# IMMIGRATION PRESCRIPTION FOR PHYSICIAN RECRUITERS

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## Introduction

The U.S. is suffering a physician shortage that will likely increase by all reports. According to the Association of American Medical Colleges, we will have 62,900 fewer doctors than need and that number is likely to double in 2025. Others estimate that the U.S. may lack up to 200,000 physicians and 800,000 nurses by 2020.[1]

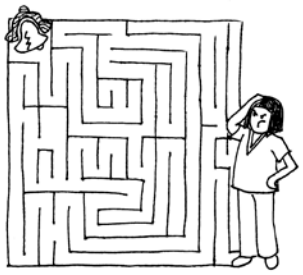
And consider these statistics:

- Foreign-born physicians account for more than one in four U.S. doctors.
- Nearly one-third of internal medicine residents are foreign-born.
- 36% of the internal medicine physicians are foreign-born.

With physician shortages, medical facilities face intense competition for a limited supply for physicians for both permanent and short-term, locum tenens placement. The challenges can be even greater for those facilities or recruiters who exclude foreign-born medical graduates (FMG) from the candidate pool because of perceived immigration barriers. The client or recruiter's perception that visas are too difficult, confusing, and time-consuming can destroy the chance for an otherwise viable placement.

On the other hand, physician recruiters with a working knowledge of the immigration options for physicians and the willingness seek help from immigration experts CAN place these providers, even in locum tenens positions.

In this e-book, you will learn the visa options available so you can successfully recruit FMG physicians.



[1] Council on Physician and Nurse Supply, www.physiciannursesupply.com/articles/council-press-release.pdf

# 1.0 Visas and Medical Training in the U.S. for FMG Physicians

To practice medicine in the United States, a physician must graduate from medical school, complete a U.S. residency program and pass licensing examinations. Foreign nationals may enter the U.S. to attend medical school under a student (or F-1) visa. This visa allows a foreign national to stay in the U.S. so long as she is enrolled full-time in school and for up to a year after graduation to complete additional practical training. Most FMG physicians graduate from medical schools outside the U.S. Regardless of whether the foreign national physician attends medical school in the U.S. or abroad, he must obtain a visa to complete a medical residency program.

## J-1 Visas for Medical Training

One visa option is the J-1 exchange visitor (or J-1) visa, which is sponsored through the Educational Commission for Foreign Medical Graduates (ECFMG). One major requirement of this visa is that the foreign national must return to his homeland for two years after completing the residency program (the two-year foreign residency requirement). Consequently, a "J-1 Physician" cannot remain to work in the U.S. immediately after completion of his medical residency program. Needless to say, this presents a formidable obstacle for many foreign born physicians. Fortunately, there are a number of methods to obtain a waiver of the two-year foreign residency requirement and then work with the H-1B professional worker (H-1B) visa.

## H-1B Visas for Medical Training

In addition, some foreign nationals avoid this hurdle altogether by completing their medical residency programs with an H-1B visa (as opposed to the exchange visa). To qualify, these physicians must have passed all three steps of the USMLE and be sponsored by the residency program, rather than the ECFMG. Many training programs will not sponsor H-1B visas but it appears many will. As you will see later, an understanding of the H-1B visa is critical for placement of these physicians.

# 2.0 Visas and Medical Practice in the U.S. for FMG Physicians

## 2.1 J-1 Waivers of Two Year Foreign Residency Requirement

For the J-1 physician who wishes to begin practicing medicine in the U.S. *immediately* after completing his residency or fellowship, the two year foreign residency requirement imposed by the J-1 visa is obviously a significant drawback. Fortunately, there are three methods of obtaining a waiver of this requirement. In addition, there are other visa strategies which permit the J-1 physician to immediately practice medicine in the U.S. which we will briefly discuss in this chapter as well.

### The Hardship Waiver

One method to avoid the two year foreign residency requirement is to obtain a hardship waiver. This waiver is granted when requiring the foreign national to return to her home country would impose an "exceptional hardship" on her spouse and children who are U.S. citizens or permanent residents of the U.S. To establish exceptional hardship, the J-1 physician must meet a two-part test. First, she must show that her family members would suffer *exceptional hardship* in her home country were they required to return with her for the two-year period. Second, she must show that her family would suffer *exceptional hardship* if they remained in the United States without her for two years.

As a practical matter, exceptional hardship is difficult to establish. For instance, the fact that the family would have to be separated is not enough to establish exceptional hardship by itself. It usually requires that the foreign residency requirement would force the family to live together in a war-torn or economically-ravaged country or be without necessary medical treatment or social services that are unavailable in the foreign national's home country. It also requires that the family would suffer equally as much if the physician returned home and left the family in the United States.

For example, Juan is a J-1 physician with a U.S. citizen wife, Jenny, who has multiple sclerosis requiring monthly treatments. She cannot work and depends solely upon Juan for income. Juan is from Bolivia where there is no facility that provides the treatments Jenny must receive. In addition, the average income for a physician in Bolivia is equivalent to $300 per month; far too little to support Jenny if she remained in the U.S. while Juan returns to Bolivia. In this case, the USCIS (and DOS) would probably determine exceptional hardship exists and grant Juan a hardship waiver.

