

**Immigration Options for Employing Foreign Physicians**

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**Agenda**

- The Physician Shortage
- Conrad 30 Program
- H-1B Status
- PERM Labor Certification
- Physician National Interest Waiver
- Practical Considerations




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**The Physician Shortage**




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## The Physician Shortage in the U.S.

- The U.S. will experience a shortage of between 46,900 and 121,900 physicians by 2032.
- The major cause of the shortage is a growing, aging population. The U.S. Census Bureau estimates that the nation's population will increase more than 10% by 2032, with those over age 65 increasing by 48%.
- The aging population will also affect physician supply because one in three currently active physicians will be older than 65 in the next decade.

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## The Physician Shortage in Rural Areas

- Rural areas will experience the shortage more severely than urban areas.
- While 20% of the population lives in rural areas, only 11% of physicians practice in rural areas.
- Further, rural residents are more likely to die from health issues like cardiovascular disease, unintentional injury, and chronic lung disease than urban residents. Rural residents are also diagnosed with cancer at later stages and have worse outcomes.

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## Recruiting Physicians to Rural Areas

- Recruiting physicians to rural areas poses specific challenges:
  - Rural areas may offer fewer opportunities for working spouses
  - Schools in rural communities may have fewer resources
  - Physicians may worry about lower salaries
  - Physicians may be dissuaded from rural areas due to the culture in medical training that values specialization and diminishes the importance of general practices

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## Addressing the Physician Shortage

- Foreign-trained physicians are critical to addressing the physician shortage.
- An estimated 29.1% of all currently practicing physicians in the U.S. were born and educated outside of the U.S.
- Further, 31.8% of all physicians practicing in Family Medicine, Internal Medicine, and Pediatrics are foreign-trained, and some areas, like Geriatrics and Endocrinology are even higher.
- Based these figures, foreign-trained physicians are critical to addressing the physician shortage in the U.S.

Journal of the American Medical Association  
American Immigration Council

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## Conrad 30 Waiver Program



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## Foreign-Trained Physicians

- To practice medicine in the U.S., all physicians must complete an accredited residency program in the U.S. or Canada.
- To complete a residency in the U.S., foreign-trained physicians must obtain certification from the Educational Commission on Foreign Medical Graduates (ECFMG) to establish that they are academically prepared to enter a U.S. residency.
- Then, the foreign-trained physicians must match into a U.S. residency program, in competition with all other candidates.
- Foreign-trained physicians complete residencies in the U.S. in J-1 status or H-1B status.

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### J-1 Status

- All foreign-trained physicians who engage in residency training in the U.S. while in J-1 status are automatically subject to the 2-year home residence requirement.
- The Conrad 30 Waiver program allows J-1 physicians to apply for a waiver of the 2-year home residence requirement upon completion of the J-1 exchange visitor program.
- The Conrad 30 Waiver program requires sponsorship through state health department and every state may issue 30 waivers each fiscal year.

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### The Conrad 30 Waiver Program

- Each state has developed specific guidelines, but the federal requirements applicable to all states are as follows:
  - Physician must have an offer of full-time employment at a facility located in a federally designated shortage area
  - Physician must agree to begin employment at the facility within 90 days of receiving a waiver
  - Physician must sign a contract to provide services at the facility for 40 hours per week, and for at least three (3) years

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### Montana Conrad 30 Waiver Program

- The Montana Department of Public Health & Human Services ("DPHHS") administers the state Conrad 30 Program each fiscal year
- Submission window opens October 1 each year.
- Ten slots are reserved for specialists, and 20 are reserved for primary care physicians (Family Medicine, Internal Medicine, Pediatrics, OB/GYN, and Psychiatry).
- The employer must demonstrate 6 months of unsuccessful recruitment efforts prior to submission of the application.
- The program maintains a preference physicians who have completed a residency in Montana.

