

Immigration Prescription for Locum Tenens Placement of Foreign National Doctors

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INTRODUCTION

The United States 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 needed and that number is likely to double in 2025. Others estimate the U.S. may lack up to 200,000 physicians and 800,000 nurses by 2020¹.

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 ebook, you will learn the visa options available so you can successfully recruit FMG physicians for locum tenens placement.

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 U.S., 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 locum tenens placement of these physicians.

2.0 VISAS AND MEDICAL PRACTICE IN THE U.S. FOR FMG PHYSICIANS

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 percent or more of the medical practice.

These visas can all be used for self-employment, enabling FMG physicians to take locum tenens positions, full-time or part-time. Next, we will offer more details about each temporary visa option and how they can be used for self-employment and locum tenens placement.

2.1 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. 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 federal 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 USCIS has 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, IMG 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 U.S. 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.

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 the physician must have completed a medical residency in the U.S. However, this does not apply if 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 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; and
- 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.

Example: Let's suppose that an H-1B physician works for Employer A for three years and he then enters into a five-year contract with Employer B. In this case, the physician will not be able to serve out the last two years of her contract with Employer B in H-1B status because she will have exceeded the six-year maximum time period for this visa. However, if at any time during this period, the H-1B employee remains outside the U.S. for one year or more, a new H-1B admission period begins and she can hold H-1B status for another six years.

Extensions Beyond the Six-Year Limit

Extensions of H-1B status beyond the six-year limitation 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.

Example: Dr. Shah holds full-time H-1B status with his employer but would like to work part-time at the hospital emergency room as an independent contractor (1099). With the help of a business attorney and CPA, he forms a professional corporation (PC) and appoints three trusted advisors to the board of directors. The PC applies for and is granted a concurrent, part-time H-1B visa, designating the hospital as the work location. The hospital pays the PC for Dr. Shah's emergency room shifts and issues a 1099 to the PC at the end of the year. The PC is responsible for payments and payroll taxes for Dr. Shah's employment.

CASE STUDY

In a noteworthy case, a client of our firm — a physician by profession — was interested in starting his own medical practice. The physician, who became sole owner of the practice, was not only the beneficiary but also the petitioner in this case qualifying under the H-1B visa category. By utilizing facts of the case and implementing H-1B Visa to Entrepreneurs rules, we were successful in establishing and demonstrating to the U.S. government that “right to control” exists in employer-employee relationship. We worked closely with the client in ensuring that the by laws of the professional corporation showed a separate Board of Directors, and that the designated Board of Directors had the power to hire, fire, pay or otherwise control the physician’s employment regardless of his ownership interest. As a result, he was able to control his own medical practice and his H-1B visa status.

The same can be done for a physician interested in a locum tenens position.

2.2 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 U.S. 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 a 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 agents, 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 Visas?

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.

The U.S. 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 and 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 percent of the business and make substantial cash investment into the business. To determine

2.3 THE E-2 "TREATY INVESTOR" VISA FOR PHYSICIANS

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 U.S. 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. (Appendix A-B, p. 18)

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: (i) there are no U.S. workers ready, willing and able to fill the position, and (ii) 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 undeserved 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. (Appendix C, p. 20)

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 an artful 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
- Priority appointments for your employers and candidates – fast service for faster placements
- 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>

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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 annbadmus@badmuslaw.com or 469.916.7900.

APPENDIX A

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 & Tobago	Tunisia	Turkey
United Kingdom	Ukraine	Yugoslavia	Czech Republic
Ecuador	Egypt	Jordan	Luxembourg
Macedonia	Mexico	Israel	

APPENDIX B

Responsibilities and Privileges of Visa Status				
Visa	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
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

APPENDIX C

PRESCRIPTIONS FOR LOCUM TENENS PLACEMENTS

Authorization	
H-1B	Physician forms professional corporation or LLC with a board of directors with assistance of business attorney and immigration attorney
	Physician's corporation applies for physician's H-1B visa for full-time or part-time
	Physician works as an independent contractor for locum tenens agency
	Locum tenens agency pays Physician's corporation for physician's services and issues 1099 to Physician's corporation
O-1	Locum tenens staffing agency applies for the O-1 visa as an agent, rather than direct employer, and pays physicians as independent contractor or
	Physician forms professional corporation or LLC with a board of directors with assistance of business attorney and immigration attorney
	Physician's corporation applies for physician's O-1 visa for full-time or part-time
	Physician works as independent contractor for locum tenens agency
	Locum tenens agency pays Physician's corporation for physician's services and issues 1099 to Physician's corporation
E-2	Physician invests in medical practice as 50% or greater owner
	Physician applies for E-2 visa for full-time employment
	Physician works as independent contractor for locum tenens agency
	Locum tenens agency pays Physician's medical practice for physician's services and issues 1099 to Physician's medical practice
EAD	Physician obtains EAD
	Physician works as independent contractor for locum tenens agency
	Locum tenens agency pays Physician directly as independent contractor and issues 1099 to physician

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