However, please note that this waiver is only available if the foreign national's spouse or children are American citizens (or at least, permanent residents of the U.S.). Therefore, if a foreign national brings his existing family to the U.S., the hardship exemption is not available to him, regardless of the circumstances in his home country.

### The Persecution Waiver

Another waiver to the two-year foreign residency requirement is the persecution waiver. The USCIS and DOS will waive the foreign residency requirement if it determines that the foreign national is *likely to face persecution* in her home country based on her race, religion or political opinions. The persecution may be caused by the home country government or a group that the government is unwilling or unable to control.

### The Interested Government Agency Waiver

The third and most common J-1 waiver is the Interested Government Agency (IGA) waiver. If a government agency requests a waiver of the foreign residency requirement for a particular physician, then it is almost always granted. Currently, there are four IGAs who request waivers for foreign medical graduates:

- Appalachian Regional Commission (ARC) waiver (federal agency)
- Department of Veterans Affairs (VA) (federal agency);
- United States Department of Health and Human Services (HHS) (federal agency);
- Delta Regional Authority, and
- State Health Agencies under the Conrad 30 program.

#### The ARC Waiver

Although Congress passed legislation in late 2004 which allows federal agencies to sponsor waivers for specialists, the ARC waiver requires the foreign born physician to practice at least 40 hours per week as a *primary care* physician for a minimum period of three years at a health professional shortage area (HPSA) facility located in the Appalachian region. The Appalachian region includes Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia. The ARC defines "primary care" as internal medicine, family practice, pediatrics, obstetrics and gynecology, and general psychiatry.

The foreign born physician must sign a three-year employment contract that includes a $250,000 liquidated damages clause. Or, in other words, the contract must contain a provision requiring the physician to pay a $250,000 penalty if he quits the job before the end of the term.

The employer sponsor must also submit documentation of recruitment efforts for the six months immediately preceding the date of the employment contract. These recruitment efforts must include notification of the job opening to all the medical schools/residency programs located in the state where the job is located. Finally, the waiver request must be accompanied with a letter from the governor of the state in question.

### The VA Waiver

The VA waiver is available to physicians coming to work in facilities run by the Veterans Administration. Unlike most of the other IGA waivers, the VA waiver is not restricted to primary care physicians nor must the facility be located in a HPSA.

However, the VA will only sponsor a foreign born physician for a J-1 waiver if her services are necessary for the continuation of a specific program and the VA's efforts to fill the position with a U.S. physician have failed. In that vain, the sponsoring VA facility must submit extensive documentation of national recruitment efforts for the 12 months prior to submission of the waiver application. In addition, the foreign born physician must sign a minimum one-year employment contract.

*Please note that although the VA waiver only requires a one-year contract, the physician must practice with the VA for at least three years to comply with the USCIS waiver requirement.*

### The HHS Waiver

The HHS waiver was previously restricted to researchers; however, in June 2003, the HHS began to sponsor clinical practitioners as well. We will discuss both waiver tracks here.

#### HHS Research Waiver

The HHS Research Waiver is difficult to obtain because the HHS will only sponsor foreign born physicians under "stringent and restrictive criteria." For instance, HHS must determine that the physician is an "integral" part of a program "of high priority and of national or international significance" and that she "possesses outstanding qualifications, training and experience well beyond the usually expected accomplishments at the graduate, postgraduate and residency levels." In general, this waiver is only granted for

physicians who can document their leadership in research. Also, usually these physicians are employed by distinguished universities or research facilities, who must provide extensive documentation, including unsuccessful recruitment efforts to find a U.S. citizen or permanent resident of comparable qualifications. If the waiver is approved by the HHS, the physician must work with the sponsoring research facility for a minimum of three years.

### The HHS Clinical Care Waiver

In June 2003, HHS began acting as an IGA to sponsor primary care physicians to work in health professional shortage areas (HPSA) or medically underserved areas (MUAs), as determined by the HHS' Bureau of Primary Health Care. This policy was in response to the closure of the U.S. Department of Agriculture's (USDA) waiver program in 2002. For HHS purposes, "primary care physicians" are defined as physicians practicing general internal medicine, pediatrics, family practice or obstetrics/gynecology.

Although Congress passed legislation in late 2004 which allows federal agencies to sponsor waivers for specialists, the HHS Clinical Care Waiver is available only to primary care physicians and general psychiatrists who have completed their primary care or psychiatric residency training programs within the past 12 months. For example, an internist enters into an employment agreement to work for a facility located in No Man's Land, Texas, a HPSA. The agreement requires him to start work on July 1, 2013. In order to apply for a HHS waiver, he must have completed his residency training no earlier than June 30, 2012. According to the HHS, this 12-month eligibility limitation ensures that the physicians' primary care training is current. It also ensures that the physician is not engaged in subspecialty training.

As with the other waivers discussed in this section, sponsoring facilities must provide proof of recent recruitment efforts to find qualified physicians who are U.S. citizens or permanent residents. Also, the sponsored J-1 physician must commit to a three year period of service with the sponsoring employer and agree to begin work within 90 days of the USCIS approval of the waiver.

