OUR PRACTICE

Physicians

It is almost impossible for a foreign national who is not a U.S. permanent resident to attend a U.S. accredited medical school. Many graduates of foreign medical schools want to practice medicine in the United States and are willing to embark on what has become, since 1976, an increasingly labyrinthine and uncertain path involving overlapping credentialing, licensing, and immigration requirements to do so.

Most "international medical graduates" ("IMGs") wishing to practice medicine in the U.S. must complete a U.S. residency and Steps 1, 2, and 3 of the United States Medical Licensing Examination ("USMLE") or equivalent to become eligible for state licensing.

Historically, IMGs could only take part in the residency using the J-1 nonimmigrant visa classification under the sponsorship of the Educational Commission of Foreign Medical Graduates ("ECFMG"), which requires that they first pass USMLE Steps 1 and 2 or earlier equivalent and the Test of English as a Foreign Language ("TOEFL") and show that the skills they seek are needed in their home country. When they enter in J-1 status for graduate medical training, they become automatically subject to a statutory requirement that they return for two years to a foreign residence before changing to the types of immigration status that would allow the full practice of medicine (normally H-1B temporary status or permanent residence).

IMGs who can arrange to pass USMLE Step 3 and find a residency program that will allow participation as an H-1B, rather than as a J-1, can avoid the home residency requirement altogether and thus be free of obligations to work in underserved areas after residency. Increasingly, U.S. residency programs are undertaking the extra responsibility to sponsor residents in H-1B, and fewer and fewer residents are using J-1, even though that means the spouses cannot derive work authorization in J-2 status. Some people are concerned that this shift is drying up the pool of foreign physicians forced to work in underserved areas, as discussed below.

The crucial task for an IMG who has trained in J-1 status thus becomes seeking a waiver of this "home residency requirement." There are only four ways to waive the residency requirement: (1) show undue hardship to a U.S. citizen or permanent resident spouse or child if the alien were forced to comply with the requirement (rare); (2) show likelihood of persecution in the home country on the basis of race, religion, national origin, political opinion, or social group (i.e., asylum, also rare); (3) convince a U.S. federal agency to represent to the State Department, which oversees J-1 sponsorships (duties formerly handled by the USIA), and the U.S. Citizenship and Immigration Services (USCIS) that a waiver would be in the national interest; or (4) become one of 30 foreign medical graduates ("FMGs") that each state may sponsor for J-1 waiver each year. Thus, the federal "interested agency waiver" and the "State 30 waiver" (also known as the "Conrad 30") are popular projects for the relatively few immigration lawyers who are knowledgeable about the processes that must be juggled simultaneously to handle a case successfully.

Presently, the following agencies sometimes sponsor FMGs for J-1 waiver requests, generally for the purposes indicated:

- Veterans Administration (VA) care of veterans at a VA hospital, which need not be in an underserved area.

- Appalachian Regional Commission (ARC) usually primary care for indigents in counties under ARC jurisdiction.
- Delta Regional Authority (DRA) modeled after ARC program, primary care for indigents in counties under DRA jurisdiction.
- Department of Health and Human Services (DHHS)- primary care for federally designated heath centers, rural health clinics and native tribal facilities with HPSA score of 07.
- Department of Health and Human Services (DHHS), Education, and National Institutes of Health/Center for Disease Control high level research.
- U.S. Coast Guard, Army, Air Force for employees and their families.
- U.S. Department of Commerce emergency physicians, to prevent closure of emergency rooms.
- Department of Defense (DOD) DOD-funded research.

Each participating federal agency, and each state under the State 30 program, has a detailed set of written, and in some instances subtly unwritten, rules for its waiver program. Under most of these programs, the alien must have an employer and agree, with severe penalties for breach, to work for at least **three** years. In most programs the alien must practice **primary care** medicine (or in certain circumstances other shortage specialties) in H-1B status in a geographic area designated by DHHS as a health professional shortage area or Medically Underserved Area that the agency recognizes as still being underserved. Other peculiar requirements apply to each agency.

Once the interested agency or state recommends a waiver to the State Department, the State Department's Waiver Review Division normally submits a recommendation to the USCIS for a final decision on the waiver–almost always approval.

