

ADVENTURES IN MEDICINE

Career & Life Planning

Survival Guide



*Immigration
Process
for Physicians*

Discovery Resource

ST-18



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The Unique Challenges of Foreign Medical Graduates

If you are a foreign medical graduate (FMG) completing your residency training in the United States and wish to remain in the country, you will face several visa-status and timing issues related to immigration law. Both you and a prospective employer must understand your special circumstances, which differ from those of non-FMGs, and plan a strategy for resolving the issues well in advance of your anticipated start date — and generally no later than the beginning of your final year in residency.

While you may glean helpful insights on the immigration process from this material and the well-meaning suggestions of colleagues or the Internet, none of these sources constitute legal advice. Just as your patients should not rely on the Internet or friends for diagnosis and treatment, neither should you regarding your immigration challenges. Every case is fact-specific. Plan to obtain counsel from an immigration attorney early in the process.

There may be times when an employer and employee will choose to have separate immigration counsel to evaluate options. You will want to make sure that the attorney handling your situation is experienced specifically in immigration for physicians.

This white paper will describe the four primary steps for attaining the proper visa or immigration status in order to practice medicine in the United States.

Step One: Examine your current visa status

When you meet with an immigration attorney, be prepared to provide copies of all documents relating to your immigration history. Most of your case history will determine both short- and long-term options available to you.

The basic documents to review include:

- Passport
- I-94 (arrival-departure record)
- DS-2019 forms issued for your J-1 participation (if applicable)
- I-20 forms (if you were ever in F-1 status)
- Copies of all immigration approval notices (or denials)
- CV
- Job offer (offer letter, contract)
- Documentation for spouse and children

Like a medical examination where a patient fails to mention current medications or a prior medical event, the failure to produce the documentation of your prior history may endanger your immigration health!

Visa Status Options for Resident Physicians

Type	Definition and Implication	Recommendations
J-1: Exchange Visitor	<p>J-1 visa status is granted to those seeking to enter as Exchange Visitors through specific J-1 sponsor programs, such as that of the Educational Commission for Foreign Medical Graduates. If you already have had a J-1 visa to engage in graduate medical education, your options differ from someone who has never worn the J-1 cloak. The importance is a critical one, as J-1 status to engage in graduate medical education (residency training) comes with a price called the “two-year foreign residence requirement.” This obliges the J-1 (and derivative J-2 family members) to return to their country of nationality or last residence before being eligible to change to any other visa status in the United States, to obtain H-1B or L-1 visas, or to apply for and obtain permanent residence.</p> <p>The alternative to returning “home” for two years is obtaining a waiver of the requirement. Never assume that you will be able to obtain a waiver. There are several possibilities to do so, but none is a certainty.</p>	<p>Avoid J-1 status if possible. This is difficult, however, since most medical residency programs will admit foreign medical graduates only in J-1 status and will not entertain the possibility of sponsoring residents for H-1B status. Also, since H-1B is of limited duration (generally six years), those who wish to embark on lengthy specialty residency training would likely exhaust their available time in the United States before they complete their training. It is not surprising that the vast majority of foreign nationals who enter the United States for residency training do so in J-1 status and thus face the two-year foreign residence requirement.</p>
H-1B: Specialty Occupation	<p>H-1B status is available for positions that require at least a bachelor’s degree, which means that a resident or physician qualifies. This status requires that the employer pay a salary that is equal to or greater than others in the region (prevailing wage) or others employed by the employer (actual wage). A resident who has held H-1B status and has never held J-1 status has a simpler path when seeking post-residency employment.</p>	<p>If possible, seek to enter a residency program that offers sponsorship as an H-1B. If residency training in your specialty will exceed four years, ask an immigration attorney to examine post-residency immigration options.</p>
O-1: Person of Extraordinary Ability	<p>O-1 status is available to “aliens of extraordinary ability” in their field. This is established through publication, presentations, patents, judging the work of others, original contributions to the field, and other evidence establishing a national or international reputation. This is a difficult but not impossible option for some clinicians.</p>	<p>When an H-1B is not immediately available, the O-1 may provide a separate option to obtain work authorization in the United States, including for those still subject to the J-1 two-year residence requirement.</p>
TN: Treaty NAFTA visa	<p>TN visa status is available to citizens of Canada or Mexico only. Physicians who will engage only in teaching or research might use this status.</p>	<p>If Canadian, this is available even if the J-1 two-year residence requirement is an impediment. This is not a useful visa for a clinician seeking to be engaged in patient care.</p>
E-2: Treaty Investor status	<p>If a treaty exists between the United States and your home country — and you will invest a substantial amount of capital in a bona fide enterprise, such as a medical practice — this may be an option for you to remain in the United States.</p>	<p>The E-2 may provide long-term but not permanent ability to remain in the United States.</p>
E-3: “Australian H-1B”	<p>This is, like an H-1B, a specialty occupation visa status but it is available only for Australian citizens.</p>	
J-2: Spouse of J-1 exchange visitor	<p>The accompanying spouse of a J-1 can obtain J-2 status, which also permits one to obtain work authorization. The status and work authorization will be valid only for the period afforded to the principal J-1 holder.</p>	<p>Obtaining J-2 status also subjects the holder to the same obligations as the J-1. Beware of the possibility that this would subject you to the two-year foreign residence requirement.</p>