### Delta Regional Authority

The Delta Regional Authority (DRA) is a federal-state partnership serving a 240-county/parish area in an eight-state region. Led by a Federal Co-Chairman and the governors of each participating state, the DRA is designed to remedy severe and chronic economic distress by stimulating economic development and fostering partnerships that will have a positive impact on the region's economy. The DRA waiver requires the foreign

born physician to practice at least 40 hours per week as a clinical care physician for a minimum period of three years at a health professional shortage area (HPSA) or medically underserved area (MUA) facility located in the Delta region. The eight states included in the region are Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Missouri, and Tennessee. The specific counties in this state that are covered by the DRA can be found on the internet at *http://www.dra.gov/dra_coverage_map.html*

The DRA will sponsor primary care and specialist physicians and charges a $3000 application fee to process waiver applications.

### The Conrad 30 Waiver

Traditionally, only federal government agencies could sponsor foreign born physicians for J-1 waivers. However, in 1994, Senator Kent Conrad sponsored a law that created a program under which each state (plus Washington, D.C., Puerto Rico, Guam, and the U.S. Virgin Islands) could sponsor up to 20 physicians for J-1 waivers each year (this number was increased to 30 in 2002). To be eligible for a Conrad waiver, the physician must agree to work for three years in a facility located in a HPSA or MUA (unless applying for a FLEX location) and agree to begin work within 90 days of the USCIS approval of the waiver. This program is by far the most widely-used waiver program for J-1 physicians.

Each state administers its allotment of waivers and therefore, each state has its own requirements for waiver requests. In general, these policies require a three-year employment contract (usually without a non-compete clause), evidence of the employer's good faith attempts to recruit U.S. citizen physicians, and evidence that the facility is viable and located in a HPSA or MUA or qualifies for a FLEX waiver.

In general, the proposed practice must be located within a designated health care shortage area. Federal law permits up to 10 of the state's 30 annual waiver slots to be used for practice locations outside of designated shortage areas, when the employer can demonstrate that it serves patients who live in shortage areas. These waivers are generally referred to as "Flex 10" or "Flex" waivers. Each state may have its own criteria for the documentation needed for a facility and physician to qualify for a FLEX waiver.

Most states limit waiver requests to physicians who will practice primary care. Like the ARC and HHS clinical care waivers, primary care is usually defined as practice in internal medicine, pediatrics, family practice or obstetrics/gynecology, or general psychiatry. However, many states will also grant waiver requests for specialty physicians, provided the HPSA or MUA has a sufficient need for such specialists.

Finally, nearly all states begin to accept J-1 waiver applications for their programs on October 1. Because of the limited number of slots available (30) for each state, an early application filed on October 1 or soon after stands a better chance of approval, especially in states where the demand for waiver slots is highly competitive. What's more, the typical timeline to obtain a waiver approval is three to six months, depending upon the state. Therefore, it is critical for a J-1 physician to find employment as early as possible in the last year of residency or fellowship. For example, a J-1 physician in her third year of an internal medicine residency and graduating on June 30, 2014 should have an employment contract by September 1, 2013, allowing sufficient time to prepare and file a waiver application on October 1. While it is possible to apply later and obtain approval, delay in filing can limit the job choices for these J-1 physicians.

### The Effect of a Waiver

It must be noted that a waiver, by itself, does not allow the foreign born physician to live and work in the United States. The waiver simply allows him to apply for a temporary work visa or permanent resident status without first returning to his home land for two years. J-1 physicians must obtain a work visa, in most cases, an H-1B visa in order to work for an employer.

### Waiver Obligations

The hardship waiver and the persecution waivers are the most "liberating" of the waivers. Physicians who obtain these waivers are not restricted in terms of employment. Once these waivers are granted, the physician may work for any employer who wishes to sponsor a work visa for him (usually an H-1B visa) or immediately apply for a green card if married to a U.S. citizen.

By contrast, IGA waivers carry certain obligations that must be fulfilled in order to avoid losing the waiver. In general, all IGA waivers require the physician to begin work for the sponsoring facility within 90 days of the USCIS approval of the waiver and continue work for a total of three years. After completing the three years, the physician is free to work in any location in the United States, provided he obtains the appropriate visa to do so.

Under the USCIS regulations, physicians who receive waivers under the Conrad 30 (State Health Agency request) program must work in H-1B status for the three-year contract period. With one exception, they may not complete the permanent residence process until they have completed the third year of the contract. Finally, many state Conrad 30 programs and the ARC, DRA, and HHS have periodic reporting requirements where the

physician or sponsoring employer must report the status of employment and in some cases, the number of patients served by the physician.

### Losing the IGA Waiver

If a physician does not comply with the requirements of an IGA waiver, she will become subject to the two-year foreign residency requirement. To avoid this fate, the physician must prove to the USCIS that she cannot continue employment with the sponsoring facility because of "extenuating circumstances" beyond her control, such as closure of the sponsoring facility or hardship to the physician. In addition, the physician must agree to work for another employer in an underserved area (HPSA or MUA). There is no laundry list of the facts that constitute hardship to the physician; however, the USCIS has approved a change of employment to another facility in cases where the original sponsoring employer:

- Terminated the physician's employment;
- Failed to pay the physician's agreed upon salary; or
- Attempted to force the physician to engage in unethical conduct.

