Immigration Options for Physicians

By Jennifer Breuer and Eileen Momblanco

The health care workforce in the United States currently is facing a shortage. According to a 2010 report from the Association of American Medical Colleges’s (AAMC) Center for Workforce Studies, demand for physicians will outpace supply through at least 2025.1 A physician shortage already was expected before the Patient Protection and Accountable Care Act (PPACA, also known as health reform) was signed into law in March 2010. According to projections by the Center for Workforce Studies, there will be a shortage of about 63,000 doctors by 2015, with greater shortages on the horizon—91,500 and 130,600 for 2020 and 2025, respectively. Earlier projections had placed the shortage at about 39,600 doctors by 2015. More specifically, the Center for Workforce Studies projects that there will be 45,000 too few primary care physicians—and a shortage of 46,000 surgeons and medical specialists—in the next decade.

Several factors are contributing to the growing demand. In addition to the 32 million Americans who will obtain health insurance if PPACA is fully implemented, 15 million more will become eligible for

Medicare in the coming years. The Census Bureau projects a 36 percent growth in the number of Americans over age 65. Yet despite these shortages, health care employers still face a difficult and lengthy process in obtaining visas and green cards for foreign nationals to fill the U.S. need for health care professionals. This article provides a broad overview of the main visa options available to health care employers for their foreign national physician employees and the challenges employers can face with each of these options.

In general, there may be four visa options for employers who desire to bring in foreign physicians to meet community need.

**H-1B Visa Option**

The H-1B visa classification is reserved for specialty occupations, which are occupations requiring at least a bachelor’s degree in a specific and relevant field. H-1B petitions typically are filed for the following health care professional positions: physicians/residents/fellows, nurses, physical and occupational therapists, pharmacists, speech pathologists, and medical technologists. Below are some of the main requirements for filing H-1B petitions for physicians.

**H-1B Requirements for Physicians/Residents/Fellows**

The Immigration and Nationality Act (INA) permits international medical graduates to be admitted under the H-1B category as practicing physicians, participants in a medical training program, or for research and/or teaching positions. The H-1B requirements differ depending on whether a physician will provide direct patient care or teach or conduct research for a public or nonprofit private educational or research institution or agency. For physicians seeking H-1B classification to primarily provide patient care, the physician must have an employer willing to sponsor him/her, and also must meet the following requirements:

1. The physician must provide evidence that he/she has graduated from an accredited medical school in the United States, has achieved the equivalent degree in medicine from a foreign country, or that he/she has a full and unrestricted medical license from a foreign country;

2. If the physician has not graduated from a U.S. medical school, he/she also must show that he/she has passed the three components of the United States Medical Licensing Examination (USMLE) administered by the Federation of State Medical Boards;

3. The physician must demonstrate proficiency in oral and written English;

4. The physician must have an unrestricted license or other authorization required by the state of intended employment to practice medicine or must otherwise be exempt by law.

**Annual Limitation on H-1B Visas**

INA imposes a limit (referred to as the H-1B cap) of 65,000 on the number of new H-1B visas that may be issued each fiscal year to foreign nationals possessing at least a bachelor’s degree in a specialized field. The H-1B fiscal year runs Oct. 1 to Sept. 30. An additional 20,000 new H-1B visas are made available for foreign nationals who possess a master’s or higher degree from an accredited U.S. university. Employers may begin filing new H-1B petitions with the U.S. Citizenship and Immigration Services (USCIS) for the start of any fiscal year in October, six months in advance of the physician’s intended start date, or April 1st of every fiscal year. Typically, the annual limit is reached well before the end of the fiscal year. For example, for the last H-1B fiscal year (Oct. 1, 2011 to Sept. 30, 2012), the limit on H-1B visas was reached in seven months.

The H-1B cap does not affect extensions of existing H-1B employment status. Thus, employers may extend and amend H-1B status for existing employees,
and hire applicants who currently are employed in H-1B status who previously have been counted toward the H-1B cap during the six years prior to application. Further, the numerical cap does not apply to any H-1B petitions made by institutions of higher education or related or affiliated nonprofit entities (including some academic medical centers), nonprofit research organizations or governmental research organizations.

**TN Visa Option**

In addition to the H-1B visa option, the health care-related immigration provisions of the North American Free Trade Agreement (NAFTA) are a valuable resource to meet health industry demands. The Trade NAFTA (TN) visa classification is a viable option for employers with immediate staffing needs that can be filled by qualified Canadian or Mexican citizens. The following health care professional positions are included in NAFTA: registered nurses, teaching or research physicians, physical therapists, occupational therapists, pharmacists and medical technologists.

