

Post-Training Options for International Medical Graduates

Written by: [H. Ronald Klasko](#), [Suzanne B. Seltzer](#)

Our firm regularly advises and represents international medical graduates (IMGs) completing training programs in developing immigration plans to match their professional plans. Based upon our many years of experience, the following is a summary of the issues that our clients, whether they start in H status or in J status, most often face.

IMGs ON H-1B VISAS

In working closely with IMGs, the major issues we focus on with our clients are developing a strategy for permanent residency and maintaining a valid H-1B status during what may be a lengthy period for obtaining permanent residency. This usually requires careful advance planning.

H-1B Quota

At the outset, the primary issue to be addressed post-training is determining whether the IMG is subject to the H-1B quota. If the IMG has only been employed as an H-1B with a cap-exempt institution, such as a university or a non-profit institution affiliated with a university, the IMG will be subject to the H-1B quota upon completion of his program. The exception to this would be if he continues to be employed by a cap-exempt institution.

Timing is the crucial factor in changing from a cap exempt H-1B to a cap subject H-1B. H-1B numbers are available under the cap starting on October 1 of each year. H-1B petitions for an October 1 start date can be filed up to six months in advance, on or after April 1. Because H-1B petitions can be submitted so far in advance, they tend to be used up far in advance of the October 1 date. We anticipate that unless the law changes, the H-1B numbers for this year will likely be exhausted during May.

Counseling IMGs who face this issue involves a number of considerations:

- Is there a basis to establish the IMG is not subject to the quota?
- Is the H-1B 'portable,' enabling the IMG to work from the date of filing until October 1?; and
- Is there another appropriate visa status available to the IMG until he is able to obtain an H-1B visa or in lieu of the H-1B?

Permanent Residence Options

Once a strategy for maintaining H-1B status is in place, we turn to devising a strategy for permanent residency. Assuming there are no permanent residence options based upon marriage to a U.S. citizen, asylum, or investment, we generally evaluate three options for obtaining permanent residence:

- EB-1 Extraordinary Ability
- EB-2 National Interest Waiver/Research
- EB-2 National Interest Waiver/Clinical Shortage
- EB-2 Labor Certification Application

In order to identify the best options available to our clients, we first explore the IMG's curriculum vitae. If the IMG's clinical and/or research background (usually research) provides a basis to present the IMG as 'one of a few at the top of his peers' (EB-1) and/or as 'substantially better than others in the field, whose work has an impact that is national in scope' (EB-2/ NIW/Research) our first choice is to proceed with one or both of these options. These routes are advantageous for several reasons, including that the applications can be self-sponsored. Except for IMGs born in India or China, who are subject to a quota backlog, a concurrent application for employment authorization and advance parole travel document can be filed. For qualified IMGs, this is the quickest route to obtaining permanent resident status.

Another option we explore with clients is the national interest waiver (EB-2) based on providing medical care in an underserved area. However, this option is only available to IMGs who commit to practice primary care in a health professional shortage area or medically underserved area. As evidence of this commitment, the doctor must sign a five year contract and obtain a favorable recommendation from the state medical board. The advantage of this strategy is that the doctor can file a concurrent application for permanent residence, employment authorization, and travel document if there is no quota backlog. The disadvantage is that the application will not be adjudicated until the completion of the five years, and the doctor is required to continue to practice in a shortage area and in a primary care field.

Perhaps the most prevalent strategy used for IMGs is an employer-sponsored labor certification application. This requires a cooperative employer willing to engage in specified recruitment efforts in an attempt to satisfy the Department of Labor that it has been unable to find a qualified, interested and available U.S. worker for the position being offered to the IMG. The position does not have to be in a health professional shortage area (HPSA) or a medically underserved area (MUA); but obviously, the more desirable the location and position, the greater the chance of finding a qualified U.S. worker. The labor certification application procedure is most appropriate for doctors being employed in shortage areas and doctors with a specialty or sub-specialty which may be in short supply.

The labor certification is filed electronically under the new PERM regulations. Processing time for this first step at present is approximately 8 months. Upon approval of the labor certification application, two more steps remain. The second two steps, the I-140 employer immigrant petition and the I-485 application for permanent residence, can be filed concurrently if there is no quota waiting list for the IMG's place of birth in the employment second preference category. If there is a waiting list, the I-140 can be filed; but the I-485 cannot be filed until the quota is reached.

IMGs following a more academic route that involves at least some classroom teaching may be eligible for a truncated form of labor certification called 'special handling.' This procedure is available even if the amount of classroom teaching is minimal. Under special handling, the employer can use the same print ad used in the IMG's selection process to satisfy the recruitment requirement, as long as it appeared in a national journal. Moreover, special handling allows the employer to select the most qualified applicant for the position. In order to take advantage of special handling, the employer must submit the application within 18 months of the IMG's selection (not start date) for the position.