The Unique Challenges of Foreign Medical Graduates

Step Two: Develop short- and long-term goals

The initial examination of your case includes an assessment of your goals. You should plan to have a candid conversation with immigration counsel about this. An employer should do the same. Key questions to consider include:

What is your long-term goal (five-plus years)? Where would you like to live and practice?

- ▶ Is your objective to gain a few years of experience in the United States and then to leave? Or is your goal to remain for a substantial part or all of your professional career? Do you want to gain permanent residence?
- ▶ If you plan to leave the United States, do you anticipate returning to your country of nationality or permanent residence or elsewhere?
- ▶ Is immigration the paramount concern (that is, to anchor you and your family to the United States) or is professional development the primary issue?
- ▶ Are you willing to live in a region of the United States in which there is a great demand for your specialty but which may not be an area in which you want to live long-term?
- ▶ Does your accompanying spouse share your vision or will compromising on location be difficult?
- ▶ Is your spouse a professional on a parallel track? Are you juggling the consideration of a two-career couple?
- ▶ Do you have children with special needs mandating specific areas for special schooling?

These are a few of the issues that will shape the strategy for your case.

Exercise

Creating Immigration Status Goals

A clear and candid representation of your short- and long-goals will be essential in your effort to obtain the proper visa status and pursue your desire to practice medicine in the United States. Having a format for listing your goals will help ensure that your objectives are understood by you, your employer and immigration officials.

Learning Objective

Identify and express your career and life goals that pertain to your immigration case in the short-term (one to three years) and the long-term (four years and beyond).

Short-term Goals (One to Three Years)

Fill in the blanks:

By _____ (month and year), my short-term goal is to complete these action items:

So that I am able to accomplish these objectives (for example, practice medicine or live in the United States for X years):

Long-term Goals (Four Years and Beyond)

Fill in the blanks:

By _____ (month and year), my short-term goal is to complete these action items:

So that I am able to accomplish these objectives (for example, practice medicine or live in the United States for X years):

Step Three: Understand common scenarios linked with visa status and options for practicing in the United States

First and foremost, as a foreign national you will need to secure a visa status that will permit your employment by a particular employer in a particular location. Work visas are generally employer-specific, position-specific and location-specific. Contemplated changes in employer, location or your position require prior assessment as to eligibility. Never assume that changes are permitted; always get an assessment well in advance of a contemplated change.

Your immigration counsel will consider several temporary work visas for what is called “nonimmigrant visa” status. Each has specific eligibility requirements, time limits and procedural differences.

Scenario 1: J-1 visa subject to the two-year foreign residence requirement with no waiver

If you are a medical resident on a J-1 visa, you are subject to the two-year foreign residence requirement (2yfr), also known as a “subject J-1.” The subject J-1 is not able to change status to any other nonimmigrant category while in the United States, is not eligible to obtain an H-1B or L-1 visa from a U.S. consulate, and may not obtain permanent residence. The 2yfr obligation is satisfied by returning to the country of nationality or permanent residence from which you entered the United States for a cumulative two-year period. This is generally, but not always, the country that furnished the Statement of Need used to obtain ECFMG® J-1 sponsorship. Alternatively, you may seek a waiver of this requirement through three paths: an Interested Government Agency, a claim of exceptional hardship, or a claim of persecution. Issues involving J-1 waivers are briefly discussed later in this white paper. (Remember that “one-size-does-not-fit-all” and understanding this is especially critical on the issue of J-1 waivers.)

As a subject J-1, you may be eligible for TN, E-2 or O-1 status. Utilization of these options is akin to treating the symptom but not the disease. They will not obliterate the 2yfr, rather they will defer its impact, but it will remain lurking in the background.