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## Montana Conrad 30 Waiver Program

- The contract must include the following:
  - Contact information for all practice location(s)
  - A 40-hour per week (at least 4 days a week) practice for 3 years
  - The physician's schedule
  - A statement that the J-1 physician candidate agrees to begin work within 90 days of receipt of the J-1 waiver and the H1-B visa
  - The physician's base salary
  - An agreement to abide by the Immigration and Nationality Act (INA)

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## Montana Conrad 30 Waiver Program

- The contract must not include the following:
  - A non-compete clause or restrictive covenant
  - Termination without cause or by mutual agreement

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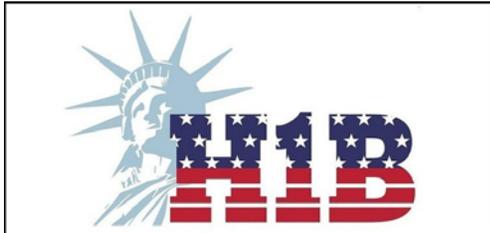
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## H-1B Overview



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## H-1B Classification

- Designed for "specialty occupations" that require equivalent of U.S. Bachelor's degree or higher.
  - Examples: physicians, PTs, OTs, pharmacists, NPs, PAs, med techs
- Temporary, nonimmigrant work authorization.
- Generally awarded in three-year increments for a maximum of six years.

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## Stages of the H-1B Process

- Recruitment
- Preparing Petition
- Filing Petition
- Post Adjudication



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## Recruiting H-1B Physicians

- Under U.S immigration law, U.S. citizens, lawful permanent residents and conditional/temporary residents, refugees, and asylees are protected from citizenship status discrimination.
- To avoid discrimination, employers should never ask a job applicant to specify current citizenship or immigration status.
- Instead, to determine whether H-1B sponsorship is necessary, the following language may be used:
  - *"Will you now, or in the future, require sponsorship for employment visa status (e.g. H-1B status)?"*

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## Employer Considerations – H-1B Cap

- Congress has set a cap of 65,000 H-1B visas per fiscal year, with an additional 20,000 H-1B visas available for individuals who have earned a U.S. master’s degree or higher from a U.S. institution.
- Each year a lottery is conducted to grant the available H-1B visas.
- However, there are certain exemptions from the H-1B cap.
- For example, a **not-profit** employer may qualify for an exemption if it has entered into a written **affiliation agreement** with an institution of higher education.
  - The affiliation agreement must establish an active working relationship, and demonstrate that the employer directly contributes to the education mission of the institution of higher education.

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## Additional Employer Considerations

- **Is there a valid employer-employee relationship?**
  - Placement of H-1B worker with 3<sup>rd</sup> party end-client may require additional evidence – Hospitalist Medical Groups
  - Who maintains control/supervision?
- **What is the offered salary?**
  - Does the offered salary meet or exceed the greater of the actual or prevailing wage?
- **Will the petition utilize Premium processing?**
  - Premium processing guarantees a decision or request for evidence within 15 calendar days and is currently \$1,440.

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## Candidate Considerations

- **Has the physician previously been in H-1B status?**
  - Has the physician exhausted some or all of 6 years?
  - If so, how much H-1B time is remaining?
- **Does the physician have family members?**
  - Will the employer cover the costs associated with dependent petitions?
- **Does the physician possess minimum qualifications at filing?**
  - License? ECFMG Certificate? Residency/Fellowship Certificate? USMLEs?

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## The H-1B Petition

- Once all considerations have been evaluated, the H-1B petition is prepared by compiling the required forms, filing fees, and all supporting documents.
- Physical H-1B petitions are submitted to U.S. Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security.
- Once approved, USCIS issues a Form I-797 H-1B Approval Notice that allows the physician to work in the U.S. and is used to complete the Form I-9.