H-1B Extensions

Permanent residency processing times vary, and particularly where the labor certification application route is chosen, the IMG must pay careful attention to the rules limiting the number of years that can be spent in H-1B or H-4 status. The general rule allows a maximum of six years that can be spent in any combination of H-1B or H-4 status with any one or combination of employers. In most cases, the IMG will have used three or four of those years in completing the training program(s). In some cases, such as if the IMG had a H-1B position or was in H-4 status prior to commencing the program, there may be less time remaining in H-1 status upon completion of the program.

There are a few exceptions to the general rule allowing a six year maximum stay in H status. For one, the IMG can extend the H-1B in one year increments beyond the sixth year where the labor certification is filed at least one year before the sixth year in H-1B status comes to an end. Remember that a labor certification requires specified recruitment efforts that normally take at least three to four months before the application can be filed. Therefore, it is critical that the IMG commence the labor certification application process no later than the middle of the fifth year in H-1B status.

Once the labor certification is approved, it may also be possible to obtain a three year extension of H-1B status. This option exists if the second step, the I-140, is also approved; and there are quota delays in filing the final step, the I-485. IMGs may also be able to 'recapture' time spent outside the U.S., because the six year rule only counts time spent in H-1B status in the U.S.

It is important to note that these rules only allow the IMG on whose behalf the labor certification or immigrant petition was filed to obtain an extension of H-1B status beyond six years. The IMG's spouse will be able to

maintain H-4 status for whatever period of time the IMG maintains H-1B status. However, if the spouse is in H-1B status himself, he will not be able to obtain a separate extension of his H-1B status, unless an employer files a labor certification on his behalf; and it is pending more than a year at the time the six year period comes to an end.

In some cases, H-1B extensions will not be possible at the completion of the six years. Then, other options must be explored. One option is the possibility of obtaining employment authorization based upon the filing of an I-485 application. The second possibility is an O-1 visa, which is an employer-sponsored visa, available for doctors of 'extraordinary ability.' The definition of extraordinary ability for this purpose is the same as for the EB-1 extraordinary ability immigrant petition discussed above.

IMGs ON J-1 VISAS

The options discussed above for obtaining permanent residence apply equally to J-1 IMGs. However, those in J status must first address their two year home residence requirement. In working with our J clients in tackling this often complex issue, we discuss three options:

- Returning to the IMG's country of nationality or last residence for two years, with the possibility of completing the permanent residency process during those two years;
- Obtaining a nonimmigrant visa that allows extending the IMG's stay in the U.S., without fulfilling the two year home residency requirement. Normally this would be the O-1 visa noted above, which requires a showing of 'extraordinary ability'; or
- Obtaining a waiver of the two year home residence requirement.

These options are not mutually exclusive, and may often be used in combination. For example, an IMG may extend her stay in the U.S. by obtaining an O-1 while she applies for a waiver of the two year home residence requirement.

In exploring waiver options, we first determine whether a research-based waiver or a clinical service-based waiver is most appropriate. If a research track is chosen, an interested U.S. federal government agency (most often the Department of Health and Human Services (HHS) through the NIH) can recommend a waiver based on the importance of the research program in which the IMG is an essential contributor. The HHS waiver must be petitioned by the sponsoring employer in what is a lengthy process. NIH funding is not required, although it may be a positive factor. While HHS will consider waivers based on clinical research, providing clinical services other than those which are incidental to the research is considered a negative factor.

IMGs who obtain a research-based waiver may apply to change status to H-1B, or apply directly for permanent residence utilizing one of the options discussed above. Normally, the H-1B status is a necessary interim step before the IMG is able to reach the point of obtaining an employment authorization document based upon the filing of the application for permanent residence.

The IMG who chooses a clinical track for a waiver is normally required to make at least a three year commitment to practicing in a HPSA, MUA, or at a Veterans Administration Hospital. Most IMGs pursuing a clinical waiver seek sponsorship by a state Department of Health under the Conrad State 30 program. Under this program, each state can sponsor up to 30 doctors for waivers, with up to five of these slots available outside of a HPSA or MUA, if the institution can establish that a majority of its patients come from a HPSA or MUA. Some states limit some or all of their slots to primary care, and some do not. Most states require the employer to prove they have unsuccessfully recruited for this position, as evidence of the unavailability of U.S. doctors.

In addition to the Conrad State 30 program, four federal government agencies also have active waiver programs for clinical doctors. Of these federal programs, three are restricted to physicians providing primary care in a shortage area -- Appalachian Regional Commission, Delta Regional Authority, and the Department of Health and Human Services. Each of these agencies has different rules and different jurisdiction, but all three require at least 40 hours per week in primary medical care with a minimum three year commitment. The fourth federal government agency program is the Veterans Administration (VA). The VA waiver program does not require that the doctor be employed in a HPSA or MUA, nor that the doctor be engaged in primary medical care. However, the application must be approved both by the employing VA facility and the Veterans Administration Central Office.

In contrast to those who receive research-based waivers, IMGs who obtain a clinical waiver must be in H-1B status for three years prior to proceeding with the final step of permanent residency. However, during the three years, the IMG can commence the initial steps of permanent residence using one of the alternatives discussed above.