TN visa holders are not permitted to have “dual intent” (both nonimmigrant and immigrant intent). Accordingly, TN visa holders cannot pursue U.S. permanent residence (or “green card”) status without a negative impact to their underlying TN status.

**J-1 Visa Option**

Similar to the H-1B visa option, the J-1 visa option is available to physicians specifically seeking to engage in graduate medical training in one of two categories: 1) to participate in a clinical exchange program involving patient contact and care, typically residency and fellowship programs, within a program of graduate medical training conducted by accredited U.S. schools of medicine or scientific institutions; or 2) to participate in a nonclinical training program and engage in teaching, research, consultation, or observation. A nonclinical program is defined as one involving no patient care or only incidental patient care.

In order to obtain a J-1 visa in a clinical exchange program primarily involving patient care, the physician must be sponsored by the Educational Commission for Foreign Medical Graduates (ECFMG), which is the only J-1 exchange program authorized to sponsor J-1 visas for this type of training. The physicians also must meet the following requirements: 1) have adequate prior education and training to participate satisfactorily in the program for which they are coming to the United States; 2) be able to adapt to the educational and cultural environment in which they will be receiving their education or training; 3) have the background, needs, and experiences suitable to the program; 4) have competency in oral and written English; 5) have passed either Parts I and II of the National Board of Medical Examiners Examination or its equivalent; 6) provide a statement of need from the government of the country of their nationality or last legal permanent residence; and 7) submit an agreement or contract from a U.S. accredited medical school, an affiliated hospital, or a scientific institution to provide the accredited graduate medical education.

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7 8 CFR § 214.6.
9 22 CFR § 62.27(a).
10 22 CFR § 62.27(c).
11 [http://www.ecfmg.org](http://www.ecfmg.org)
12 22 CFR § 62.27(b).
For nonclinical programs, a U.S. university or academic medical center which has been designated an exchange visitor program by the U.S. Department of State is authorized to issue the requisite J-1 form (Form DS-2019) to alien physicians in order to participate in observation, consultation, teaching, or research. In the J-1 documentation, the responsible officer of the exchange visitor program or the dean of the accredited U.S. medical school must certify, among other requirements, that the program in which the physician is to be engaged is solely for the purpose of observation, consultation, teaching, or research and that no element of patient care is involved.13

J-1 physicians may participate in an exchange program in the U.S. for a maximum of seven years, unless a physician can demonstrate to the Secretary of State that the country to which he/she will return at the end of additional education or training has an exceptional need for an individual with such additional qualification.

The Two-Year Foreign Residency Requirement and J-1 Waiver Applications

Any physician coming to the United States with a J-1 visa for the purpose of receiving clinical graduate medical education or training automatically is subject to the two-year home-country physical presence requirement.14 Accordingly, physicians subject to this requirement must return to their home country for at least two years before they can pursue a different work visa classification or a green card in the United States. Physicians coming to the United States for the purpose of observation, consultation, teaching, or research are not automatically subject to the two-year home-country physical presence requirement, but may be subject if they are financed by their home country government or pursuing a field of study set forth on their country’s Exchange Visitor Skills List.15

The two-year home-country physical presence requirement for J-1 physicians may be waived in the following circumstances: 1) if the physician can demonstrate that he/she cannot return to the country of

13 22 CFR § 62.27(c).
14 INA 212(e).
15 http://travel.state.gov/visa/temp/types/types_4514.html

his/her nationality or last residence because he/she would be subject to persecution on account of race, religion, or political opinion; 2) if the physician can prove that returning to his/her country would result in “exceptional hardship” to members of his/her immediate family who are U.S. citizens or permanent residents; or 3) if the physician is sponsored by an “interested governmental agency.”16 Generally, the waiver application is first filed with the U.S. Department of State. The State Department may then transmit a favorable waiver recommendation to the USCIS, which ultimately issues the J-1 waiver approval notice. The entire J-1 waiver process could take anywhere from six months to a year, depending on current government processing times. Because of the two-year home-country physical presence requirement and the length of time and costs associated with filing a J-1 waiver application, most employers choose to pursue H-1B visas on behalf of their physician employees instead of J-1 visas.

