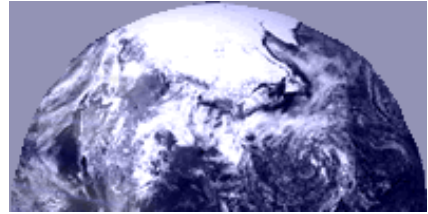


# Thompson Immigration Law Associates

Providing U.S. & Global Immigration Solutions  
to Businesses Around the World



## U.S. Immigration For Foreign Physicians

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## 1 INTRODUCTION TO U.S. IMMIGRATION FOR FOREIGN HEALTHCARE WORKERS

The United States has one of the most structured and detailed immigration laws in the world, with many government agencies regulating various parts of the immigration process. The healthcare field is probably the most highly regulated area of all.

Every physician and many other healthcare providers have special credentialing requirements they must comply with before they can enter the United States to work. While these credentialing requirements slow down the overall immigration process, they also help ensure that a foreign healthcare worker has the equivalent credentials as a U.S. trained healthcare worker. They also establish a more objective system that allows foreign healthcare workers and potential U.S. employers the ability to know more definitively determine whether a particular foreign healthcare worker will qualify for a work visa or green card.

### 1.1 “CREDENTIALING” VERSUS “LICENSING”

To understand how the U.S. immigration system is applied to foreign healthcare workers, two concepts must be distinguished - credentialing and licensing.

- “Credentialing” refers to a process *established solely for immigration purposes* that must be completed before a foreign healthcare worker may obtain a U.S. work visa or green card. This credentialing process is designed to ensure that a foreign healthcare worker’s education is equivalent to that received in the United States; that their license to practice in their country of origin is unrestricted and unencumbered; and that the foreign healthcare worker has passed both English language and technical competency examinations.
- “Licensing” is a set of requirements established by each State in the United States as a prerequisite for most healthcare professionals (both foreign and U.S. citizens) to practice in that State.

A foreign healthcare worker must, therefore, comply with more requirements in order to work than a U.S. citizen. In fact, it is possible for a foreign healthcare worker to be fully licensed in the State where they intend to work, yet still be unable to obtain a work visa or green card because they have not met all of their credentialing requirements.

Not all foreign healthcare workers are subject to immigration credentialing requirements. Only foreign physicians and those healthcare workers covered by the “VisaScreen” credentialing program need to comply with extra credentialing requirements. All other foreign healthcare workers must only comply with the licensing requirements established by the State in which they intend to work.

## 2 FOREIGN MEDICAL GRADUATES (“PHYSICIANS”)

A "foreign medical graduate" is any foreign national who:

1. Is a graduate of a medical school located outside of the United States, Canada and Puerto Rico; and
2. Is coming to the United States principally to perform services as a member of the medical profession.

A foreign medical graduate is inadmissible into the United States if he or she is an "unqualified physician." An unqualified physician is a physician who has graduated from an unaccredited medical school and seeks to enter the United States principally to perform services as a member of the medical profession. An exception to this rule is if the foreign physician has passed Steps I, II & III of the United States Medical Licensing Examination ("USMLE") and is competent in both oral and written English.

While this inadmissibility rule applies only to medical graduates coming to the United States "principally to perform services as members of the medical profession", the U.S. Citizenship and Immigration Services ("USCIS") has interpreted this to include medical diagnosis and patient treatment, as well as medical research and teaching.

The rule does not apply to foreign medical graduates who enter the United States as a dependent of another foreign national, U.S. citizen or permanent resident.