• **TN (Trade NAFTA) status** — A result of the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico, TN status is available to citizens of those countries. For a physician, it is available only for teaching or research positions. To acquire the status, you must physically leave the United States and seek entry with proper documentation. Currently, a Canadian may seek that entry directly at a U.S. border point or at the disembarking airport. A citizen of Mexico must submit a visa application at a U.S. consulate and appear for a prearranged interview. TN status is currently issued in three-year increments and is renewable indefinitely in three-year increments. Your family members (spouse and unmarried children under the age of 21) may accompany you to the United States, but can not obtain work authorization while here unless they separately qualify in some other status.

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• **E-2 (Treaty Investor) status** — The first requirement for an E-2 is the existence of a treaty or bilateral agreement between the United States and your country of citizenship which covers this option. You must have invested or be actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States and you must be coming to develop and direct the enterprise. E-2 status requires at least 50 percent ownership by nationals of the treaty country and also requires that the investment be more than “marginal,” meaning that it will generate income greater than what is necessary to support you and your family. You will need to demonstrate that the facility will employ others (and not only you and your family.)

The E-2 process requires that an application be submitted to a U.S. consulate outside the United States. (For Canadians, this is the only non-immigrant visa category that requires you to obtain a visa.) All applicants should be prepared to submit a detailed business plan and substantial financial documents. It can take several weeks to compile this documentation. There is frequently a delay of several weeks to several months, depending on the consulate, before the review by the consulate will be completed and an interview scheduled. You will be required to travel to the consulate for an interview. Your spouse will be able to seek work authorization in the United States incident to E-2 dependent status, but your children will not have that privilege. In light of the fact that this category requires a substantial investment (aimed at building a practice), you should seek legal assistance about the wisdom of such a business venture while the 2yfr remains in the picture. An important question to consider: If you do not have assurance of a long-term connection to the United States, do you want to make a substantial investment in a buying, starting and building a practice?

• **O-1 (Extraordinary Ability) status** — O-1 status is available to a physician who can establish extraordinary ability in the field, demonstrated by sustained national or international acclaim. This category is generally available to those who can provide documentation of publications, presentations, awards and other objective evidence of acclaim. The category is more difficult (but not impossible) to use for clinicians who do not have that type of documentation.

An O-1 is initially granted for three years, with extensions available thereafter for an indefinite period. The spouse and unmarried children under 21 may accompany the O-1 but are not permitted to work in the United States. The process will require the submission of a petition to the U.S. Citizenship and Immigration Services (USCIS) and once approved the subject J-1 must leave the United States and apply for the O-1 visa at a U.S. consulate, generally in the home country. The O-1 petition may be submitted on an expedited basis (with an additional filing fee) to the USCIS. If approved, the determination will be issued in 15 days. (A request for evidence may also be issued in 15 days, thus slowing the process.) The timing of the consular process differs according to the particular consulate and is affected by many variables including the nationality of the applicant, the workload of the consulate and the time of year in which it is submitted.

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• **H-1B (Specialty Occupation) status for Canadians** — An H-1B visa is not available to a subject J-1, except if you are a Canadian. Because Canadians are visa exempt, it is possible to obtain H-1B status. The process will require a petition filed by an employer with USCIS, and once approved will require you to exit the United States and reenter. The details of an H-1B are discussed below.

Scenario 2: If not subject to the J-1 two-year foreign residence requirement

If you are a foreign national who is not subject to the 2yfr because you have never been in J-1 status as a medical resident or because you did not enter the United States in J-1 status in other circumstances, you can consider seeking to be employed in the nonimmigrant categories available to the subject J-1s discussed above. You are also able to seek H-1B status.

H-1B status is for those in specialty occupations, generally jobs that require at least a bachelor's degree or higher for entry into the field. Thus, a position that requires an M.D. (or D.O.) degree will generally be eligible for this category. To obtain an H-1B to work as a physician, you will need to have completed U.S. Medical Licensing Examination 1, 2 and 3 or its equivalent and be licensed in the state in which you seek to practice.

Licensure is governed by state law. This means that you must determine the state licensing law for the state in which you seek to practice. (Caution: Some states currently have restrictive licensure laws for physicians that must be analyzed on your behalf early in the process of considering job prospects. While U.S. immigration law is a federal body of law and the law applies equally to any place in which you seek to live in the United States, professional licensing laws are left to each state.)