### Alternatives to Waivers

A physician who cannot obtain a J-1 waiver immediately may still remain in the U.S. after completion of his residency program by obtaining an extraordinary ability visa (O-1) or a treaty investor visa (E-2). If the physician qualifies for an O-1 or E-2 visa, he must obtain the visa at a U.S. consulate. He cannot obtain a change of status from J-1 to O-1 or E-2 while remaining in the United States. Procedures for the O-1 and E-2 visa are discussed in later chapters.

Finally, it is important to note that while the O-1 and E-2 visa permit the J-1 physician to live and work in the United States without first obtaining a J-1 waiver; these visas do not waive the two-year foreign residency requirement. Therefore, if the physician ever desires to become a permanent resident or U.S. citizen, he will have to either return to his home country for two years or obtain a J-1 waiver at some point in the future.

## IGA Waiver Program Comparison

| Waiver Program | Physician Requirements | | |
|---|---|---|---|
| | Term of Service | Sponsoring Facility | Area of Practice |
| ARC | 3 years | HPSA in Appalachian region. | Primary care |
| VA | 3 years | VA facility | No limits |
| HHS Research | 3 years | University or research facility | Research of national or international significance |
| HHS Clinical Care | 3 years | HPSA or MUA | Primary care and general psychiatry |
| DRA | 3 years | HPSA or MUA in Delta Region | No limits |
| Conrad 30 | 3 years (some states require 4 or more years) | HPSA or MUA or FLEX locations | Primary care/general psychiatry and specialties where needed |

### Temporary Work Visas

Once licensed to practice medicine, foreign nationals may work as physicians under a number of temporary non-immigrant visa programs. Some of them include:

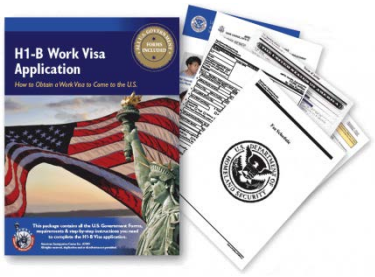
- H-1B: The most common program for foreign physicians is the professional workers visa, or H-1B visa. To obtain an H-1B visa, the foreign born physician must be sponsored by an employer. This visa is good for up to six years.

- O-1: This visa program allows an employer to sponsor any alien worker who has "a level of expertise indicating that the person is one of the small percentages who has risen to the very top of the field of endeavor." The visa can be issued for up to three years and can be renewed annually thereafter. As the name implies, this type of visa is only granted to *extraordinary* physicians.

- E-2: This visa program is available to nationals of certain countries, such as Egypt, Mexico, Pakistan, and numerous others. Qualifying physicians can work as physicians owning 50% or more of the medical practice.

Next, we will offer more details about each temporary visa option and how they can be used for permanent placement.

## 2.2 The H-1B "Professional Worker" Visa for Physicians




Physicians and medical researchers, as well as other professional occupations, meet the definition of "professional workers" for this purpose. Under an H-1B visa, a foreign born physician may practice medicine in the United States for up to six years generally. Here are some important facts to know about the H-1B visa.

## Who Can Sponsor H-1B Visas?

Under the H-1B visa program, the physician must be sponsored by an U.S. employer. H-1B employers can be businesses, non-profit organizations and even government agencies. No legitimate U.S. business is prohibited from sponsoring H-1B visas for its foreign-born employees. The only requirement is that the employer must have the ability to hire, fire, or otherwise control the physician's work.

## Self-Employment with the H-1B visa

In a January 2010 memorandum (PDF), the government, through the U.S. Citizenship and Immigration Services (USCIS) agency, announced a new policy which excluded self-employed physicians from the H-1B visa, even if the physician's practice is incorporated. However, since 2011, the government's position has changed. Now, professionals such as doctors, lawyers, engineers, accountants, computer scientists, and others may hold H-1B status with companies they own.

The USICS has a stated that "entrepreneurs with an ownership stake in their companies, including sole employees, may be able to establish the necessary employer-employee relationship to obtain an H-1B visa, if they can demonstrate that the company has the independent right to control their employment." In August 2011, USCIS issued an updated Q &A on employee-employer relationship clarifying how self-employed workers can establish a valid employer-employee relationship to qualify for the H-1B "specialty occupation" classification.

Now, FMG physicians can start their practice or work as independent contractors (1099), including locum tenens. To do so, the physician must form a corporation or limited liability company (LLC). The corporation or LLC must have a right to control the physician's employment including the ability to hire, fire, pay, supervise or otherwise control the employment. The government gave the example of a separate board of directors with those very powers. Other arrangements such as a partnership should be acceptable as well.

## H-1B numerical limitations (H-1B cap)

In 1990, Congress first imposed a 65,000 numerical limitation ("cap") on the number of new H-1B visas issued on annual basis. Since then the cap has gone through a number of revisions, including the addition of several exemptions from the cap. In 1998, Congress recognized the negative effect of this limit on the ability of American companies to

compete globally so Congress raised the annual cap to 115,000 for two years and in 2000 it increased the number to 195,000. For those five glorious years, there seemed to be plenty of H-1B visas to go around.

