular issue was not under review by the court, the opinion states that:

"Section 245 of the Act permits an alien who is temporarily in the United States to become, under certain circumstances, a lawful permanent resident. One of the circumstances which must exist is that the alien be admissible to the United States for permanent residence under the Act. Aliens ineligible for admission to the United States for permanent residence, and therefore ineligible for relief under section 245, are specified in section 212 of the Act, 8 U.S.C. § 1182 (1964)." 404 F.2d at 658.

The same principle, in our view, would require that applications for adjustment to immigrant status to perform services as members of the medical profession, submitted by aliens who do not meet the requirements of 8 U.S.C. § 1182(a)(32), be denied, notwithstanding the fact that the applicants are not literally "coming to" the United States.

The Bloomfield case is also noteworthy in that Bloomfield was required to meet the standards for admissibility for permanent residence in effect at the time of action on his visa application, even though, just

as in the situation now under consideration, the requirement which resulted in the denial of his application was a new one, added after he entered this country and after he applied for an immigrant visa. See also Talanoa v. Immigration and Naturalization Service, 397 F.2d 196 (9th Cir. 1968), in which a similar result is described as deriving from the general rule of administrative law that an administrative agency is required to act under the law as it stands when the agency's order is entered.

Moreover, as mentioned earlier, the 1977 amendments, in effect, create various exceptions to the exclusionary rule of the 1976 amendments. The third exception, for doctors holding specialty certificates, operates in favor of FMGs who were practicing medicine in a State on the effective date of the 1976 amendments. Clearly, if section 1182 (a)(2), as added by Pub. L. No. 94-484, had been thought by the Congress to be inapplicable to FMGs in the United States, it would have been superfluous to enact an amendment in 1977, the only apparent purpose of which is to mitigate the effect of the 1976 amendments on certain FMGs practicing their profession in the United States.

Finally, Dr. Chua contends that the new law is "unfair and unconstitutional" because it affects FMGs who have "qualified" by passing the ECFMG and the FLEX, "with the clear understanding that those were the main legal requirements to practice in this country." He suggests further that the FLEX be considered the equivalent of the NBME, for purposes of meeting the new statutory requirement that FMGs pass the NBME or its equivalent. You make the additional point, in a letter to HEW, that the VQE, established by HEW as equivalent to the NBME, in fact may not be equivalent, because the VQE is made up of some of the harder questions from the NBME.

We take no position on the merits of the various examinations involved since the Act gives the Secretary of Health, Education, and Welfare the discretion to establish an examination equivalent to the NBME, whether by designating an existing examination or designing a new one. However, we must point out that until the 1976 amendments, there was no requirement for FMGs to take any examination to qualify for immigrant status. Under INS regulations, passing the ECFMG is merely one of several alternative methods of establishing that a FMG is a member of the medical profession, a determination which is significant only for purposes of deciding whether the FMG falls within the third preference category. 8 C.F.R. § 204.3(e)(2) (1977) (since revised, pursuant to the 1976 amendments, at 42 Fed. Reg. 3627 (1977)).

The new law thus does not act to deprive a FMG of any status to which he may previously have been entitled. If he qualified for classification in the third preference category, whether by passing the ECFMG or otherwise, he remains so classified. By passing the FLEX or the ECFMG, however, an FMG did not qualify for immigrant status.

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Of course, as Dr. Chua points out, many FMGs have taken and passed the ECFMG or the FLEX. These doctors presumably took the examinations to qualify for a preference, or because they are prerequisites for State licensing of physicians or for admission to graduate medical training. The ECFMG and the FLEX may have been the "main legal requirements to practice medicine in this country," as Dr. Chua says, but only in the sense that they were necessary for State licensing. They were never necessary or sufficient as legal requirements for admission to this country for permanent residence. Hence, requiring FMGs who have passed the FLEX or the ECFMG to take the NBME or its equivalent does not deprive them of any rights.

We trust that this information will be useful.

Sincerely yours,

  
Deputy Comptroller General  
of the United States