

Physician Immigration J1/H1B

J-1 Waivers for Physicians

J-1 physicians who have entered the United States through sponsorship from Educational Commission on Foreign Medical Graduates (ECFMG) for clinical training (residency and fellowship training) are subject to a two year home residence requirement. These physicians are not permitted to change to H or L status, or apply for a green card until they have returned to their home country for two years, or until they have been granted a waiver of the two year home residence requirement. Waivers can be very difficult to obtain. Even doctors who marry a US Citizen cannot secure a US Immigrant Visa ("green card") without a waiver, or satisfying the two-year requirement.

The waivers available to J-1 physicians include interested government agency waivers, persecution waivers, and hardship waivers.

Clark Hill's Immigration practice group has extensive expertise with J-1 and H-1B Physicians, J-1 waivers and green cards for Physicians. Please hit the "contact us" link below if you would like a free publication.

IGA Waivers

Interested Government Agency (IGA) waivers can be granted to those J-1 physicians who are sponsored by an employer based on a commitment to work for at least three years in a medically under-served area of the U.S. several agencies are willing to support a J-1 waiver, including the Department of Veterans Affairs (VA), the Appalachian Rural Commission (ARC), and the Department of Health and Human Services (HHS), Delta Regional Authority. Each state is permitted to grant up to 30 waivers each year (Conrad State 30 Program).

To be granted a waiver, the employer and the physician must comply with several requirements. They must demonstrate that they have entered into an employment contract, confirming that the physician will work for 40 hours per week, for a minimum of three years. Employers must be able to show that they have engaged in recruitment to search for minimally qualified US workers. The employer must also demonstrate that the work will take place in an area that has been designated by HHS as medically under-served, with two exceptions. First, a waiver sponsored by the VA does not require the work to be in an under-served area. Second, each state, through its Conrad State 30 Program, is permitted to grant up to five waivers for work that is not located in an under-served area, at the states' discretion. The waiver is initially filed with the interested government agency, then forwarded to the US Department of State, and finally to the US Citizenship and Immigration Services (USCIS). Processing times vary from 4-16 weeks. It is important to note that timing is a concern, especially if an employer is processing the J-1 waiver through the Conrad State 30 Program. Many states have established set application periods. Employers and Physicians will need to be aware of these deadlines in states that receive large numbers of J-1 waiver applications.

Hardship Waivers

Hardship waivers can be granted to those J-1 physicians who can demonstrate extreme hardship to a qualifying relative, including a US citizen or lawful permanent resident spouse and/or child. He/she must show that the qualifying relative would suffer extreme hardship both if the J-1 physician returned to his/her home country without the qualifying relative for two years, and that the qualifying relative would suffer extreme hardship if he/she returned to the J-1 physician's home country for two years. Extreme hardship can be demonstrated through medical, psychological, financial, and educational means. The waiver is initially filed with USCIS. If USCIS agrees that the qualifying relative would suffer extreme hardship if the two year home residence requirement is enforced, the waiver is forwarded to the US Department of State for their opinion. If the US Department of State also determines that extreme hardship exists, the waiver decision is sent to USCIS, where the waiver can be granted.

As an alternative, a J-1 physician is also permitted to apply for an O-1 visa. Note that a J-1 physician is not permitted to change his/her status from J-1 to O-1 in the US. The O-1 petition must first be approved by a USCIS Regional Service Center, and then the J-1 physician must apply for the O-1 visa at a U.S. Consulate abroad. Also, note that is the J-1 physician can obtain an O-1 visa, he/she remains subject to the two year home residence requirement.



Healthcare Law Leader

Laura R. O'Hara
+12146512250
laura.ohara@clarkhillstrasburger.com

Healthcare Law Director

George T. Brandon
+12134175124
gbrandon@clarkhill.com

Healthcare Law Areas of Practice

- Behavioral Health Care Law
- HIPAA and Privacy Laws
- Long Term Care
- Long Term Care Compliance Institute
- Managed Care Litigation
- Medical Malpractice
- Medical Staff Relations
- Medicare and Medicaid Reimbursement

H-1B Visas

US employers frequently use the H-1B Visa category to quickly hire foreign nationals. A foreign national generally qualifies for H-1B status if he/she holds at least a US Bachelor's Degree (or equivalent) relevant to the field in which he/she will be working, and the position normally requires at least a Bachelor's Degree as an entry-level requirement to perform the job. The H-1B Visa must be sponsored by a US employer. The H-1B Visa is usually granted for three years and extended up to a maximum of six years. Any time spent in the US working for another employer in H-1B or L-1 Visa status will count against the six-year limit. Another six years of H-1B Visa time may be available once the foreign national spends one full year outside the US. Foreign nationals may seek US Immigrant Visa ("green card") status while on an H-1B Visa.

