America's Healthcare Professional Shortage Crisis: Can the U.S. Immigration System Help Treat the Problem?

By Sheila T. Minihane & Charles R. Baesler, Jr.

As the U.S. population ages and entrance into the health care professional market remains static, the United States, Kentucky included, is facing a serious healthcare professional shortage. The Bureau of Labor Statistics reports that our nation's health care system will require more than 1.1 million new nurses through 2012 and, without aggressive intervention, will fall 30 percent below the nation's anticipated needs.[1] This shortage is often most apparent and critical in rural areas which in many cases are experiencing a complete absence of critical healthcare professionals, most notably physicians. The shortage of health care professionals directly impacts patient care by leading to overcrowding due to inability to handle patient volume, increased wait times, the unavailability of certain surgeries and procedures, discontinued patient care programs, and in dire cases a complete lack of access to certain types of healthcare.

One method of addressing the health care professional shortage is attracting talent from foreign countries. The U.S. has long relied on foreign health care workers to supplement our healthcare labor force and continues to do so where options exist. For example, foreign trained registered nurses accounted for 10-15 percent of the nation's newly licensed nurses, and 20-25 percent of our physicians are foreign born.[2] Many of the immigration options that existed until recently however, have been stymied or eliminated, leaving U.S. health care providers in a precarious situation as they look to the future and their staffing needs. Below is an overview of the arsenal of immigration options that may be available to healthcare employers as they address their staffing needs and proposed legislation that may help alleviate some of the bureaucracy.

Current Immigration Options Available for Health Care Workers

The U.S. immigration system is comprised of an alphabet soup of potential immigration options that healthcare-related employers can utilize to sponsor foreign workers in an to attempt to fulfill their labor needs. The current visa framework has significant limitations however, in that the options are minimal, the processes are often burdensome and difficult to navigate, and are subject to numerical caps and severe backlogs. As has transpired in the past few years, the rules, processes and backlogs can change dramatically and on a moment's notice, often leaving employers who have devoted significant time and resources to the sponsorship process without the critical health care professionals they need.

Nurses, Physical Therapists and Related Health Care Professionals

As a practical matter, there are few temporary immigration options for the sponsorship of nurses and allied health care professionals such as physical and occupational therapists. Essentially these workers must fit within our current immigration framework with all of its limitations and barriers.

H-1B specialty occupation category

The H-1B visa is for specialty occupations, essentially professional positions which require a bachelor's degree or higher in a specific field.[3] This category is available to some healthcare professionals such as doctors (provided other stringent requirements are met as discussed below), physical and occupational therapists, pharmacists and dentists. Except for limited managerial or specialized positions however, this option is not available to Registered Nurses, as most employers require an associate's rather than a bachelor's degree. For those positions where the H-1B is an option, there are significant limitations on this category including an annual numerical cap of 65,000. This fiscal year, the 65,000 numerical cap was exceeded in one day based on U.S. Citizenship and Immigration Services' receipt of over 150,000 applications.[4] But for limited exceptions such for as institutions of higher education or individuals already employed in the U.S. in H-1B status, there are currently no H-1Bs available until October 2008. The H-1B visa blackout is placing great strain on employers in need of highly skilled workers across the marketplace including healthcare organizations.

H-1C Health Care Professional Shortage Program

As noted above, Registered Nurses represent one of the greatest labor shortage occupations in the healthcare industry. They do not qualify for the H-1B visa and

IMMIGRATION LAW

there are very few other temporary immigration options available for this job. Under the H-1C program, qualifying hospitals in Health Professional Shortage Areas (HPSAs) are permitted to employ foreign workers as Registered Nurses for up to three years.[5] Few entities qualify for the H-1C however, and thus it is of limited applicability. Among other requirements, the sponsoring healthcare institution must demonstrate that it is in a designed HPSA area, has a specific number of acute care beds, and meets specific Medicaid and Medicare population percentage requirements. No more than 500 H-1C visas can be granted each year, and of these, only 25 H-1C visas are available in states with a population of less than 9 million, such as Kentucky. Given these restrictions, the H-1C is a nearly useless staffing tool for healthcare institutions.

