A PRIMER: VISAS FOR INTERNATIONAL STUDENTS, RESIDENTS AND OSTEOPATHIC PHYSICIANS

JOINT AACOM & AODME ANNUAL CONFERENCE
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prepared by
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Why is this Important?

• Foreign Nationals (FNs) are enrolled as international students in U.S. Schools of Osteopathic Medicine.

• Transition to single GME Accreditation System will result in more interface with issues involving IMGs.
Focus

- U.S. Immigration Framework
- Visa options for International Students graduating from U.S. Osteopathic Medical School programs for GME and post GME Clinical positions
- Distinguished from complex International Medical Graduate (IMG) framework
- Offer letters, contracts, and payment of attorneys’ fees and costs
The Immigration Framework
Nonimmigrant Visas (Temporary) vs. Immigrant Visas (Green Cards)
What Government Agencies are Involved?

- Department of Homeland Security (DHS)
  - Citizenship and Immigration Services (CIS)
  - Customs and Border Protection (CBP)
  - Immigration and Customs Enforcement (ICE)
- Department of State (DOS)
- Department of Labor (DOL)
Path of Entry for International Students and IMGs

- FN Abroad
- FN in US.
- International Medical Graduate
- U.S. School of Osteopathic Medicine
- Nonimmigrant (Temporary) GME Training
  - Transfer from Hospital, Physician Group or University
  - Nonimmigrant (Temporary) Visa
    - Physician Appointment
  - Immigrant Visa (Green Card)
**Key Temporary and Permanent Visa Classifications**

**Nonimmigrant Visas (Temporary)**
- F-1 Student (Study and GME)
- J-1 (ECFMG Sponsors mainly IMGs for GME)
- H-1B Professional, (GME/Appt.)*
  - H-1B1 (Chile/Singapore)
  - E-3 (Australia)
- O-1 Extraordinary Ability (Appt.)

**Immigrant Visas (Permanent)**
- "Green Card"
  - PERM Labor Certification*
  - Certain PERM Exempt Categories
  - Family-based
Navigating the GME Program or Employer’s Resources and the Foreign National’s Expectations
F-1 International DO Students

• Matriculated in Degree Program: Professional, Masters or Doctoral
• Enrolled on a full-time basis
• Attaining satisfactory academic progress
• Spouse and children may accompany F-1 as F-2 derivatives.
F-1 Employment Authorization

• On-Campus – 20 hours wk. and 40 hours wk. during vacation

• Off- Campus Economic Hardship – 20 hours wk.

• Curricular Practical Training (“CPT”)

• Optional Practical Training (“OPT”)

F-1 Graduating International DO Students

• Optional Practical Training (“OPT”) can be used for 1st year residency/internship.

• Application by student for Employment Authorization Document (Form I-766)

• Generally maximum of 1 year, with limited exceptions

• Transition plan essential for 2nd year.
U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. Citizenship and Immigration Services

EMPLOYMENT AUTHORIZATION CARD

The person identified is authorized to work in the U.S. for the validity of this card.

NAME: VOID, VOID V

Lee W. Cristóbal

A# 000-000-376

CARD# WAC00000000376

Birthday Category Sex
01/01/03 E19 M

Country of Birth
El Salvador

Terms and Conditions
None

NOT VALID FOR REENTRY TO U.S.

CARD VALID FROM 01/01/50 EXPIRES 01/01/50
What is the J-1 Exchange Visitor Program?

