

The ABC'S Of Immigration: Visa Options for Graduate Medical Training

by Gregory Siskind

Most physicians seeking to enter the US to practice medicine must initially engage in training before they can actually move into private practice. This is largely because licensing requirements in each state require training in the US and without a license; a visa is not an option. There are exceptions, of course, for certain physicians of national or international renown. But for the vast majority of physicians, the first step necessary to coming to the US will be to get accepted into a residency or fellowship program.

The process of getting admitted into a graduate medical training program in the US is outside the scope of this article. However, for excellent information on this topic, consult the American Medical Association information page on this topic at <http://www.ama-assn.org/ama/pub/category/1554.html>. Also be sure to visit the Educational Commission on Foreign Medical Graduates at www.ecfm.org. ECFMG is the sole sponsor of physicians coming in to the US for graduate medical training and plays a role in both the J-1 and H-1B process.

Physicians seeking to enter the US to engage in graduate medical training can normally enter on either H-1B or J-1 non-immigrant visa status. The vast majority enters on J-1 exchange visitor status in a J-1 category specifically carved out for graduate medical training. Later in this article, after a discussion of the requirements of each category, I'll discuss some of the reasons why the J-1 category is used by about 90% of physicians in training in the US.

J-1 Visas

Physicians seeking to enter the US in J-1 status to engage in graduate medical training are subject to strict requirements. The J-1 visa requirements for physicians engaged in "clinical" training are much tougher than physicians engaged in "non-clinical" training so the place to begin a discussion of J-1 visas is on this subject.

Non-Clinical Programs

The Department of State, of course, regulates the J-1 program since it took over that responsibility after the DOS acquisition of the US Information Agency in 1998. DOS' regulations define the two categories of graduate medical training:

Physicians who are coming to participate in a clinical exchange program, involving patient contact and care, within a program of graduate medical education or training conducted by accredited US schools of medicine or scientific institutions. The only exchange program sponsor authorized to bring exchange visitors for this purpose is the Educational Commission for Foreign Medical Graduates (ECFMG)[1]; and

Physicians who are coming to participate in a non-clinical exchange program, either with no patient care or contact, or where patient contact is only incidental to the physician's primary activity of teaching, research, consultation, or observation.[2]

Note that ECFMG must sponsor physicians engaged either in clinical training and may sponsor physicians engaged in non-clinical training, particularly if a university or academic medical institution lacks its own qualifying J-1 program or in cases where a physician is coming for a special "advanced short term training" opportunity. The distinction between "clinical" and "non-clinical" can become crucial since physicians seeking J-1s to engage in graduate medical training must pass several examinations that can make entry to the US a long and cumbersome process.

So what is a "non-clinical" exchange program? DOS regulations go on to explain that universities, academic medical centers and ECFMG can issue a Form DS-2019 exchange visitor form to any alien physician coming to the US for purposes of observation, consultation, teaching, or research. [3] Other exchange visitor categories like research scholar, professor, short-term scholar and specialist can be used for physicians working in such programs.

The key is whether the primary purpose of the work in the US is clinical or not. If clinical, a physician seeking a J-1 visa must apply for entry under the graduate medical education category. To show that the primary purpose of the program is not "clinical", a physician needs to show that he or she will only engage in no patient care or only "incidental" patient care. That means that a physician must show that he will only be observing and will only be attending or providing lectures or engaging in research that won't have an impact on patient care. Note that such non-clinical work could include being present when patient care is administered by another physician and even engaging in actual physical contact with a patient as long as it is clear that the care of the patient could in no way be affected. [4]

Any contact with patients must be limited in order to carry out the observation, consultation, teaching, or research purposes noted above. And the DS-2019 issued by the exchange program must specifically note these purposes and whether any patient care will occur. [5]

Foreign medical graduates seeking to enter the US for public health and preventive medicine programs can also enter in non-clinical status as long as they do not participate in any direct patient care. J-1 responsible officers must attach to the DS-2019 a certificate in such cases that states, "This certifies that the program in which [name of physician] is to be engaged does not include any clinical activities involving direct patient care." [6]