A petition for H-1B status must be filed with the USCIS Regional Service Center no more than six months before the requested start date. The USCIS may take several months to process an H-1B. However, for an additional \$1,225.00 processing fee, the USCIS will review the petition in 15 days.

H-1B Extensions Beyond 6 Years

Extending H-1B Visas beyond the six-year limit is possible in some circumstances. Specifically, if the first step in the green card process (Immigrant Worker petition or PERM Labor Certification) is filed before the end of the foreign national's fifth year in the US on an H-1B, then generally the H-1B can be extended one year at a time until the green card is approved or denied. Alternatively, if the H-1B employee cannot finalize his/her green card status because of priority date backlogs, then generally a three-year extension can be secured, as long as the I-140 Immigrant Worker Petition is approved, and the green card case remains pending. Finally, time spent out of the US while on an H-1B can be added to the time an H-1B employee can work in the US. This is referred to as recapture, and in general, any credible proof is accepted (passport stamps, copies of airline tickets, etc).

H-1B Cap

The US government limits the number of new H-1B Visas to 65,000 per year (the government's fiscal year runs from October 1 to September 30). Once this limit, or "cap", is reached, an employer cannot employ a foreign national in H-1B status until the next fiscal year begins. It is important to note that foreign nationals who currently hold H-1B status and are either extending and/or amending that H-1B status or are seeking H-1B status with another employer, are generally not subject to the cap. Foreign nationals who will be employed at and in furtherance of the basic or applied research of a governmental or non-profit research organization, or an institution of higher learning (college or university), are not subject to the cap. Finally, J-1 physicians who have been granted a waiver to work in a medically underserved area are also exempt from the cap.

20,000 additional H-1B's, beyond the 65,000 listed above, are available to foreign nationals who have a Master's Degree, or other advanced degrees, from a US college or university.

Wages

The employer must pay the H-1B worker the wage it pays similarly experienced US workers for the same job in the same location, or the wage as determined by a required wage survey, whichever is higher. H-1B workers generally must be paid from the sponsor's US payroll. H-1B workers should not pay for any H-1B costs or attorney fees.

H-1B Portability

H-1B portability allows a foreign national, who currently holds H-1B status, to change employers more quickly. Once the new employer files an H-1B petition, and it has been received by the USCIS, employment with the new company may commence. This saves significant time, as the employer does not have to wait for approval of the H-1B, which could take several months. In some cases, H-1B workers may travel internationally while utilizing H-1B portability.

H-1B Extensions

H-1B employees who have an extension of status filed and pending are allowed to work for up to 240 days, while the extension is pending. International travel is not permitted once the status expires, even though the H-1B employee can continue working.

Changing H-1B Status and International Travel

A foreign national in the US in a lawful immigration status (other than H-1B), who is applying for a change to H-1B

status, generally should not travel outside the US while his/her H-1B petition is pending. The USCIS can deny a change of status petition if it determines that a foreign national has departed the US while the H-1B petition is pending. However, these international travel limitations may not necessarily apply for foreign nationals changing from one H-1B employer to another H-1B employer.

Family Members

The H-4 Visa is available to the spouse and children (under the age of 21) accompanying the H-1B applicant to the US. The H-4 Visa is generally granted for the same period as the H-1B employee and must be extended accordingly. As with H-1B change of status petitions, international travel should be postponed for those filing a change to H-4 status. Time spent in the US on an H-4 does not count against that foreign national's six-year limit on an H-1B, as described above, if he/she obtains a separate H-1B. H-4s are not eligible for US social security numbers but can apply for ITINs with the US Internal Revenue Service. H-4s cannot work but can attend a school or a university.