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## Terminating an H-1B Worker

- When an employer terminates an H-1B worker prior to the expiration of the H-1B validity period, the employer may be liable for payment of the employee's wages and other penalties until the employer effectuates a "bona fide termination" by following these steps:
  1. Notify the employee that the employment relationship has ended
  2. Notify USCIS in writing
  3. Pay the employee's reasonable costs of transportation to their home country

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## PERM Labor Certification



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## What Is PERM?

- Employment-based permanent residency pursued via Permanent Labor Certification ("PERM").
- PERM Labor Certification is the most common route to obtaining permanent resident status for physicians.
- **Employer** decides who to sponsor and the timeframe within which to initiate sponsorship.
- Three-step process:
  - (1) pre-filing recruitment/PERM Labor Certification; (2) I-140 petition; and (3) I-485 application

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## Stages of the PERM Process

- Minimum Requirements
- Prevailing Wage Determination
- Pre-Filing Recruitment
- Preparing Application
- Filing Application
- Post Filing



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## Step 1: Minimum Requirements

- Employer must establish and confirm actual, objective minimum requirements (Degree Level, Field of Study, Training, Experience, Licensure, etc.).
- Physician must meet requirements at the time of beginning employment, or at the time PERM application is filed, whichever is earlier in time.

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### Step 2: Prevailing Wage Determination

- Submit application for Prevailing Wage Determination to the Department of Labor.
  - Processing currently takes approximately 120+ days.
- Once the Prevailing Wage Determination has been issued, confirm that the offered salary meets or exceeds the prevailing wage.
- Generally, it is recommended to wait until the Prevailing Wage Determination is issued prior to commencing live recruitment.

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### Step 3: Pre-Filing Recruitment

- Pre-filing recruitment establishes that there are no minimally qualified U.S. applicants who are ready, willing and able to accept the position.
  - Certain required recruitment mediums:
    - 30-day job order with the State Workforce Agency ("SWA")
    - Two consecutive Sunday newspaper print ads
    - Physically post Internal Job Posting at worksite for 10 consecutive business days
  - Select three additional mediums
- **Must occur within 30 to 180 days before filing the PERM labor certification with the DOL.**

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### Step 4: Filing Application

- PERM Labor Certification Application (ETA Form 9089) is electronically filed through online portal.
  - Processing currently takes approximately 5 months, but has varied in the past five years.
- Sometimes the U.S. Department of Labor will select an application for Audit, which can significantly increase the overall processing time.
- Physician PERM applications are infrequently audited.

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### Step 5: Post Filing

- The Department of Labor will issue audit; or
- The Department of Labor will issue certification (approval)



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### Physician National Interest Waiver ("PNIW")



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### PNIW Overview

- Allows foreign physicians to request a waiver of the labor certification requirement based on a letter of support from the State Department of Health.
- Waiver alone does not provide work authorization or permission to be physically present in the U.S.

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## PNIW Overview

- Eligible physicians must work full time for five years in a designated Health Professional Shortage Area (“HPSA”) or Medically Underserved Area (“MUA”).
- Time spent in H-1B status to fulfill a J-1 Visa Waiver requirement can be counted toward the five-year requirement.
- The state department of health requires interested physicians to submit the following:
  - A letter from their employer describing how their work will improve access to care and is in the public's interest.
  - A copy of their contract showing they have completed or will complete five years of service.

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## Permanent Residency

- Permanent residents may engage in ongoing employment with any U.S. employer, in any occupation.
- After five (5) years, permanent resident may apply for U.S. citizenship through the naturalization process.




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## Practical Considerations

- Foreign-trained physicians seek out opportunities with employers who will sponsor their immigration processing.
- There can be a significant amount of anxiety associated with the sponsorship process, so communication is key.
- Having a comprehensive plan of recruitment and retention is critical to engagement with foreign-trained physicians.
- Many sponsored physicians will depart once sponsorship is no longer needed.

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Please visit the Hall Render Blog at <http://blogs.hallrender.com> for more information on topics related to health care law.

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