- Implemented to foster international exchange pursuant to Fulbright-Hayes Act (Mutual Educational and Cultural Exchange Act)
- Governed by Department of State (DOS) through Bureau of Educational and Cultural Affairs
- Since 2003, Tracking of International Exchange Visitors through Internet based SEVIS system
J-1 Process

• Considerations
  • Temporary nonimmigrant visa
  • Requires “unabandoned residence abroad”
  • Generally, a J-1 visa must be issued by a U.S. Consulate abroad.
ECFMG is sole sponsor for J-1 physicians in U.S. clinical training programs

Administers its Exchange Visitor Sponsorship Program (EVSP) in accordance with Department of State Guidelines

U.S. teaching hospitals or residencies designate liaison with ECFMG
J-1 Period of Stay for GME

• Period to complete the training, or up to 7 years

• Change in specialization and extensions:
  • Home country has “exceptional need” for the physician to be trained in the specialty
  • Change in specialization allowed once if done within first 2 years of program
  • Extensions in special circumstance (e.g. to sit for American Specialty Board examination)
Parameters of J-1 Clinical Training

- Training activity specified
- Location designated
- Remuneration authorized by sponsor or designee of the sponsor for services that are part of the authorized program
- Moonlighting prohibited
J-1 2 Year Home Country Physical Presence Requirement and Waivers

• Immigration and Nationality Act (INA) requires J-1 physicians and their J-2 dependents to
  • return to home country (country of nationality or of last residence)
  • reside and be physically present there for minimum of 2 years following departure from the U.S. before being eligible for an H-1B Specialty Occupation Visa, L-1 Intra Company Transferee Visa, or Immigrant Visa/Adjustment of status to permanent residence
• Also prohibited from changing status in the U.S.
ECFMG requires:

- Home country foreign Ministry of Health “statement of need” for specialty area of training and confirming physician has filed a written assurance with the government certifying return to home country upon completion of training in the U.S. and intends to enter the practice of medicine in the specialty being sought for at least 2 years.
Grounds for Waivers of the 2 Year Home Country Residence Requirement

• Exceptional Hardship to a US Citizen spouse or child
• Claim of Persecution based upon race, religion or political opinion
Grounds for Waivers of the 2 Year Home Country Residence Requirement

- Agreement to work for 3 years in H-1B status in a Designated Health Care Shortage Area pursuant to a request from Interested Government Agency or State Department of Health (AKA “CONRAD PROGRAM”) to Department of State (DOS) and DOS’ recommendation to U.S. Citizenship and Immigration Services (USCIS)
J-1 Obstacles for U.S. DO Graduates

• If candidate has been in the U.S. for many years, usually cannot show an “un-abandoned residence abroad”

• Many foreign countries do not offer Osteopathic Physician Programs similar to U.S programs, and cannot obtain Ministry of Health Statement
The H-1B Nonimmigrant Classification for a Specialty Occupation
How is the H-1B Different From Other Work Visas?

- Involves both DOL and USCIS
- Quota Driven/Quota Exemptions
- Requires payment of attorneys fees and costs by the employer
Qualifying for an H-1B

• Position requires at least a Baccalaureate Degree in a specialty occupation
• Foreign national has a Baccalaureate Degree or the equivalent based upon a combination of education, training and experience; has a professional license, if applicable
• Examples: engineers, IT professionals, teachers, M.D.s and D.O.s
Physician must establish:

- **License/authorization from state of intended employment to practice medicine, or is exempt; and**
  - Full and unrestricted license to practice medicine in a foreign state; or
  - **Graduated from a medical school in the United States or foreign state.**
Petitioning organization must establish that the alien physician:

• Passed the Federation Licensing Examination (FLEX) (or an HHS determined equivalent – currently USMLE Steps 1, 2 & 3) or graduate of U.S. medical school; and

• Has oral and written English competency or is a graduate of a School of Medicine accredited by Secretary of Education.
H-1B Annual Quota ("Cap")

• Annual quota for Bachelor’s degree – 65,000 of which 6,800 are for nationals of Chile and Singapore

• Annual quota for Advanced Degree Graduates from U.S. Universities – 20,000
H-1B Cap Exempt Petitions

- Petitions unaffected by the cap:
  - Qualified Organizations claiming cap exemption
  - Extensions
  - Change in the terms of employment
  - Change of employers (exception may apply)
  - H-1B-like classification for Australians (E-3)
  - H-1B physicians with Conrad waiver
H-1B Cap Exempt Petitions