Unfortunately, on October 1, 2003, the number dropped back to 65,000. Not surprisingly, cap was reached 5 months into the fiscal year in February 2004. The situation became more drastic in FY 2005 when the visas were exhausted on October 1 and in FY 2006 when the visas ran out on August 10, nearly two months before the start of the fiscal year. In 2013, nearly 120,000 petitions were submitted and the USCIS conducted a lottery to determine the "winners" of the available slots.

Currently, up to 65,000 H-1B visas (6,200 for workers from Chile and Singapore, 58,200 for all other nationalities) may be issued each fiscal year for professional workers. The fiscal year begins on October 1 and ends September 30. Because an employer can apply for an H-1B visa up to six months in advance of the anticipated starting date of employment, the USCIS will accept applications for the new fiscal year (October 1) on or after April 1 of the year. In other words, applications can be filed as early as April 1 for an October 1 approval date.

However, some workers are excluded from the cap ("cap-exempt") including physicians who receive a J-1 waiver of the two-year foreign residency requirement and agree to work in a medical shortage area. Also cap-exempt are workers who are employed at universities or colleges or at non-profit organizations affiliated with universities or colleges ("cap-exempt employers"). Note that if a physician will be employed by a for-profit employer, such as a hospitalist group, to work at a hospital that would be considered a cap-exempt location, this employment arrangement could qualify for cap-exemption. This is important for physicians who completed residency in H-1B status, rather than J-1 status.

In addition, the cap only applies to "new employment," so in general, a person who already has an H-1B and applies for another H-1B with another employer is not subject to the cap. However, if the worker obtained H-1B status through a cap-exempt employer and then seeks to change employment to an employer that is not cap-exempt, the new application will be subject to the cap. For example, a physician finishes his residency in H-1B status with a university hospital on June 30, 2015. He has a contract with a private facility to start work on July 15, 2015. His new employer will sponsor the H-1B visa but

the petition will be counted towards the cap. If the cap has already been reached, the physician cannot work until October 1, 2015, assuming the employer files early enough.

Physicians who completed residency in J-1 status but returned home for two years as required OR who received a hardship or persecution waiver must also be mindful of H-1B cap issues as they might be subject to the H-1B numerical limitations, depending upon their circumstances.

### What Physicians Can Qualify for the H-1B Visa?

In order to qualify for an H-1B visa to practice patient care medicine, the foreign born physician must pass all parts of the USMLE, NBME or FLEX, and the English language proficiency test given by the ECFMG. In addition, the physician must be licensed to practice medicine in her intended state of employment. Usually, except for physicians who trained in Canada, this means that the physician must have completed a medical residency in the U.S. However, this does not apply in the case the physician obtains an H-1B visa to complete a U.S. medical residency program.

Furthermore, not all foreign-born physicians are subject to these requirements. These requirements only apply to foreign medical graduates (FMGs). For purposes of the H-1B visa, the following foreign born physicians are not considered FMGs:

- Physicians of national or international renown;
- Graduates of U.S. medical schools;
- Physicians who are not practicing patient care (e.g., medical researchers).

### How Long Can a Physician Work With an H-1B?

In general, a physician can hold H-1B status for a maximum of six consecutive years. Initially, the H-1B petition may request a maximum of three years for any particular job. After that, an extension request must be filed that can extend the H-1B for another three years, if necessary. Nevertheless, an H-1B worker may not extend her stay beyond six years by simply switching employers.

### Extensions Beyond the Six-Year Limit

Extensions of H-1B status beyond the six-year limitation (“AC21 extensions”) are available where the employee has a petition for immigrant worker (I-140 petition) or a labor certification application with the Department of Labor that has been pending for

more than 365 days. In this case, H-1B status may be extended for one-year periods. In addition, if the employee has an approved I-140 petition but cannot be approved for permanent residence because of an immigrant visa backlog, H-1B status may be extended for three year periods.

### Part-Time H-1B Visas

A physician may work with an H-1B visa on a part-time or full-time basis. For part-time employment, the H-1B visa petition must state the number of hours per week the physician will work. This number can be a range, e.g. 10 to 30 hours. The physician must be paid for the exact hours worked. If the physician is ready to work but there is no work available, e.g. no patients, he must receive payment for the minimum hours listed on the H-1B petition.

### Concurrent H-1B Visas for Moonlighting

A physician may work for more than one employer simultaneously so long as each employer separately applies for the H-1B visa. This is called a "concurrent" H-1B visa. There is no limit on the number of concurrent H-1B visas for any employee. Therefore, a physician may work for any number of employers, provided each employer has filed an H-1B on his behalf.

### Off-Site Employment

If a physician's work location is not owned or controlled by the employer, e.g. a hospitalist working at a hospital but employed by a private practice, the petitioning H-1B employer must provide additional evidence that it is the actual employer, rather than the hospital. In these circumstances, the employer must be prepared to provide proof such as the full employment contract, professional services contract with the hospital, payroll information, and other documents showing that the employer has the ability to hire, fire or otherwise control the physician's employment.