### 2.1 CREDENTIALING AND LICENSING REQUIREMENTS

#### 2.1.1 CREDENTIALING REQUIREMENTS

The credentialing requirements for foreign physicians is administered by the Educational Commission for Foreign Medical Graduates (<http://www.ecfm.org/>). The ECFMG certification process addresses three areas:

1. Whether the foreign medical graduate has the necessary educational and licensure credentials; specifically:
  - a) They have completed all educational requirements to practice medicine in the country in which their education was received;
  - b) They have graduated from a four year medical school listed in the WHO's World Directory of Medical Schools; and
  - c) They have an unrestricted and unencumbered license or certificate of registration to practice medicine in the country in which they received their medical education (*this requirement will not be required in the near future*).
2. Whether the foreign medical graduate is competent in both oral and written English; and
3. Whether the foreign medical graduate has passed the necessary technical competency examinations; specifically:
  - a) Steps I, II & III of the United States Medical Licensing Examination (<http://www.usmle.org>) (*the USMLE is used for both credentialing and licensing purposes*).

An ECFMG certificate of successful completion of the above credentialing and examinations is an essential prerequisite for any foreign medical graduate who wishes to enter the United States to work in a clinical setting. It is also required by the U.S. Department of Labor as a prerequisite for foreign medical graduates for apply for a permanent residency green card.

There is no exemption from the requirement that a foreign medical graduate demonstrate that they are competent in both oral and written English. It is even required if the candidate was born or has lived in a country where the native language is English. Only those foreign physicians who graduate from an LCME-accredited medical school in the United States, Puerto Rico, or Canada are “exempt” from this English language requirement. But this is because such graduates do not fall within the definition of a “foreign medical graduate”. The English language proficiency requirement may be fulfilled either through the English examination prepared by the ECFMG, which is originated from the Test of English as a Foreign Language (“TOEFL”), or if the foreign physician previously has taken the ECFMG English examination, by taking the TOEFL. The TOEFL is administered by the Educational Testing Service (<http://www.ets.org>).

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## 2.1.2 LICENSING REQUIREMENTS

Each State has its own set of licensing requirements. These requirements are tracked by the Federation of State Licensing Boards, and can be found at the following URL address: [http://www.fsmb.org/usmle\\_eliinitial.html](http://www.fsmb.org/usmle_eliinitial.html).

## 2.2 NONIMMIGRANT VISAS FOR FOREIGN PHYSICIANS

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### 2.2.1 TN VISAS (FOR CANADIAN AND MEXICAN NATIONALS)

A TN (or “Trade NAFTA”) visa can be obtained by Canadian and Mexican citizens under the North American Free Trade Agreement (“NAFTA”). A Canadian or Mexican physician may enter the United States on a TN visa, but only for teaching and research purposes. The physician may not engage in any patient contact other than “incidental contact” that occurs because of his or her teaching or research duties.

To qualify for a TN visa, a foreign physician must possess an M.D., Doctor en Medicina, or a state/provincial license. However, most physicians in teaching and/or research positions do not need to possess a license in the State of intended employment since they will not be working in a clinical setting. However, some States do require a less restrictive faculty license for physicians in such positions.

A TN visa is now a 3-year visa that can be extended indefinitely. A Canadian citizen may apply at the U.S.-Canada border. However, a Mexican citizen must apply for a new TN visa at the U.S. Embassy or consulate in Mexico.

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### 2.2.2 H1B VISAS (FOR ANY NATIONALITY)

The United States' standard work visa is the 3-year H1B visa. A foreign physician may qualify for H1B status if:

1. They are coming to the United States at the invitation of a non-profit, private education or research institution or agency to teach or to conduct research; or
2. They have met all of their credentialing and licensing requirements (*discussed above*).

Note that most Canadians do not sit for the U.S. credentialing examinations because 41 States recognize the standard Canadian examination, the Medical Council of Canada Qualifying Examination ("MCCQE") (formerly the Licentiate of the Medical Council of Canada, or "LMCC") for *State licensure* purposes. However, the MCCQE is not adequate for *immigration credentialing* purposes. Therefore, Canadian physicians must meet more stringent credentialing requirements for an H1B work visa than they do to apply for permanent residency (*i.e.*, a green card) within the United States.