An H-1B employer must pay the required wage for your position. There must be a guaranteed base salary that meets the required wage at a minimum. The employer can always pay more than the required wage, but never less. The process for the H-1B initially requires the employer to determine (and maintain documentation regarding) the prevailing wage for the job in the area of intended employment and the wages it actually pays others doing the same job. It must post a notice on its premises relating to wages to be paid. Once completed, a Labor Condition Application (LCA) is submitted to the U.S. Department of Labor which makes promises about the wages and working conditions for the position. The certified LCA is then submitted to the USCIS with all other documentation, including an H-1B petition.

There is a quota of available H-1B numbers, currently set at 65,000 annually, plus 20,000 for those who have been awarded a graduate level degree from a U.S. academic institution. (This quota is the subject of current proposed changes by Congress and therefore you should ascertain at the time of filing whether this quota has been changed.) Colleges and universities (and affiliated hospitals) are currently exempt from the quota. Also exempt are those who have secured a J-1 waiver by virtue of agreeing to work in an under-served area. Thus, employment at one of those exempt employers removes another variable from the immigration case. By contract, employment with a private practice poses the problem of ascertaining whether there will be an available H-1B number.

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USCIS requires filing fees for an H-1B and those fees were under consideration for further increase as this article was being prepared. These include the base fee for Form I-129 (currently \$320), an anti-fraud fee (currently \$500), and a worker-training fee (currently \$750 to \$1500 depending upon the number of employees). University-affiliated hospitals are exempt from the last fee. Under no circumstances may this fee be paid by the employee. In addition to government filing fees, legal fees are likely to be incurred in the H-1B process. Some university hospital employers and other large employers have in-house staff to handle the H-1B work without the necessity of outside counsel. In any event, an H-1B petition should be submitted by counsel with appropriate expertise.

An H-1B may be obtained for three years at the outset with the ability to extend it for another three years. The six-year maximum of an H-1B can be extended if, before the end of five years in H-1B status, the permanent residence process has been commenced. Once commenced by the fifth year, the H-1B can be extended until permanent residence is completed, even if that takes several years.

Scenario #3: J-1 waivers through an Interested Government Agency

Although waivers of the 2yfr are available upon proving a fear of persecution in the home country or upon proving exceptional hardship to a U.S. citizen/permanent resident spouse or child of the J-1, the Interested Government Agency (IGA) waiver is the most utilized ground for waivers by subject J-1s.

The law permits a waiver of the 2yfr if an IGA agrees to support the application. IGAs include federal agencies such as Health and Human Services, the Department of Veterans Affairs, the Appalachian Regional Commission, the Delta Regional Authority, Department of Defense, NASA, National Institutes of Health and the Department of Energy. Further, each of the states has the ability to serve as an IGA under the "Conrad 30" program, which allocates 30 slots per state to be the subject of a waiver recommendation. As each federal agency has its own rules for the support of waiver applications, each state has its own rules for seeking a waiver through the state's Conrad program. The rules generally oblige you to work in a particular geographic region, in a particular position and for a particular employer for three years. In fact, most of the programs require a binding agreement between the employer and employee.

CAUTION: Planning is critical in this area. The waiver process is rarely characterized by speed. You can seek only one waiver at a time, so a deliberate, careful strategy must be employed in the selection of the best employment situation and with an appropriate agency that will support the waiver in that jurisdiction.

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Generally, the process involves submitting an application to the agency in the form (and sometimes at the precise time) required. For the Conrad 30 program, each state has its own rules and timing. Some accept applications only on one day of the year; others have a “rolling” process. Upon approval, the agency notifies the U.S. Department of State of its favorable recommendation and the Department of State, in turn, notifies the USCIS of its separate recommendation. Only then will the USCIS adjudicate the waiver application. Once the waiver application is approved, an H-1B can be approved. You will be obliged to commence employment within 90 days of the waiver approval by USCIS and will be required to work in H-1B status for three years. Once three years of work in H-1B is completed under the agreed terms, you are free of the 2yfr.

Conrad State 30 J-1 Visa Waiver Program

Approximately 1,000 J-1 visa waivers are issued each year to physicians who agree to practice in underserved areas in the United States. This is a tremendous increase from the 70 J-1 visa waivers issued in 1990, and certainly verifies the extent of which many communities across the United States continue to face severe difficulties in attracting U.S. physicians to meet their respective health care needs. At present, there are approximately 3,200 foreign-born physicians practicing in underserved areas, compared to only 2,000 American physicians practicing in underserved areas. The Conrad State 30 J-1 Visa Waiver program is the most common method of obtaining a J-1 visa waiver for physicians willing to enter into a three-year employment contract in a designated health professional shortage area (HPSA) or medically underserved area (MUA). The Conrad 30 program provides for the approval of up to 30 J-1 visa waivers for each state. Each state, by regulation, has enacted its own specific requirements that a foreign physician must meet in order to qualify for consideration for inclusion in the program.