### Change of Employment

As H-1B physicians are sponsored by their employers, their immigration status is tied to their employment. That is, they can only work for the employer who sponsors the H-1B. Nevertheless, a physician may change jobs provided that the new employer files an H-1B petition on her behalf.

In fact, a physician already in H-1B status may start new or concurrent employment when the prospective employer files a new H-1B petition for her (as opposed to waiting until the petition has been approved). This is called "portability" of the H-1B status. The petition is considered filed when the USCIS physically receives the petition. To qualify for portability, the individual must hold or have held H-1B status, the new petition must be filed before the individual's current authorized stay expires, and the individual must not have been employed without authorization. If the H-1B physician begins the new job upon filing of the petition, and the new H-1B petition is ultimately denied, the physician is no longer authorized to work in that job.

Of course, in the case of a former J-1 physician who has obtained an IGA waiver, things are different. This physician will be contractually obligated to remain with an employer for three years. In this case, if the physician leaves his job before the end of the three year term, he will violate the terms of his J-1 waiver, unless he can establish the extenuating circumstances as previously describe. As a result, before going to work for another employer, he will be required to observe the two-year home residency requirement (return back to home country).

### H-4 Spouse Employment Authorization


Generally, spouses of H-1B workers hold H-4 status and are unable to work. However, on May 26, 2015, the government will begin accepting H-4 employment authorization document (EAD) applications for work authorization. Physicians who are married to H-1B workers may qualify for an EAD and have an opportunity to work.

### Who qualifies for the H-4 work cards?

There are only two types of H-4 spouses eligible for work authorization:

- Where the primary H-1B worker spouse is the beneficiary of an approved I-140 petition; OR
- Where the primary H-1B worker spouse has obtained a 7th year or more H-1B visa extension because of a pending green card application. If the primary H-1B worker has a PERM labor certification or I-140 petition filed and pending for 365 days before the his or her 6 year H-1B limitation, he can obtain an additional one

year H-1B status and extend his H-1B as long as the green card applications are pending

H-4 spouses of H-1B1s, H-2 or H-3 visa holders are not eligible under the rule at this time. Children who hold H-4 status, even if old enough to work, are not eligible under this rule.

### Are there any restrictions on using the EAD?

The EAD provides unrestricted employment authorization. It can be used to work full time or part time for any employer in any field or position. It can also be used for self-employment.

### When will the EAD expire?

The EAD will expire at the same time as H-4 status. Applicants should renew the H-4 and EAD at least 4 months in advance of expiration.

### Is there a limit to the number of H-4 EADs the government will issue?

No. All who are eligible can apply for the EAD anytime after May 26. It's estimated that about 179,000 H-4 spouses will apply this year.

## 2.3 The O-1 "Extraordinary Ability" Visa for Physicians

As previously discussed, the U.S. immigration law provides a special class of visa (the O-1 visa) for persons who have an extraordinary ability in the sciences, arts, education, business or athletics. Accomplished foreign physicians can use this visa program to work in the United States for an initial period of three years for each new employer, after which this visa may be renewed indefinitely.

### Who Can Sponsor O-1 Visas?

Under the O-1 visa program, the physician must be sponsored by an U.S. employer or agent. O-1 employers can be businesses, non-profit organizations and even government agencies. No legitimate U.S. business is prohibited from sponsoring O-1 visas for its foreign-born employees. The only requirement is that the employer must have the ability to hire, fire, or otherwise control the physician's work. If so inclined, locum tenens staffing agencies can sponsor O-1 physicians as an agent, rather than direct employers. This arrangement allows the agency to place physicians in jobs as independent contractors. Alternatively, the physicians can form their own companies and self-sponsor their O-1 visa, similar to H-1B self-employment.

### What Physicians Can Qualify for the O-1 Visa?

To qualify as an "extraordinary ability alien," the physician must demonstrate "a level of expertise indicating that the person is one of the small percentages who have risen to the very top of the field of endeavor." Specifically, the physician must be the recipient of either (i) a major, internationally-recognized award or (ii) at least three of the following distinctions:

- The physician has received nationally or internationally recognized prizes or awards for excellence in his area of expertise;
- The physician belongs to professional associations requiring outstanding achievements of their members, as judged by recognized national or international experts;
- The physician has been the subject of articles in major media or trade publications relating to his work;
- The physician has participated on a panel or as a judge of the work of others in his area of practice;

- The physician has made original scientific or scholarly contributions of major significance;
- The physician has written scholarly articles that have been published in professional journals or other major media;
- The physician has worked in a critical capacity for an organization with a distinguished reputation in the field of medicine; and
- The physician has commanded a high salary or other compensation.

### How Long Can a Physician Work With an O-1?

The maximum period of employment for an **initial** O-1 petition is three years. That is, the physician may work for three years for the employer without filing an extension. At the end of the three-year period, the employer must file a one-year extension request in order for the employment to continue. The employer can continue to file a one-year extension requests indefinitely for as long as the employment continues. Unlike the H-1B visa, there is no limit on how long a physician can hold O-1 status.

