

Immigration Issues Relating to Foreign Doctors

When faced with the task of recruiting the best qualified physicians, the first consideration for a hospital or private practice group is locating physicians who have distinguished themselves in their respective residency training and research programs. Very often, the most highly qualified individuals are foreign nationals who are in the United States as nonimmigrant visa holders. This article provides answers to the most commonly asked immigration questions regarding foreign physicians.

Is the Doctor Subject to the Two-Year Return Requirement?

A foreign doctor is only subject to a two-year home country return requirement if he or she was admitted in or changed status to J-1; and

1. received government financing from the U.S. government or the home country government; or
2. is on the skills list of the country of nationality or last residence; or
3. received “graduate medical education or training” in the United States.”
 - “Graduate medical education or training” does not include a program of observation, consultation, teaching or research, even if that program includes “incidental patient care.”
 - Incidental patient care may be more than a minimal percentage as long as it is incidental to the primary purpose of observation, consultation, teaching or research.
 - “Medical” excludes dentistry and other nonmedical fields.
 - Not all ECFMG-sponsored doctors fall in the definition; e.g., research fellowships.

Note: *The two-year return requirement does not only mean two years outside of the United States; the doctor must be physically present in his or her country of nationality or last residence.*

If Subject to the Two-Year Return Requirement, Does the Doctor Need a Waiver?

The two-year return requirement only prevents the doctor from obtaining an H or L visa, changing status from J-1 to another status in the U.S. or obtaining permanent resident status. The doctor can obtain visas other than H or L at a U.S. Consulate outside of the U.S., or other benefits, including:

- A. E-2 treaty investor visa
- B. J-2 visa (if spouse is J-1)
- C. F-1 student visa (if the doctor is admitted to the United States in F-1 status, he or she could change status to H-1B even though he or she could not obtain a H-1B visa)
- D. Asylum
- E. TN-1 for Canadian or Mexican nationals
 - Graduates of U.S. medical schools can be TN-1 to perform patient care; graduates of non-U.S. medical schools can perform patient care only if incidental to teaching and/or research.
 - Factors to determine whether patient care is incidental: time spent, payment for services, substantiality of salary and responsibility for regular patient load.
 - Licensing regulations of each state should be reviewed to ascertain whether foreign medical graduate may perform incidental patient care or contact in TN-1 status.
- F. O-1 visa for doctor of extraordinary ability
 - Standard is “sustained national or international acclaim and recognition” in the field.
 - The key is defining the field as specifically and restrictively as possible.
 - The doctor is compared with others in the field, not with other doctors of his age group.
 - Credentialing examinations are not required.
 - Employer sponsorship is required.
 - The key is usually reference letters; referees should be provided guidelines for reference letters.
 - Doctor must obtain O-1 visa at U.S. Consul before working in O-1 status
 - O-1 visa can be issued for three years with unlimited one-year renewals; two-year return requirement still exists.

If a Waiver of the Two-Year Return Requirement Is Needed, What Types of Waivers Are Possible?

- A. No objection statement waiver is not available for a doctor who is subject based on graduate medical education or training.
- B. Persecution waiver may be available if doctor would be subject to persecution in home country.
- C. Exceptional Hardship Waiver
 - Must prove exceptional hardship to U.S. citizen or permanent resident spouse or children both if the spouse or children remain in the U.S. and if the spouse or children return to the home country with the J-1 doctor.
 - Focus is on the U.S. citizen or permanent resident spouse or child and not on the J-1 doctor.
 - Chances improve if the children are older; if the country of nationality or last residence is a third-world country or a country that is not favorably disposed to U.S.

- citizens or to people of the religion, ethnicity or other characteristics of the spouse or child.
- Evidence may include psychological reports, proof of unavailability of prescription medications, Travel Advisories and State Department health reports.
 - If waiver is approved, doctor does not need to work in any particular geographical area or change status to H-1B for any particular period of time.
- D. Interested Government Agency Waiver

1. Non-Clinical

Application filed with Department of Health and Human Services (“HHS”) Exchange Visitor Waiver Review Board.

- More interested in bench research than clinical research.
- Must prove importance of research, critical contribution of the alien, credentials of the alien, relationship of the alien’s work to others, funding and unavailability of U.S. workers.
- May take four to six months or longer to obtain HHS recommendation to Department of State (“DOS”).
- If approved, doctor is not required to change status to or be H-1B for any particular period of time.