Scenario #4: The ultimate cure — permanent residence

The grant of permanent residence means that you can remain in the United States indefinitely (as long as you are law-abiding and do not leave the United States for extended periods). Once a permanent resident, you may work for yourself or for any employer in the United States in any job you choose.

Permanent residence is evidenced by a document called a Permanent Resident Card (previously known as an Alien Registration Card), commonly known as a “green card.” It is the card that is evidence of the status.

You do not simply “convert” your status from nonimmigrant visa holder to permanent resident. Rather, an entirely separate immigration process is involved to acquire permanent residence. It is not available to every one who desires it and it can take years to accomplish. There are both family-based routes and employment-based routes.

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A key point is that under current law, a physician willing to be flexible in job location will likely find an opportunity that will serve as a basis for employment-based immigration. In most instances, you will need a sponsoring employer although in some instances you may self-petition.

How the immigration process generally works

The process is specific to the individual and it would be wise for you to meet with an immigration lawyer early in your career to analyze how your particular set of circumstances will lend itself to the process. This is especially significant when you are considering several job offers.

Here are the process steps:

- 1.** The employment-based permanent residence process requires a test of the labor market by an employer.
- 2.** This culminates in the filing of a Labor Certification Application with the U.S. Department of Labor. For non-faculty positions, the employer must establish that there were no minimally qualified U.S. workers who sought the job. Thus, the standard measurement for such applications is that you were the “only person left standing after recruitment.” For faculty positions, the standard of measurement is “best qualified.”
- 3.** After the labor certification is approved, an employment-based (I-140) petition is filed with the USCIS to substantiate your qualifications for the position.
- 4.** Finally, when a number is available in the national priority system, you are eligible to submit an application for permanent residence (Form I-485 and substantiating proof) for you, your spouse and children.

Some applicants are exempt from the Labor Certification requirement, including those who can establish that they are Outstanding Researchers/Professors, those who possess Extraordinary Ability in their field, or those whose work is in the national interest of the United States. Whether you fit within one of these exceptions will be the subject of analysis by you and your immigration attorney.

The process of permanent residence is affected by country quotas (of your country of birth) and the demand in particular categories. As noted, thoughtful advance planning is the key to a successful outcome!

Managing outcomes

Planning your immigration case requires examining options and goals, both short-term and long-term. Determining your priorities for a life and career in the United States and remaining flexible in evaluating options will reduce much of the anxiety embodied in this pivotal moment of your life. You are well advised to discuss these issues early in your residency training. Armed with an overview of options as they impact your personal situation, you can then hone your plan at the beginning of each year of residency training, as you come closer to evaluating job opportunities to meet both your short-term and long-term objectives. Plan early, revisit the plan, and hone it!

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Step Four: Create a plan of action and timeline

Once you have assessed your current circumstances and set your short- and long-term goals (reviewed with immigration counsel to assure their feasibility), you have essentially created a plan of action. For example, the plan for an FMG who is a J-1 visa holder with a 2yfr would likely include:

- A review of U.S. regions or programs that would support a J-1 waiver process;
- Analysis of the feasibility of success in that region;
- Securing of a job offer with an employer willing to sponsor the J-1 holder in the process;
- Determination of the timelines for submission of the waiver application to that program;
- Preparation for licensure sufficiently in advance for the program requirements; and/or
- Filing for the H-1B, commencing work in that H-1B within 90 days of the waiver approval.

Exercise

Long-Term Plan

Record your long-term goal from the first exercise here:

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Action Step	Timeframe / Due Date	Who's Involved or responsible for this step

Resources:

<http://www.j1waiver.com/conrad.html>

<http://hpsafind.hrsa.gov/>. Here you can locate HPSAs (Health Professional Shortage Areas). As you will see, it requires you to designate the state in order to receive the information, which makes it cumbersome. Many physicians will go wherever (within reason) they can find a willing employer in an HPSA or MUA (medically underserved area).

www.travel.state.gov

Important Note: This material should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with your own lawyer concerning your own situation and any specific legal questions you may have.