The Green Card Process for Physicians

If a physician is not an individual of extraordinary ability17 or eligible for national interest waiver,18 then he/she must be sponsored by an employer in order to obtain a green card in the United States. Program Electronic Review Management (PERM)19 is the first of three stages of the employer-sponsored green card process. As part of the PERM process, the U.S. Department of Labor (DOL) requires that employers prove, through a test of the labor market, that there are no U.S. workers who are qualified, willing, and able to fill the job position held by the foreign national. The employer is required to test the U.S. labor market by

16 INA 212(e)(iii).
17 8 CFR § 204.5(h). The extraordinary ability immigrant category is reserved for persons with extraordinary ability in the sciences, arts, education, business, or athletics with extensive documentation showing sustained national or international acclaim and recognition in their fields of expertise.
18 8 CFR § 204.12. National interest waivers are available to physicians who are willing to work for five years in designated medically underserved areas or Veterans Affairs facilities.
19 PERM is the online alien labor certification application process implemented by the U.S. Department of Labor on March 28, 2005.
posting advertisements ("recruitment") for the job position based on DOL specifications. The PERM recruitment period is approximately 60 days. If, after the 60-day period, the employer has not identified a qualified U.S. worker who is willing and available to fill the offered position, the PERM application may be filed with the DOL. Please note that, as with the H-1B classification, the PERM application requires the employer to attest to the DOL that it will pay the foreign national 100 percent of the prevailing wage for the sponsored position by the time that the foreign national’s permanent residence status has been approved.

Once the PERM application is certified by DOL, the second stage of the green card process is the Immigrant Petition for Alien Worker or Form I-140, which is filed with the USCIS. In this petition, the employer must confirm that the sponsored foreign national possesses the requisite qualifications for the job position certified during the PERM process. The third stage of the green card process is known as "Adjustment of Status" or Form I-485. This stage of the green card process requires the foreign national to confirm that he/she is eligible for a green card and is not subject to immigration-related grounds of inadmissibility for prior issues with immigration history, criminal convictions, or health-related grounds.

An analysis of the level of education and experience required for the position and the country of nationality of the foreign national will determine how quickly a green card case will be processed. With these considerations in mind, the overall process could potentially take four to seven or more years before the foreign national is issued a green card.

**Significant Government Backlogs for Green Card Applications**

The overall processing times for the entire green card process vary on a monthly basis. The priority date is established on the date that the PERM application (the first stage of the green card process) is filed with DOL. This date is critical because it establishes the foreign national’s place in line for a green card. There are only a certain number of green cards issued per fiscal year, per country of birth, and per immigrant visa category. If there are more people who apply for a green card than there are green cards available, a backlog forms and applications are adjudicated based on the priority date. This is known as immigrant visa "retrogression." The State Department issues a visa bulletin every month which indicates the status of the backlogs that month for green card processing. The foreign national may only file the Adjustment of Status application if in the United States or apply for the immigrant visa at a U.S. embassy or consulate overseas, in the month in which the foreign national’s priority date is "current."

If the foreign national is in the United States and does not have underlying nonimmigrant status, then the employer will need to wait for the foreign national to obtain employment authorization. Once the foreign national is able to file the Adjustment of Status application, he/she can apply for a temporary Employment Authorization Document (EAD), which is issued in one-year increments until the green card has been approved. However, given the current retrogression of immigrant visa numbers in a majority of immigrant visa categories, this could potentially be a delay of more than a couple of years. Direct sponsorship of a green card, then, without concurrent sponsorship of an H-1B visa, is not a good short-term option, since the employer likely will have to wait for more than a couple of years before the foreign national can enter the United States and begin working.

Employers should consider the fact that H-1B visas and green cards are for "at-will" employment, and there are no immigration laws that would prevent the foreign national from leaving the employer to work for a different sponsoring employer. Reimbursement agreements must be considered and drafted carefully; employers could be fined if they require payment of a penalty for leaving the employer's employ before a date agreed to by the nonimmigrant and the employer.

In deciding whether to pursue permanent residency for a physician, an employer must consider the lengthy green card processing times and whether the need for the foreign national will continue to exist.

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20 [http://www.uscis.gov/i-140](http://www.uscis.gov/i-140)
21 [http://www.uscis.gov/i-485](http://www.uscis.gov/i-485)
22 [http://travel.state.gov/visa/bulletin/bulletin_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html)
years from now. Some employers may want to start the green card process earlier in order to later benefit when visa numbers become available. Overall, pursuing green card sponsorship as a means to employ a foreign national physician can be a long-term strategy lasting a few to several years. In the interim, sponsoring employers will need to file petitions for underlying work visa status, such as H-1B status, in order for the physician to continue working while awaiting final green card approval.