Qualified Organizations

• Institutions of higher education

• Related or affiliated nonprofit entity – Most healthcare organizations claim cap exemption

• Nonprofit research organization

• Governmental research organization
H-1B Process

• Labor Condition Application at DOL
• H-1B Petition at USCIS
• Premium Processing available (15 calendar day turnaround)
• Consular Processing
Specialty Occupations (H-1B)

- Total of 6 years in 3 year increments
- Certain exceptions beyond 6 years
Specialty Occupations (H-1B)

- Employer-employee relationship required
- Employment authorization limited to sponsoring employer
- Concurrent sponsorship allowed
- Full time or part time
DOL Component of H-1B Labor Condition Application ("LCA")

- Provide assurance that H-1B workers will not adversely affect wages and working conditions of U.S. workers
How Companies Abuse Work Visas

A new report confirms critics’ charges against the H-1B program. Tighter oversight may be on its way.

- Business Week, October 27, 2008
The Labor Condition Application (LCA)

- Employer must pay the greater of actual wage or the prevailing wage
- Posting/Union notification
- Public Access and DOL record-keeping requirements
- Additional rule apply if H-1B Dependent/Willful Violator
Additional Employer Obligations

• Payment of costs and attorney fees associated with the LCA and H-1B petition

• If H-1B terminated before the end of authorized stay, employer liable for reasonable costs of transportation abroad

• Mandatory notification to USCIS for bona fide termination
Pros of H-1Bs for Graduate Medical Education

- International students graduating from U.S. D.O. or M.D. programs qualify
- Approval possible within 15 days
- Flexible as to duties for non-accredited emerging areas/research
- Good recruitment tool
Cons of H-1Bs for Graduate Medical Education

- Attorneys fees and costs paid by employer
- J-1s transitioning to H-1B require waiver
- Six year limitation may require early analysis of options for some specialties
Summary – Most Common Nonimmigrant Visas
D.O.s and M.D.s

• J-1 Exchange Visitor Program
  • Administered by ECFMG for clinical GME
  • Mainly International Medical Graduates (IMGs) - rare for U.S. D.O. Graduates

• H-1B Specialty Occupation – GME/post GME
  • Feasible for U.S. D.O. Graduates
  • Special requirements for IMGs
The Green Card Process
Permanent Resident Card
The Green Card Process

Exempt:
Extraordinary Ability in Science
Outstanding Professor or Researcher
National Interest Waiver
Exceptional Ability / Schedule A (II)

Labor Certification (PERM)*

Employment-Based Immigrant Petition

Family-Based Immigrant Petition

Consular Processing or Adjustment of Status Priority Date Current

Lawful Permanent Resident “Green Card”
Medical Graduates of a medical school not accredited by a body approved by the Secretary of Education (regardless of whether the school is in the U.S.) are inadmissible to immigrate to the U.S. principally to perform services as a member of the medical profession, unless:

- They have passed Parts I and II of the National Board of Medical Examiners Examination (NBME) or an equivalent exam, currently the U.S. Medical Licensing Examination (USMLE), as determined by the Secretary of HHS and they are competent in written and oral English.
How Institutions/Employers Benefit from Sponsoring Physicians for Green Cards
The Immigrant Quota System Maze
• Green Cards are subject to annual quotas
• Quotas are by employment-based ("EB") classification, and certain per country limits apply based on country of birth
# Visa Bulletin – May 2015

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PERM Labor Certification – Three Step Process

• Step One: PERM Labor Certification
• Step Two: Immigrant Petition
• Step Three: Adjustment of Status or Consular Application for Permanent Residency
PERM Labor Certification
Step One

• Demonstrate to DOL, through a test of the labor market, that there are no able, willing and qualified US workers who are available to fill the proffered position in the geographic area where the job opportunity is located.