Furthermore, each **new employment (different employer)** is entitled to a new three-year validity period. Therefore, an O-1 physician can work for Employer A for three years and then contract with Employer B for another three years. After that, the physician can only receive one-year extensions with Employer B.

### Part-Time O-1 Visas

A physician may work with an O-1 visa on a part-time or full-time basis. For part-time employment, the O-1 visa petition must state the number of hours per week the physician will work. This number can be a range, e.g. 10 to 30 hours. The physician must be paid for the exact hours worked. However, unlike the H-1B visa, there is no requirement that the physician be paid any minimum amount if no work is available.

### Concurrent O-1 Visas for Moonlighting

A physician may work for more than one employer simultaneously so long as each employer separately applies for the O-1 visa. This is called a “concurrent” O-1 visa. There is no limit on the number of concurrent O-1 visas for any employee. Therefore, a physician may work for any number of employers, provided each employer has filed an O-1 on his behalf.

## 2.4 The E-2 "Treaty Investor" Visa for Physicians

The United States has treaties with certain countries allowing nationals of those countries ("treaty countries) to obtain temporary visas (E-2) to live in and develop a business in the U.S. A list of the countries as of this writing is found at the end of this chapter. Unlike the O-1 and H-1B visas, the E-2 visa does not require U.S. employer sponsorship.

### What Physicians Can Qualify for the E-2 Visa?

To qualify as an E-2 treaty investor, a foreign born physician must be national of a treaty country must intend to work **full-time** to develop his own business in the U.S. He can't enter the country to work as an employee for another and develop a part-time business "on the side." The physician must invest his full attention to development of the business.

In addition, the physician must own at least 50% of the business and make substantial cash investment into the business. To determine if an investment is "substantial," authorities will compare the amount of the investment to the total cost of purchasing or creating the business. If the business is relatively inexpensive to purchase or create, then the physician will be expected to invest most, if not all, of the required capital. On the other hand, if the business is capital intensive, then a lower percentage of cash investment may be accepted.

Finally, the physician must provide a five-year plan demonstrating that the business will generate enough revenue to support the physician and his family *and* employ others as well. If the business will only support the physician, then it does not qualify for E-2 status.

### How Long Can a Physician Work With an E-2?

Under this visa, the physician may reside in the United States so long as he is running the business, e.g. medical practice. The initial approval period is for two years. Each approved extension is valid for two years and an E-2 visa may be extended an unlimited number of times.

Interestingly, each approved extension request or entry into the U.S. will be valid for two years at a time, even if the E-2 visa will expire earlier. For example, let's suppose that an E-2 physician travels internationally and enters the U.S. with less than 30 days left before his E-2 visa expires. In this case, the USCIS will admit the physician and give him a two-

year stay on his I-94 entry document. However, if the physician travels outside the U.S. again, he must obtain a new E-2 visa before he can re-enter the U.S.

## E-2 Treaty Countries

| Albania | Argentina | Armenia | Australia |
|---|---|---|---|
| Austria | Azerbaijan | Bahrain | Bangladesh |
| Belgium | Bolivia | Bosnia & Herzegovina | Bulgaria |
| Cameroon | Canada | China (Taiwan) | Colombia |
| Congo | Costa Rica | Croatia | Estonia |
| Ethiopia | Finland | France | Georgia |
| Germany | Grenada | Honduras | Iran |
| Ireland | Italy | Jamaica | Japan |
| Jordan | Kazakhstan | S. Korea | Kyrgyzstan |
| Latvia | Liberia | Lithuania | Moldova |
| Mongolia | Morocco | Netherlands | Norway |
| Oman | Pakistan | Panama | Paraguay |
| Philippines | Poland | Romania | Senegal |
| Slovak Republic | Slovenia | Spain | Sri Lanka |
| Suriname | Sweden | Switzerland | Thailand |
| Togo | Trinidad & Tobage | Tunisia | Turkey |
| United Kingdom | Ukraine | Yugoslavia | Czech Republic |
| Ecuador | Egypt | Jordan | Luxembourg |
| Macedonia | Mexico | Israel | |

## Non-Immigrant Visa Status Comparison

| Visa | Responsibilities and Privileges of Visa Status | | | |
|---|---|---|---|---|
| | Eligibility | Length of Stay | Part-time and/or Concurrent Employment | Self-Employment (1099) |
| H-1B | Physician must be sponsored by an employer and licensed to practice patient care medicine. | The maximum period is six years. The initial period is three years with an additional three-year renewal. | Yes | Yes |
| H-4 | Physician's H-1B spouse must have an approved I-140 or have an AC21 7th year (or beyond) H-1B extension. | Corresponds to H-1B spouse's authorized status. | Yes, unlimited employment options | Yes |
| O-1 | Physician must be sponsored by an employer and demonstrate "extraordinary ability." | The initial period is three years but the visa may be renewed indefinitely. | Yes | Yes |
| E-2 | Physician must be a citizen of a treaty country, investing own funds in a business that will grow. | The initial period is two years but the visa may be renewed indefinitely. | No, cannot have two different employers; however, physician's practice can have contracts with multiple clients | Yes. |

# 3.0 Permanent Residence (Green Card) for Physicians

## Green Card Options


Each of the visa programs previously mentioned is a temporary residence program. In other words, it only grants the foreign national the right to reside in the U.S. temporarily for a specified period of time (e.g., up to six years).