Clinical Programs

As noted above, physicians coming to enter on a J-1 visa to participate in a clinical program as defined by 22 C.F.R. § 62.27 must have the sponsorship of the Educational Commission for Medical Graduates (ECFMG) [7], a non-profit private organization charged with ensuring that foreign medical graduates have training on a par with their American-educated counterparts. No other organization is authorized to offer such sponsorship. Clinical training generally includes residency programs and fellowship programs in primary care and specialty programs and patient care is more than just incidental.

The ECFMG is charged with a variety of tasks. It processes DS-2019 forms for exchange visitors, evaluates educational and experience credentials, tests to ensure physicians have the appropriate skills to come to the US for graduate medical training, counseling foreign medical graduates and monitoring the graduate training programs where foreign physicians are working. ECFMG charges for its services and physicians and training programs should plan on the process of getting ECFMG certification and a form DS-2019 taking at least several months.

22 C.F.R. § 62.27(b) lists seven requirements for clinical trainees to qualify for J-1 status. They are the following:

Gave adequate prior education and training to participate satisfactorily in the program from which they are coming to the United States;

Be able to adapt to the educational and cultural environment in which they will be receiving their education or training;

Have the background, needs and experiences suitable to the program;

Have competency in oral and written English;

Have passed either Parts I and II of the National Board of Medical Examiners Examination (or its equivalent or be exempt from those examinations);

Provide a statement of need from the government of the country of their nationality or last legal permanent residence;

Submit an agreement or contract from an accredited US medical school, an affiliated hospital, or a scientific institution to provide the accredited graduate medical education. Both the alien physician and the official responsible for the training must sign the agreement or contract.

The ECFMG's requirements are designed to ensure that these seven requirements are met.

Exam requirements

The regulations refer to Parts I and II of the National Board of Medical Examiners Examination or an equivalent. In fact, the National Board of Medical Examiners and the Federation of State Medical Boards have not offered the NBME exam for many years and now offer a three-step examination called the United States Medical Licensing Examination (USMLE). The USMLE has replaced the NBME, FLEX, FMGEMS and all other exams previously offered and since the examination has been offered for more than twelve years, it will be very unusual for practitioners today to see physicians with older examinations..

The first step of the USMLE test whether physicians can apply their knowledge of biomedical science. The second step evaluates a doctor's ability to apply medical knowledge. The third step further tests the ability of physicians to apply their medical knowledge to the extent necessary to assure a physician's ability to practice medicine without supervision. For a J-1 visa, Steps 1 and 2 of the USMLE need to be passed.

Beginning in 1998, ECFMG added an additional testing requirement. Applicants must pass the Clinical Skills Assessment (CSA). The CSA is administered in Philadelphia and Atlanta and is comprised of a battery of mock clinical experiences that tests a physician's medical skills as well as his or her ability to communicate with patients and other health care personnel. In the years following the addition of this requirement, J-1 admissions to the US plummeted by more than 25%. That was blamed on two major factors relating to the CSA. First, weaker candidates for admission were not passing the exam. Second, unlike the USMLE Steps 1 and 2, which can be taken outside the US, the CSA must be taken in the US and a number of physicians were denied visas to enter. [8] The drop has reversed, however, and J-1 admissions are now at levels close to the pre-CSA period. That may be because physicians are better preparing for the examination (including spending more time improving their spoken English skills) and because consular officials are more familiar with the CSA requirement.

Beginning in mid-2004, the CSA examination is being replaced by the new USMLE Step 2 Clinical Skills examination. The term "Step 2 Clinical Skills" examination or "Step 2 CS" will normally refer to the exam. That examination is fairly similar to the CSA and will be available not only in Philadelphia and Atlanta, but also Los Angeles, Houston and

Chicago. [9]

In addition to the USMLE and CSA, J-1 clinical visa applicants need to pass an English examination. The well-known Test of English as a Foreign Language (TOEFL) is used by ECFMG to test an applicant's English skills. The ECFMG used to administer its own English examination but now only uses the TOEFL.