Trade Nafta (TN) category

The TN category permits Canadian and Mexican citizens to obtain temporary work authorization in the United States in designated professions.[6] The list of eligible professionals includes Registered Nurses provided they can demonstrate they have earned a Licenciatura degree or state or provincial licensure either in the U.S. or in their home country. The TN is also available to several other healthcare professional occupations including dentists, dieticians, medical technologists, nutritionists, occupational therapists, pharmacists, physicians (teaching and research only), physical therapists, psychologists, recreational therapists, and veterinarians.[7] This category presents a viable option, but its use is limited by the fact that in most cases, foreign healthcare workers, and most notably Registered Nurses, are from countries other than Canada or Mexico such as the Philippines, India and China, which cannot utilize the TN category.

Evaluation of Foreign Health Care Credentials: The VisaScreen® Certificate

The initial hurdle most foreign-educated health care workers face before they can be granted any of the temporary categories discussed above or U.S. permanent residence is the Visa Screen.® The Visa Screen® certification process includes testing and a review of the candidate's education, licensure and English language skills to assess whether it is comparable to that required of U.S. healthcare workers.[8] While such a requirement is not unreasonable in its own right, the process for obtaining the certificate is costly, bureaucratic and extremely time consuming. Testing occurs only at designated times throughout the year which varies based upon the foreign national's home country and is limited in many areas. The process can take several months, which adds additional delay to the ability to fill shortage occupation areas.

Permanent Residence Options and the Current Backlog

Schedule A for Registered Nurses and Physical Therapists

One of the paradoxes of immigration law is that while no *temporary* visa options exist for Registered Nurses, the U.S. Department of Labor has acknowledged that the chronic shortage of nurses and physical therapists in the U.S. warrants a streamlined process for *permanent* residents in these occupations as sponsorship would not adversely impact the wages and working conditions of U.S. workers. Thus, as required of many other permanent residence categories, employers need not test the U.S. labor market and recruit for nurses and physical therapists under "Schedule A."[9] The employer is subject to specific requirements with respect to wages, working conditions, public notice and related obligations. In addition, the foreign national nurse or physical therapist must meet specific academic, licensure and testing requirements for approval including the Visa Screen® certification process discussed above.

For many years, Schedule A was a viable tool to sponsor Registered Nurses and Physical Therapists for work in the U.S. However, in late 2006, like many employment-based permanent residence categories, the Schedule A category experienced a dramatic backlog. These backlogs have made it all the more important to start the process to establish the candidate's place in line, but employers must now wait a significant amount of time until the individual can actually enter the U.S. as a permanent residence and begin employment.

Testing the U.S. Labor Market: PERM Labor Certification

For those health care occupations that don't qualify under Schedule A, employers are required to test the U.S. labor market and prove that no minimally qualified U.S. workers are willing and available to perform the job. The U.S. Department of Labor issued new regulations and an online application process a few years ago that have made this process somewhat more predictable, streamlined, and efficient making labor certification a viable option for employers in need of healthcare professionals.[10] However, current visa backlogs in the permanent residence system have weakened the effectiveness of this option.

The Permanent Residence Backlog

U.S. immigration law sets limits on how many employment-based permanent resident cases may be approved each fiscal year. Currently, only 140,000 visas are available per year which are divided into five "preference categories" with jobs that require an advanced degree given higher priority followed by skilled and unskilled labor positions.[11] If the numerical limit is exceeded in a particular category for a particular nationality, a backlog develops. The State Department then creates a waiting list that applicants are placed on until they can proceed with the permanent residence process. Individuals from countries with high rates of immigration to the U.S. such as India, China, Mexico and the Philippines where many foreign healthcare workers come from are subject to much longer waiting periods than those from countries with low rates of immigration such as Europe or Canada.[12] These backlogs are extremely unpredictable, and often can change with very little advance warning. Thus, employers can complete the process of testing the U.S. labor market and showing that no qualified U.S. workers are available, but must still wait years until individuals can be processed to come to the U.S. to begin employment. The backlogs have been at an all time high in terms of wait times in the past few years, and serious reform to the system is needed.