For teaching and research positions, a foreign physician need not present evidence of having passed the USMLE. However, such a physician cannot engage in any patient contact other than "incidental contact" that occurs because of his or her teaching or research duties. Most physicians in teaching and/or research positions do not need to possess a license in the State of intended employment since they will not be working in a clinical setting. However, some States do require a less restrictive faculty license for physicians in such positions.

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### 2.2.3 J-1 VISAS AND WAIVERS

Most foreign physicians entering the United States to pursue graduate medical training (*i.e.*, a residency or Fellowship program) do so through the J-1 "exchange visitor" program. This program is administered by the U.S. State Department. The credentialing requirements are administered by the Educational Commission for Foreign Medical Graduates ("ECFMG").

All J-1 physicians must comply with a two-year foreign residency requirement. This requirement requires them to return to their home country for at least two years before they can change their nonimmigrant status or apply for an immigrant visa or green card. The only exception to this rule is for Canadian physicians who wish to enter the United States on TN status.

There are, however, waivers of the two-year foreign residency requirement. While this topic is beyond the scope of this Portfolio discussion, Thompson Immigration can assist in obtaining these waivers. For foreign physicians, a waiver of the two-year foreign residency requirement is usually obtained through an interested government agency and generally requires that the foreign physician provide services in a Health Professional Shortage Area ("HPSA"), Medically Underserved Area ("MUA") or similar shortage area for a designated period of time.

## 2.3 IMMIGRANT VISAS ("GREEN CARDS") FOR FOREIGN PHYSICIANS

Many foreign physicians apply for an employment-based green card through the "PERM" labor certification green card process. This three-step process involves:

1. Testing the local labor market and then filing a PERM labor certification application with the U.S. Department of Labor ("DOL");
2. Filing an I-140 immigrant visa petition with the U.S. Citizenship and Immigration Services ("USCIS"); and
3. Filing an I-485 adjustment of status application with the USCIS.

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### 2.3.1 THE “PERM” LABOR CERTIFICATION APPLICATION PROCESS

Under the PERM process, before a U.S. employer may sponsor a foreign national for a green card, it must prove to the U.S. Department of Labor that there are no U.S. workers “ready, willing and able” to perform the job for which the foreign national is being sponsored. This is done through the PERM recruitment process.

There are several mandatory recruitment steps for all PERM applications. There are also additional steps required for “professional” positions, such as for a physician. All recruitment in preparation for filing a PERM application must be performed for at least 30 days. The recruitment must be started no earlier than 180 days before a PERM application is filed, and must be completed at least 30 days before a PERM application is filed. However, for “professional” positions, one of the additional recruitment steps may be performed within 30 days of the filing of a PERM application.

Once a PERM application is filed, the DOL’s new computer system will analyze the application to determine whether it fits the criteria requiring an audit by the DOL. If not, the computer will still randomly select applications for routine audits. Even if the computer system does not flag an application for an audit, a DOL representative may still review the application manually and flag it for an audit. If audited, an employer has only 30 days to respond to the DOL. As such, every employer must assume it will be audited by the DOL and be prepared for such an eventuality.

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#### 2.3.1.1 THE “PERM” PROCESS FOR FOREIGN PHYSICIANS SPONSORED BY A UNIVERSITY

The DOL's labor certification regulations contain a separate procedure for foreign nationals employed as college or university teachers. These procedures are known as "special handling". These special handling procedures can benefit foreign physicians who are being sponsored by university-affiliated hospitals or clinics if the foreign physician has a faculty appointment in addition to his or her clinical responsibilities.

The standard for approving a special handling labor certification application is easier to meet than the standard for a regular labor certification application. For example, instead of showing that no qualified U.S. worker applied for the job, the college or university must merely show that the alien beneficiary is the best-qualified candidate for the position. In addition, the DOL will accept recruitment completed within 18 months before the filing of the special handling labor certification application. This relieves the employer from having to re-advertise for the position.