2. Clinical

A. Sponsorship by State (Conrad 30 Program)

- Most states participate, but each state has different rules, different timing and different allocation of 30 waivers available.
- Some states limit to primary care.
- Facility must be physically located in HPSA or MUA (not sufficient for patient population to come from HPSA). States may use up to 5 waivers for physicians serving patients from an MUA or HPSA from a facility that is not in an MUA or HPSA. Some states have opted not to do so.
- Facility can be private, for-profit medical practice; facility need not have any specific commitment to serving the poor or the underserved.
- Most states require significant proof of recruitment and unavailability of U.S. doctors.
- No objection statement from home country; only required if doctor has contractual financial obligations to that country.
- Doctor must begin employment at the facility within 90 days of receiving the waiver.
- Doctor can delay procedure if still working under training program contract, or expedite procedure (e.g., filing Labor Condition Application in advance of receiving waiver or even obtaining H-1B petition approval before waiver is approved and going to U.S. Consul after waiver is approved).
- Doctor must remain at facility in H-1B status for three years; if he or she leaves facility, two-year return requirement is reinstated.
- Doctor eligible for extraordinary circumstances waiver of Section 222(g).

B. Federal Government Agencies

(1) Issues Common Among All Federal Government Agencies:

- (a) Must work 40 hours per week in HPSA or MUA (exception: Veterans Administration).
- (b) Must be primary medical care (general practice, family practice, internal medicine, pediatrics, OBGYN) (exception: Veterans Administration).
- (c) Must be H-1B at the facility for at least three years.
- (d) Contract cannot contain a covenant not to compete.
- (e) Must provide proof of significant recruitment for U.S. workers.
- (f) Facility must provide medical care to Medicaid or Medicare-eligible and indigent uninsured patients.
- (g) Sponsoring federal government agency makes recommendation to DOS, which makes recommendation to USCIS, which issues the waiver.

(2) Specific Federal Government Agencies

- (a) Department of Housing and Urban Development - *Program discontinued*
- (b) United States Department of Agriculture - *Program discontinued*
- (c) Veterans Administration

- Doctor must hold at least a fifty (50) percent staff appointment at a VA facility where doctor has a joint appointment.
- Waiver request must be initiated by individual VA facility and approved by VA Central Office.
- National and internal recruitment requirement.
- Need not be HPSA or MUA or primary medical care.

(d) Appalachian Regional Commission

- Applies to rural counties in Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.
- Application filed with the state (some states will not accept applications).
- Doctor must not have engaged in specialty medical training.
- Doctor cannot be out of status for more than six months.

(e) HHS Clinical Waiver Program

- Applies to all states.
- Doctors must enroll in Federal Credentialing Program (120-day processing).
- State health department must acknowledge or support.
- Application must be within 12 months of physician's completion of primary care residency.
- Physician must practice primary care only

Options for Permanent Residence

A. Options Not Related to Employment

1. Family-based petitions
2. Asylum
3. Investor Petition

B. Extraordinary Ability Immigrant Petition

- Same standard as O-1 petition
- Credentialing examination not required
- Employer sponsorship not required

C. National Interest Waivers

- Credentialing examination required except graduates of U.S. medical school or non-clinical medical practice (VQE; FMGEMS; FLEX I and II; NBME I, II and III; or USMLE 1, 2 and 3).
- Available for physicians working full-time in a HPSA or MUA or for a VA facility for a minimum of 5 years.
- Physician can apply for permanent residence before completing five years, but cannot be approved until completion.
- Requires letter from state or federal agency attesting that the physician's work furthers the public interest.

D. Labor Certification Application

- Credentialing examination required (see above).
- Permanent employment required, but possible to file labor certification application for residency program.
- Reduction in recruitment expedites procedure (examples of recruitment include physician recruitment firms, letters to residency program directors, physician job fairs and advertising).
- Special handling labor certification available if some classroom teaching involved in position.
- Employer sponsorship required.
- Issues include prevailing wage, unduly restrictive job requirements, and proof of unavailability of U.S. workers.

Alternative Statuses While Permanent Residence Process Pending

- A. Voluntary departure/employment authorization - no longer available.
- B. Doctor can remain in the United States during pendency of waiver pursuant to INS Operations Instruction 214.2(j)(4), but cannot obtain employment authorization.
- C. May be able to obtain J-1 extension to sit for examinations; other nonimmigrant options may be available.
- D. No unlawful presence accrues for purposes of 3-year and 10-year bar if doctor is "D/S."