Immigration Options for Physicians

The J-1 Exchange Visitor Category

Under the Immigration and Nationality Act (INA), non-citizen physicians who obtain their medical training abroad may come to the United States as nonimmigrant Exchange Visitors (J-1) to undertake clinical education or training in an area of medical specialty.[13] In the majority of cases, J-1 Exchange Visitors are required to return to their home country, or country of last residence, for at least two years after completion of the J-1 program. This requirement must be satisfied, or waived, before the physicians will be eligible to work in the United States on a temporary or perma-

nent basis.[14] For example, a physician will be subject to the two-year home residency requirement if he or she is going to engage in research or scholarship, and the skills to be obtained during such research or scholarship have been determined by the U.S. Department of State to be in short supply in the alien's home country.[15] In addition, an alien who comes to the United States in J-1 status to receive graduate medical training will always be subject to this requirement.[16]

Notwithstanding the two-year home residency requirement, U.S. Citizenship and Immigration Services (USCIS) may grant a waiver of the requirement if the U.S. Department of State makes a favorable recommendation to the USCIS that the home residency requirement should be waived.[17] For physicians who are employed in J-1 status as medical researchers or in other non-clinical capacities, there are a number of permissible bases for a waiver. One such waiver is the "no objection waiver," in which the alien's home country government indicates that it does not object to a waiver, and if the J-1 Exchange Visitor Program was not funded by the United States government.[18] In addition, an interested U.S. agency may request a waiver if the agency believes that it is in the public interest for the physician to receive such a waiver. Finally, the alien may obtain a waiver in unusual circumstances if he or she can show exceptional hardship on a U.S. citizen or U.S. permanent resident spouse or child, or if the alien will suffer persecution if he or she is required to return home.[19]

For J-1 exchange scholars who obtained medical training in the United States, the only way to obtain a waiver is through a recommendation from an interested state or federal agency. Such recommendation can only be obtained if the alien will be employed, providing full-time, approved medical services, in a designated Healthcare Professional Shortage Area (HPSA) or Medical Underserved Area (MUA).[20]

The procedure for applying for and obtaining the waiver for international medical graduates is detailed and a somewhat lengthy process, which involves applications to state agencies, U.S. Department of State and USCIS. In order to qualify for a waiver, the international medical graduate must first obtain a no-objection letter from the country to which he or she must otherwise return. In addition, the physician must accept employment at a qualified health care facility within 90 days of receiving the waiver, and the physician must practice primary care or in an approved specialty medicine for a total of three full years in the shortage area as set forth in the various applications.[21]

Of course, obtaining the waiver is not the only way to address the two-year home residency requirement. While it is not the route most commonly used, the physician (and any other individual who is subject to the two-year home residency requirement) may satisfy the requirement by simply returning to the person's last country of residence or nationality for at least two years. For physicians engaged in clinical practice, the "return country" must be the country which provided certain documentary support for the physician to undertake his or her J-1 fellowship or residency program.[22]

The H-1B Specialty Occupation Category

As described above, the H-1B category is available to professionals, including physicians who have the requisite medical education and appropriate training for the position.[23] An international medical graduate who satisfies the two-year home residency requirement, or who has obtained a waiver of that requirement, may be eligible to be employed in H-1B status. The H-1B category is available for three years, and may be renewed for an additional three years.[24] The physician's H-1B status may, in some circumstances, be extended for one year or even three-year increments beyond the usual six-year limit, provided that the physician has initiated the permanent residency filing process prior to the end of his or her fifth year of H-1B status.[25]

The annual cap of 65,000 H-1Bs per year described earlier has created a shortage of specialty occupation workers in the United States. However, a physician is eligible for a change of status from J-1 to H-1B if the physician applies for and obtains a waiver of the two-year foreign residency requirement upon request by an interested federal or state agency, based on the physician's agreement to work for three years in a HPSA or MUA.[26] Thus, foreign medical graduates have a way to avoid the restrictions on the numerical cap if they will agree to serve in an underserved area.