Three groups of physicians do not need to meet these examination requirements (though state licensing requirements may very well mean that a physician exempt for visa purposes will still have to take the examinations. The exempt physicians include

Physicians licensed in a US state prior to January 9, 1977; [10]

Physicians who graduated from most US and Canadian medical schools; [11]

Physicians of "national or international renown in the field of medicine" [12]

Statement of Need

The Statement of Need can be provided in the form of a letter which indicates a need in the home or residence country for the physician's services in the particular training specialty as well as a confirmation that the physician plans on returning to the country upon completing training in the US. The wording of the letter should conform to the specific language provided by ECFMG in its application package. The Statement of Need is typically signed by an official in the country's Ministry of Health or whatever agency is equivalent to the US Department of Health and Human Services. Without a Statement of Need, the physician will have no choice but to pursue an H-1B visa or other method of entering the US to engage in graduate medical training since ECFMG will not sponsor a physician lacking the document. [13]

The ECFMG Certificate

An applicant who passes the exams noted above and whose medical education is reviewed by ECFMG and determined to be adequate can obtain an ECFMG Certificate. An applicant must have an ECFMG certificate before ECFMG will issue the required DS-2019 form needed for a J-1 visa application. [14] There are other reasons why applicants need the ECFMG certificate including the following:

The Accreditation Council on Graduate Medical Education (ACGME) requires residency and fellowship programs to only admit foreign applicants with an ECFMG certificate;

Medicare reimbursement rules require health care facilities training doctors to ensure that physicians have the certificate; and

States require the certificate in order to get a training or full license.

The ECFMG certificate has a two-year validity period and can be revalidated by taking the TOEFL exam again. Once an applicant enters the US in J-1 status, ECFMG will consider the certificate valid indefinitely.

Licensure

In order to participate in graduate medical training in the US, an applicant not only needs

a visa, but the appropriate license as well. Requirements vary from state to state (see the attached chart), but an ECFMG certificate is a normal requirement. While all three steps of the USMLE are typically required to get full licensure, a temporary license limited to training is available for J-1 visa applicants in most states. Without having the third step of the USMLE exam.

214(b)

Even if a physician can get into a training program and get ECFMG's support, J-1s are still subject to Section 214(b) of the Immigration and Nationality Act, which presumes that an applicant has the intention of immigrating. From a practical standpoint, this is normally not a problem as consular officers don't typically use 214(b) as a basis of denying a J-1 visa for a physician. But it is occasionally a problem and cannot be ignored.

212(e)

Section 212(e) of the Immigration and Nationality Act requires applicants entering the US to engage in graduate medical training in a clinical setting to return to their home country or country of last residence for a period of two years. The requirement and the methods for getting the requirement waived are the subject of extensive discussion in this book and will not be covered further here. Section 212(e) is, of course, the major disadvantage of the J-1 over the H-1B visa and all physicians entering on J-1 status need to carefully consider the requirement before acquiring J-1 status.

Moonlighting

While it is quite common for residents and fellows to supplement their meager incomes with additional work beyond their training programs, J-1s are prohibited from accepting such work unless their responsible officers designate the work part of their training. [15]

Length of training

ECFMG normally issues DS-2019 forms for periods of up to a year at a time with a total of seven years permitted for graduate medical training programs (unless the physician can show exceptional circumstances and can show that the additional training is needed in the applicant's home country). Physicians must request an annual extension with ECFMG and must include a form I-644 signed by the training program director verifying the physician has been in good standing in the program.

In 1999, the USIA published a Policy Statement that directed ECFMG to NOT sponsor applicants for any time more than that necessary for board eligibility. This had the effect of barring many applicants from seeking additional time for prestigious and extremely advanced training programs that typically add a year to the minimum required training.