To get permanent residence status, i.e. a "green card," a foreign national physician has various options, if he or she meets the requirements for each option. These options include asylum, employment-sponsorship, investment, and family-sponsorship. There is even a green card lottery. However, we will only discuss the employment-sponsorship options most often by foreign-born physicians.

A process called labor certification is the most common way to get a green card through employment-sponsorship. In short, a U.S. employer may sponsor a FMG physician for permanent residence; provided that: (1) there are no U.S. workers ready, willing and able to fill the position, and (2) the employer has the ability to pay the offered salary.

Another way to get a green card through employment is the national interest waiver (NIW). Congress has created a special national interest waiver program for foreign physicians. To qualify, a foreign physician must agree to practice medicine in an underserved area for a period of five years. A FMG physician does not need an employer to sponsor the NIW application. He can apply either as an employee or as an independent contractor (self-employment) so long as he commits for working for five years.

In addition to the national interest waiver for advance degree or exceptional aliens, *extraordinary* ability aliens are also eligible for permanent resident status. Like the NIW, an employer sponsor is not required. However, an eligible physician must be extremely accomplished and prove that she has "a level of expertise indicating that [she] is one of the small percentages who has risen to the very top of the field of endeavor."

### Work Authorization during Pending Green Card Applications

The last step of any green card process is the filing of the Application for Adjustment of Status, Form I-485, with the USCIS. If the physician holds a current temporary visa, has never overstayed a visa or worked without authorization for more than 180 days, and is

not otherwise undesirable (e.g., a criminal, a leper, etc.), the application will likely be approved. During the processing of the Form I-485, the physician will receive an employment authorization document (EAD), which will allow him or her to work for any employer or be self-employed. There are no restrictions on employment using the EAD, except that the EAD must be unexpired.


However, if the physician was sponsored by an employer through the labor certification process, the physician cannot leave that employment unless the I-140 petition is approved and the I-485 application has been pending for at least 180 days. If this condition has not been met, the physician can work part-time using the EAD.

# Summary

***Medicine is not merely a science but an art. The character of the physician may act more powerfully upon the patient than the drugs employed***. Philipus Aureolus Paracelsus (1493 - 1541) German-Swiss physician, Man and the Created World Archidoxies, c. 1525.

Like the practice of medicine, the practice of law is part science, part art. In this book, I have described for you the science of immigration law -- the rules and regulations that govern legal immigration in the United States. However, immigration law is one of the most complicated areas of U.S. law (second only to tax law) and is changing all the time. And, as any good doctor knows, effective treatment cannot be prescribed without first examining the patient.

So while you should use this book as a general guide, it is not meant to constitute legal advice. You or your candidate should seek out a qualified immigration attorney to get the right diagnosis and treatment for the specific immigration situation.

As a physician recruiter, an alliance with an immigration attorney can be critical to your success. With Cowles & Thompson's free Recruiter Advantage Program, you will get:

- Answers to your immigration questions without charge – no more wasted time on placements that won't work because of immigration issues
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- Monthly updates on immigration news affecting physicians
- Free educational seminars for you and your clients and candidates

Just email immigration@cowlesthompson.com to join our program and get the help you need to make more placements.

# Resources

- "Foreign-Born Health Care Workers in the United States," Kristen McCabe, Migration Policy Institute, http://www.migrationinformation.org
- "U.S. Government, Heal They Self: Immigration Restrictions and American's Growing Health Care Needs," Stuart Anderson, National Foundation for American Policy, http://www.nfap.com
- Association of American Medical Colleges, http://www.aamc.org
- U. S. Immigration & Citizenship Services (USCIS), http://www.uscis.gov
- http://www.physicianimmigration.com
- For immigration updates regarding FMG physicians and other healthcare workers, connect with us:


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# About The Author

Attorney Ann Massey Badmus has concentrated her legal practice in the area of immigration law since 1993. Since that time, she has successfully processed thousands of visa petitions, J-1 two year foreign residency waiver applications for physicians, and permanent residence applications based upon labor certification, extraordinary ability aliens, national interest waivers, outstanding researchers, and multinational managers and executives. Ann has also represented clients in family-based immigration cases.

Ann is also a sought-after speaker to various groups and organizations on issues of immigration. She has published numerous articles on immigration, hosted a television show on the Africa Television Network called "Immigration Matters," and has authored a well-received book entitled "The Immigration Prescription: The Practical Guide to U.S. Immigration for Foreign Born Physicians." She has been interviewed about immigration laws on numerous affiliate stations of the Fox News Radio Network. To keep her clients well-informed about changing immigration laws that affect their businesses and livelihood, Ms. Badmus conducts periodic seminars and publishes a monthly physician immigration newsletter.

*If you have questions about immigration options for a specific candidate or would like Ms. Badmus to speak to your organization about immigration for foreign-born physicians, you are invited to contact her at abadmus@cowlesthompson.com or 214-672-2161.*