If a waiver can be obtained, the prospective employer petitions the USCIS for the alien's H-1B temporary status for at least **three** years. The alien either changes to H-1B status within the U.S. or, if a status violation or overstay has occurred or if a trip abroad is convenient enough, obtains an H-1B visa at a U.S. consulate, possibly in a third country such as Canada or Mexico. Deciding when to file H-1B papers, and whether and how to request change of status or consular notification and/or premium processing, requires careful discussion between the immigration attorney, employer, and physician. The law requires that the alien agree to start work within three years of the waiver issuance, but as a practical matter the lag can be longer as long as the alien proceeds to the designated work promptly upon conclusion of training and acquisition of H-1B status.

In most cases the physician wishes to pursue permanent residence as expeditiously as possible after obtaining H-1B status, although the process can begin before H-1B approval or even H-1B filing. Usually this is done through one or both of two ways:

- The regular labor certification process involving a showing, through sufficient advertising, that there is no minimally qualified U.S. physician available. Upon approval the employer may file an immigrant petition, but the last step toward permanent residence may not begin until the three-year term of J-1 waiver service in an underserved area is completed and a visa number is available. This process need not involve the employer involved in the J-1 waiver service, but it usually does.
- A special variation on the "national interest waiver" under which the physician must work 5 years (which can include the 3 years for the J-1 waiver) providing primary or other federally designated shortage care (which may include specialties) in an underserved area with a letter from the state's department of health attesting to the public interest in the work. The physician may self-petition. Although the physician may, even before completing the 3 years of J-1 waiver service, immediately file for permanent residence with interim work and travel authorization, it may not be approved until the physician has worked for five years in the medically underserved area. This can be useful for obtaining the spouse's and children's work authorization.

Many Canadian schools and residency programs are recognized by U.S. credentialing and licensing boards. Thus, often they can waive in for H-1B status if they have USMLE Step 3 or equivalent. Even with USMLE Step 2 they can obtain permanent residence if their employer can show no U.S. workers available, "national interest" in the alien's immigration, or "extraordinary ability" of the alien. Some U.S. specialty boards, particularly in family practice, have severely limited reciprocal certification of Canadian-certified specialists and are now requiring a new U.S. residency to sit for specialty board exams.

There are other possible ways around the many problems for FMGs. Less onerous rules apply to non-clinical positions. Physicians of "extraordinary ability" can bypass many requirements. Some physicians even seek immigration status based on positions below their full capability, such as medical technologist. Physicians who immigrate through non-employment based categories, such as through close family relationships, may be able to avoid the home residency requirement and face only licensing requirements. The rigorous normal requirements certainly invite imaginative solutions.

How We Can Help

We represent a broad range of health care providers and physicians in the complex matters faced by immigrating physicians. We represent large research hospitals, small rural hospitals (and the entities that own them), nursing home entities, non-profit medical clinics, HMOs, physician groups, and of course foreign national physicians, throughout the United States. We help coordinate J-1 status compliance, obtain H-1B status where available, seek O-1 status in lieu of J-1 waivers where necessary, and coordinate family members' immigration status. We routinely assist with obtaining J-1 waivers through "Conrad State 30" programs of state health departments, through various federal agencies including HHS/NIH, ARC, DRA, and VA, and through hardship and persecution waivers. We pursue permanent residence through labor certification, national interest waiver, outstanding professor/researcher, and/or extraordinary ability categories. We have extensive experience pursuing the various credentialing, licensing, and immigration requirements physicians must meet, and we coordinate strategies to overcome the complex timing problems posed by these different requirements at their various stages. We have unique experience unraveling prevailing wage problems and contract issues that sometimes arise with small physician practices. In addition, we handle immigration of a large volume of other types of medical workers. When requested (i.e., when we have not been associated only as immigration counsel), we work with our firm's Health Law Group, one of the biggest in the U.S., on contractual, fraud and abuse compliance, and other issues that arise in physician-provider relationships.

Important Links

- DHHS: Research Waivers
- Liaison Committee on Medical Education
- Educational Commission for Foreign Medical Graduates (ECFMG)
- National Board of Medical Examiners (NBME)