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#### 2.3.1.2 WAIVER OF THE LABOR MARKET TESTING AND JOB OFFER REQUIREMENTS

For many foreign physicians it may be possible to bypass the labor certification process entirely by requesting a waiver of the job offer requirement because it is in the "national interest" of the United States. Under this process, the foreign physician files an I-140 Immigrant Petition for Alien Worker directly with the USCIS. He or she can do this through their employer or independently. In other words, foreign physicians may sponsor themselves for a “national interest waiver” green card. The foreign physician does this by showing that their work serves the "national interest" (*e.g.*, by improving health care). This process is especially useful in those States that do not permit hospitals to employ physicians directly.

Foreign physicians in J-1 status, who have filed and/or obtained a waiver of the two-year foreign residency requirement through an interested government agency, often employ this immigrant visa option. For

example, criteria used to determine whether an individual's work serves the national interest includes the fact that the foreign physician's services improves this countries' health care, and that an interested government agency has requested a J-1 waiver. A waiver application from an interested government agency is typically supported with extensive documentation on the urgent need for the physician's immediate services to meet a community's primary health care needs, including confirmation that the facility involved is located in a medically disadvantaged community. However, it is important to note that it is not necessary for a foreign physician to obtain his or her two-year foreign residency waiver through an interested government agency in order to qualify for a national interest waiver green card.

To obtain a national interest waiver green card, a foreign physician must comply with the following special requirements:

1. The foreign physician is required to work in a shortage area designated by the Department of Health and Human Services ("HHS") or in a Department of Veterans Affairs ("VA") facility for five years. Note that the VA facility does not have to be in a certified shortage area.
2. The service time must be completed within six years' of the job offer waiver.
3. The foreign physician must obtain a determination from the HHS, VA or another federal agency that has knowledge of the physician's qualifications or from a State Department of Public Health that the physician's work is in the public interest.
4. Unless the foreign physician is working in a VA facility, his or her area of specialty must be in one of the following HHS-specified specialties: family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, or psychiatry.

A foreign physician may file an I-485 Application for Adjustment of Status with the USCIS at the same time as the I-140 petition with national interest waiver request. However, the USCIS will not process the I-485 Application until the foreign physician's five-year period of medical service is completed.

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### 2.3.2 THE IMMIGRANT VISA PETITION AND ADJUSTMENT OF STATUS PROCESS

Once the PERM labor certification application is certified by the DOL, the sponsoring employer files an I-140 Immigrant Petition for Alien Worker with the USCIS. The purpose of an I-140 is to demonstrate to the USCIS that the sponsored employee has the qualifications as set forth in the PERM application and through the ECFMG credentialing process, and that the sponsoring employer has the ability to pay the prevailing wage for the position being sponsored in the geographic area where the position is located.

If visa numbers are available, the sponsored employee can also file an I-485 Application for Adjustment of Status, along with an I-765 Application for an Employment Authorization Document ("EAD") and an I-131 Application for an Advance Parole Travel Document.

- The purpose of the I-485 application is to request that the USCIS convert the applicants' immigration status from "nonimmigrant" to "immigrant", or "permanent resident".
- The purpose of an "EAD" is to allow a foreign national to work as a "prospective immigrant" (*i.e.*, they no longer need to rely on their nonimmigrant status for work authorization).
- The purpose of an "advance parole" travel document is to allow a foreign national to travel outside of the United States as a "prospective immigrant". Without an advance parole, a foreign national will be deemed to have abandoned their green card application when they exit the United States.

The only exception to this rule is if the foreign national is traveling on an “H” or “L” nonimmigrant visa.

One major benefit of the EAD and advance parole applications is that a person on advance parole need not renew their nonimmigrant visas at a U.S. Embassy or consulate. This is seen as a significant benefit by most foreign nationals.

Another major benefit is that after a foreign national’s I-140 has been approved and his or her I-485 has been pending for at least 180 days, the foreign national may transfer his or her green card application to a new employer. This provides some flexibility to a foreign national whose I-485 has been pending for a long time.