Changing specialties is also barred by ECFMG after the first two years of training so physicians need to determine early on if the area they have chosen is not ultimately the right decision.

Physicians can typically seek extensions at the end of their seven-year limits in order to study for board examinations. This has often become crucial when physicians are seeking waivers of the home residency requirement and risk falling out of status during the long waiver application process.

"Non-Standard" Programs

ECFMG will sponsor physicians in three types of programs:

- 1) Sponsorship in a residency program accredited by the Accreditation Council for Graduate Medical Education (ACGME).
- 2) Sponsorship in programs within a specialty or sub-specialty where the appropriate Specialty Board of American Board of Medical Specialties (ABMS) offers a Certificate.
- 3) Sponsorship of J-1 physicians in programs within a subspecialty that is recognized by the appropriate ABMS Board, as evidenced by a letter from the CEO of that Board. [16]

ECFMG lists qualifying non-standard programs on its web site at <http://www.ecfm.org/evsp/nonstand.html#nonstand> .

J-2 spouses

The ability of a J-1 visa holder's spouse to work during the term of the J-1 is a significant benefit of J-1 status for many physicians over the H-1B visa. J-2 spouses can file an I-765 with a USCIS Service Center after the J-1 has been admitted in J-1 status. Note that J-2 work authorization can be used as well for graduate medical training. But the couple should be counseled that the J-2 spouse's completion of a program could be jeopardized if the J-1 completes training too quickly and does not get a waiver of Section 212(e).

Application Procedure

J-1 doctors do not need advance approval from the USCIS to be able to submit a J-1 visa application at a US consulate. The chief requirement is to present the normal non-immigrant visa application, supporting documents (including a DS-2019 form issued by ECFMG) and an application fee.

Since the terrorist attacks of September 11, 2001, the process of applying for a non-immigrant visa to enter the US has become much more cumbersome and time consuming. Residency programs around the US have been reporting problems with applicants not receiving visas in time to start their training programs. This is especially true for applicants from certain Muslim countries (including Pakistan, one of the countries supplying the most physicians to US training programs). Applicants are advised to take these delays into consideration and to apply as early as possible for ECFMG certification and a visa application.

H-1B Visas

Prior to the Immigration Act of 1990, the only way for physicians to come to the US to engage in graduate medical training was to enter in J-1 status. But the 1990 Act dropped this requirement and for many years now physicians have been able to use the H-1B visa to join residency and fellowship programs. There are several basic requirements physicians must meet to enter to perform clinical medicine including the following:

The physician has a license or other authorization required by the state where the physician will practice;

The physician has an unrestricted license to practice medicine in a foreign country or has graduated from a foreign or US medical school; and

The physician has passed the appropriate examinations.[17]

Examinations

As noted above, a physician needs to have passed one of the required medical examinations:

Federation Licensing Examination (FLEX) parts I and II, or an "equivalent examination as determined by the Secretary of Health and Human Services";

National Board of Medical Examiners (NBME), Parts I, II and III; or

The United States Medical Licensing Examination (USMLE), Steps 1, 2 & 3[18]

As noted above, for more than a dozen years, the USMLE has been the exclusive examination. Passage of earlier examinations is still recognized, but "mixing and matching" of examinations is not permitted for H-1B purposes.

Note that the Licentiate Medical Certificate of Canada is NOT equivalent to the FLEX or USMLE for H-1B purposes.

Physicians are also required to document competency in English and passage of the Test of English as a Foreign Language will suffice for this purpose.

Licensure

All states require physicians to be licensed to practice medicine including physicians working in residency or fellowship programs. Some states do not permit physicians to sit for USMLE Step 3 prior to engaging in graduate medical training so H-1B status and in such states, the J-1 is the main option.

The H-1B requirements of the 1990 Act also require a physician to show that he or she possesses a state license "or other authorization" in order to perform patient care as well as a full and unrestricted license to practice in a foreign country or proof of graduation from a foreign medical school.