• Note: Different standard for college or university teachers – “no equally qualified and available”
PERM Labor Certification Step Two

• Immigrant Petition at USCIS
  • U.S. advanced degree or its equivalent
  • Meet the minimum requirements of the permanent physician position
  • Overcome the “unqualified physician” inadmissibility provisions at the time the labor certification is filed
PERM Labor Certification
Step Three

• Application to Adjust Status to Permanent Resident or Consular processing of immigrant visa

• Can only occur when priority date is “current”

• Note: J-1 still needs waiver to adjust status
Special Considerations for PERMs Labor Certification for Physicians

- **When** must process be started?
- Is this a **permanent position**?
- Is there an **employer – employee relationship**?
- Will salary meet **Prevailing Wage**?
- **Challenges in defining minimum requirements**
DOL Rule on Attorneys Fees and Costs

• Bans sponsoring employers from recouping foreign workers’ costs, including employers’ attorneys’ fees related to preparing, submitting and obtaining a permanent labor certification

• Prohibits substitution of alien beneficiaries on LCs, and sale, barter or purchase of LCs
National Interest Waiver - 5 Year Commitment in Designated Medically Underserved Area

- Provides a waiver from PERM Labor Certification and a waiver from the J-1 two year home country requirement for clinical physicians.
- Requires commitment to work full time as a clinical physician for an aggregate of 5 years in an HHS designated medically underserved area or at a Veterans Affairs facility.
- Statement from a federal agency or department of public health confirming that the physician’s employment is in the public interest.
- Applies to Specialty Physicians.
Advantages to Physician NIW

• May be self-petitioned by physician

• Attorneys fees and costs may be paid by physician

• No Test of the Labor Market

• Faster than 3 step PERM process
Summary of Common Routes to Green Card for Physicians

• Most common employment-based for clinicians
  • EB-2 PERM-based Labor Certification
  • EB-2 National Interest Waiver based upon 5 year contract in Health Care Shortage Area

• Other routes
  • EB-1 Outstanding Professor or Researcher
  • EB-1 Extraordinary Ability in the Sciences
  • EB-2 Exceptional Ability/Schedule A Group II
  • Family based petition

Remember: If subject to the 2 year home country residence requirement J-1 Waiver required
Family-Based Immediate Relative Petition

- **US Citizen spouse** may file Immediate Relative petition and foreign national can concurrently file for Adjustment of Status
- “Open market” work authorization provided on interim basis within 90 days
- Process usually completed within a year.
- **Note:** J-1 still needs waiver to adjust status
Avoiding Missteps in Offer Letter and Contracts

- Analysis of attorneys fees and costs
- Explore advantages to sponsorship for H-1B and Green Card
- Is J-1 waiver required for H-1B or Green Card based upon HPSA/MUA? Is so may affect work location
- If H-1B, consider remaining time on 6 year max and options for continued employment beyond 6 years crucial
- If National Interest Waiver to be pursued consider 5 year contract requirement
Avoiding Missteps in Offer Letter and Contracts

• Consult immigration counsel
• Full evaluation should be done before offer letter
• Incorporate immigration-related contingency provisions in offer letter and contract
• Flexibility a plus in immigration sponsorship policies
Summary