Note that some states will not issue a license without proof of the issuance of a visa. The circularity problem is avoided in these cases by getting a letter from the state licensing board documenting that the only thing standing in the way of issuing a license is the visa itself. Such a letter has traditionally satisfied the USCIS.

Exemptions

Physicians who have graduated from US medical schools do not need to demonstrate passage of any of the exams noted above.[19] They only need to demonstrate that they have a state license. The same applies to physicians who are "of national or international renown in the field of medicine." [20]

Challenges to Using the H-1B Visa

From the point of view of the doctor, the H-1B is usually the visa of choice if the goal is to eventually settle in the US. The avoidance of INA Section 212(e)'s home residency requirement cannot be overstated for many doctors, particularly those pursuing career paths that don't easily lend themselves to a waiver strategy.

But getting an H-1B visa is not always easy and even getting H-1B status is not free from problems.

First, many programs will exercise their discretion and not sponsor physicians for H-1Bs. There are various reasons for this. First, some programs believe that the J-1 is the more appropriate visa category to use for training programs. Others are concerned about problems with the H-1B cap (see the discussion below). Others do not want to assume the various obligations of an H-1B employer and potentially be subject to applicable civil and criminal violations. And others do not feel comfortable with the more complicated H-1B visa application process.

Timing issues can be a major problem in H-1B cases, both before the program starts and after the program ends. Only 65,000 H-1B visas are permitted to be issued per year except in cases where an employer or applicant is exempt. In 2004, the cap was hit for the first time in several years as increased cap numbers reverted to the original statutory limit. An exemption exists for universities and their affiliates as well as non-profit and government research institutions. Obviously, many residency and fellowship programs are covered, but not all. To date, the USCIS has taken a liberal view of the term "affiliation" for purposes of determining whether a residency program is closely enough connected with a university to claim a cap exemption, but practitioners are advised to watch this issue closely.

Even if a physician can get into a program that is exempt from the cap, they may still be "bitten" by the H-1B cap when the program ends. That's because if a person enters to work in a job that is exempt from the cap and then switches to a job that is not cap-exempt, the applicant is again subject to the H-1B cap. That is a problem for physicians because their training programs end in the summer, traditionally the period when the H-1B cap is a serious problem. This can frequently result in a significant delay in starting employment since new visa numbers do not become available until October.

Another problem for physicians using the H-1B for training is the six-year limit in the category. If a physician is in a training program that lasts more than six years, the physician may run out of time. It might be possible to pursue a green card during this period of time, which would allow for the possible extension of the H-1B, but qualifying for permanent residency while one is engaged in training can be very dicey and the physician may not be in a position to qualify to apply.

Nevertheless, the H-1B is certainly becoming more and more attractive and over the years, more and more residency and fellowship programs have become comfortable with the application process. The trend of using the H-1B visa instead of the J-1 visa is likely to intensify particularly as the physician shortage intensifies and the labor market for foreign medical graduates seeking post-training positions continues to improve.

[1] 22 C.F.R. § 62.27(a).

[2] 22 C.F.R. § 62.27(b)

[3] 22 C.F.R. § 62.27(c).

[4] Id.

[5] 22 C.F.R. § 62.27(c)(i) requires the DS-2019 in this case to specifically say "This

certifies that the program in which [name of physician] in to be engaged is solely for the purpose of observation, consultation, teaching, or research and that no element of patient care services is involved." 22 C.F.R. § 62.27(c)(ii) requires a statement must be appended to the DS-2019 if there is to be any incidental patient care. That language states the following: "(A) The program in which [name of physician] will participate is predominantly involved with observation, consultation, teaching, or research. (B) Any incidental patient contact involving the alien physician will be under the direct supervision of a physician who is a US citizen or resident alien and who is licensed to practice medicine in the state of _____. (C) The alien physician will not be given final responsibility for the diagnosis and treatment of patients. (D) Any activities of the alien physician will conform fully to state licensing requirements and regulations for medical and health care professionals in the state in which the alien physician is pursuing the program. (E) Any experienced gained in this program will not be creditable toward any clinical requirements for medical specialty board certification."

[6] 22 C.F.R. § 62.27(d).

[7] The ECFMG's web site contains a considerable amount of useful information and can be found online at www.ecfm.org.

[8] While INS data confirms the drop in J-1 physician admissions in 1999 and 2000, there is no official data available on visa denials for physicians seeking to enter the US to take the CSA. However, the author of this article discussed the matter with ECFMG officials who confirmed that denials of B-1 visas sought for the purpose of coming to the US to take the CSA was a serious problem and that ECFMG was working with the Department of State to educate consular officials on the need to take the CSA in the US in order to later qualify for J-1 status.

[9] The CSA will be offered until mid-2004 and the results will still be honored even after the Step 2 CS begins. For details on the Step 2 CS, go to www.ecfm.org.

[10] PL 95-83, section 602, technical note to INA § 212(a)(32).

[11] 22 C.F.R. § 62.27(b)(5).

[12] I.N.A. § 101(a)(41).

[13] 22 C.F.R. § 62.27(a)(6).

[14] Graduates of US and Canadian medical schools accredited by the Liaison Committee on Medical Education (which includes most medical schools in both countries) do not need an ECFMG certificate to get a DS-2019 form though the certificate may be needed to get a license.

[15] The ECFMG issued a memorandum outlining this policy in 2000. The text of the memorandum can be found on the ECFMG web site at www.ecfm.org and reads as follows:

"The U.S. Code of Federal Regulations governing the Exchange Visitor Program clearly states that the primary objective of the exchange visitor physician's training in the United States should be to enhance his/her skills in the field of medicine. J-1 visa sponsorship, which is documented by Form IAP-66 and issued by ECFMG, authorizes a specific training activity and associated financial compensation. The final requirement for sponsorship as an exchange visitor physician involves the

signing and returning of the white copy of Form IAP-66 to ECFMG. This certifies that the exchange visitor physician understands that he/she *"..... shall be permitted to perform only those activities described in Items 2 and 4 on page 1 of this form."*

Federal Regulations do not permit activity and/or compensation outside the defined parameters. The U.S. Code of Federal Regulations governing the Exchange Visitor Program state:

(a) An exchange visitor may receive compensation from the sponsor or the sponsor's appropriate designee for employment when such activities are part of the exchange visitor's program.

(b) An exchange visitor who engages in unauthorized employment shall be deemed to be in violation of his or her program status and is subject to termination as a participant in an exchange visitor program.

(c) The acceptance of employment by an accompanying spouse or minor child of an exchange visitor is governed by Immigration and Naturalization Service regulations.

(22 CFR § 514.16)

Participation in a structured training program should serve to meet the above objective by strengthening and improving the J-1 exchange visitor physician's knowledge of American techniques, methodologies and expertise in a particular medical specialty. As J-1 exchange visitor physicians sponsored by ECFMG have a chosen primary objective of graduate medical education, they may receive compensation *only* for activities that are part of the designated training program. Therefore, work outside of the sponsored program is *not* permitted."

[16] A discussion of the types of programs DOS will allow ECFMG to sponsor is contained in a September 16, 2002 memorandum discussing a teleconference with participants from ECFMG, the American Council on Graduate Medical Education, the American Hospital Association, the American Medical Association, the American Board of Medical Specialties and the Department of State. That memorandum is reproduced on the ECFMG web site at <http://www.ecfm.org/evsp/summary1002.pdf>.

[17] 8 C.F.R. § 214.2(h)(4)(viii)

[18] *Id.*

[19] 8 C.F.R. § 214.2(h)(4)(viii)(B)(2).

[20] 8 C.F.R. § 214.2(h)(4)(viii)(C).

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