• U.S. Immigration Framework
• Visa options for International Students graduating from U.S. Osteopathic Medical School programs for GME and post GME Clinical positions
• Distinguished from complex International Medical Graduate (IMG) framework
• Offer letters, contracts, and payment of attorneys’ fees and costs
SARAH LEA TOBOCMAN, Esq. is an Equity Shareholder and Chair of the Immigration Practice Group at Gunster, Yoakley and Stewart, P.A. She is a primary member of the Immigration Practice Group and a member of the Corporate and International Practice Group. She has been practicing in the area of business immigration since 1983, and she has led Gunster’s Immigration Practice Group since joining the Firm in 1999. Ms. Tobocman has a longstanding interest in assisting healthcare systems with their immigration needs with an emphasis on compliance issues. She also regularly assists human resource departments and in the process of recruiting and retaining foreign workers through the preparation of customized recruitment materials and the creation of systems which assist employers in managing the sponsorship of foreign workers. In addition, she has handled the full array of U.S. employment-based nonimmigrant and immigrant visas petitions and consular applications for over 28 years. She is actively involved in representing employers in I-9 employment eligibility verification requirements, drafting worksite enforcement compliance policies, and in training employers on best practices for compliance with U.S. immigration laws. She frequently lectures, trains and writes articles for business groups on immigration laws and compliance. Please see [http://www.gunster.com/attorney/sarah-lea-tobocman/](http://www.gunster.com/attorney/sarah-lea-tobocman/) for a detailed list of articles, seminars and presentations. Ms. Tobocman received her B.A. degree with Honors from the University of California at Berkeley in 1976 and her J.D. Degree from the University of San Francisco School of Law in 1979. While an undergraduate, she also attended the Centro de Estudios Colombo-Americanos in Association with the Universidad de los Andes in Bogotá, Colombia. Ms. Tobocman was admitted to the Florida Bar in 1980 and commenced practicing in the area of business immigration in 1983. After practicing at a boutique business immigration law firm for five years, first as an Associate and then as a Partner, she founded her own business immigration boutique which she managed for twelve years. She was recruited by Gunster and joined the Firm in 1999 as an Of Counsel Shareholder, and was named Equity Shareholder in 2004. She has served or currently serves in the following professional leadership positions: President, South Florida Chapter, American Immigration Lawyers Association, 1-year term; Board of Governors, American Immigration Lawyers Association, 1-year term; Co-chair, Immigration Committee, International Law Section of The Florida Bar, 3-year term; Executive Council, International Law Section of The Florida Bar, 6-year term; Continuing Legal Education Committee, The Florida Bar, 1-year term; Co-chair, Greater Miami Chamber of Commerce Immigration Task Force, 1-year term; Miami-Dade County Beacon Council’s International Advisory Task Force (current). She is the recipient of the following honors: Chambers USA “Leaders in their Field” (2008-2014); AV rated as independently determined by Martindale-Hubbell, since 1998; “Best Lawyers in America,” Immigration Law, 2009-15; South Florida Legal Guide, “Top Lawyer,” 2006-13; “Florida Super Lawyers” 2006-13; South Florida Business Journal, “Best of the Bar”, 2003. She has appeared on CNN en Español and Univision as a commentator on immigration issues. Ms. Tobocman is fluent in Spanish.

This document provides general information. It is not a substitute for advice in a particular case.

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Beatriz Osorio, Esq. is an associate in Gunster’s Immigration practice group. As an integral part of the firm’s Immigration team, Ms. Osorio assists health care systems, multinationals, financial management and banking organizations, technology companies, hotels/resorts, professionals and individual investors fulfill their immigration needs. She is involved in the preparation of employment based nonimmigrant and immigrant visa petitions, such as Investor Visa Applications, Professional/Specialty Occupation Petitions, Intra-company Transferee Petitions, Extraordinary Ability Petitions, Labor Certification Applications, and Consular Visa Applications. She also participates in counseling employers regarding their compliance with U.S. immigration laws. Beatriz has exclusively dedicated her career to practicing immigration law. In addition to business immigration matters, she also has experience handling family based petitions and removal matters. Ms. Osorio received her Bachelor of Arts Degree from Nova Southeastern University in 2006 and her J.D. Degree from Nova Southeastern University, Shepard Broad Law Center, cum laude, in 2011. While at Shepard Broad Law Center, Ms. Osorio was awarded Book Awards in International Sales & Arbitration, Constitutional Law I, and Civil Pre-Trial. She was a Board Member and Competitor of the Moot Court Honor Society. She was admitted to the Florida Bar in 2011 and is a member of the Cuban American Bar Association. As a Colombian native, Ms. Osorio is proficient in Spanish. Her multi-cultural background enhances her understanding of the experiences of foreign nationals in the U.S. immigration processes.

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