The physician must, during the first three years of H-1B, comply with the requirements of the waiver, if obtained, which will require full-time work in the appropriate HPSA/MUA. Failure to fulfill the three years of employment in the appropriate and approved position of employment may, in some circumstances, result in the physician's failure to obtain permanent residency or other future immigration status.

Trade Nafta (TN) Category for Medical Researchers

Some Canadian and Mexican nationals are eligible to come to the United States to work in certain designated professional positions, usually for periods not to exceed one year. TN status may be renewed indefinitely as long as the individual intends to remain temporarily. Physicians are not eligible to come to the United States in TN status to work primarily in clinical care. However, foreign physicians may enter the United States under the TN category, but only to teach or conduct research, provided there is no or only incidental patient care. They may not enter the United States to practice medicine under TN even if they graduated from a U.S. medical school.[27]

Permanent Residence Options for Physicians

Physicians have a number of options when considering permanent residency. First, a physician who is employed in pri-

Sheila Minihane is a partner in the Immigration Practice Group at Stoll Keenon Ogden PLLC in Louisville. Her practice focuses on guiding employers through the U.S. immigration sponsorship process and assisting companies with immigration issues related to corporate reorganizations, tax, I-9 compliance, and employment issues affecting foreign nationals. Ms. Minihane received her law degree from the University of Michigan Law School in 2000 and practiced immigration law with Sidley Austin in Chicago for three years prior to joining Stoll Keenon Ogden.

Charles Baesler is a partner in Stoll Keenon Ogden PLLC and is chair of the firm's Immigration Practice Group. He is also currently chair of the American Immigration Lawyers Association MidSouth Chapter. Mr. Baesler represents employers before the Department of Homeland Security, the Department of Labor, and U.S. consulates overseas in obtaining employment authorization for various professionals and skilled workers.

vate practice may, similar to the allied professionals describe above, be sponsored by his or her employer under an employment-based petition that is based on a labor certification. Alternatively, a physician who is employed as a faculty member at a university hospital or health care facility may be sponsored under a labor condition application process which is less onerous on the university employer than the process to which other employers are subjected.

In addition, some physicians (especially those who have worked in HPSAs or MUAs) are eligible for an exemption from the labor certification process if they work in an MUA five years.[28] Such physicians obtain a "National interest waiver" of the labor certification requirement. To be eligible for this benefit, the physician must agree to work full-time for at least five years, not including time on a J-1 visa, before he or she is eligible for adjustment of status to permanent residency. Further, the physician must complete the five years of service within a six-year period from the time the person obtains employment authorization or from the time of the approval of the employer's immigrant petition.[29]

Also, physicians in academia are eligible for additional permanent residency categories if they can demonstrate a certain level of international renown in their particular area of specialty.[30] A physician may be qualified as such an "outstanding professor or researcher" if he or she is recognized internationally as outstanding in a specific academic area; has at least three years of experience in teaching or research in the area; and seeks to work in the U.S. in a tenured, tenure-track or comparable position for a university or private sector employer which employees at least three persons full-time in research activities.[31] In order to qualify as an outstanding researcher, a physician should present evidence of at least two of the following types of materials:

- Documentation of receipt of major prizes or awards;
- Documentation of membership in associations that require outstanding achievement;
- Published material in professional publications written by others about the person's work in the field;
- Evidence of the individual's participation as a judge of the work of others in the same or allied field;
- Evidence of the individual's original scientific or scholarly contribution; or
- Evidence of the individual's authorship of scholarly books or articles in the academic field.

Proposed Legislation to Alleviate the Health Care Shortage

Over the past several years, Congress has taken up the issue of comprehensive immigration reform on numerous occasions but it has failed to pass legislation in this arena time and time again. In the current political climate and with elections on the horizon, the general view is that a comprehensive bill that encompasses all aspects of immigration reform including immigration benefits, enforcement and undocumented workers has little to no chance of success. Many supporters of immigration reform do believe however, that immigration legislation limited to highly skilled professional workers has a good chance of success. The *Securing Knowledge Innovation and Leadership Act of 2006* or "SKIL Bill" is targeted at increasing the legal immigration of scientific, technology, engineering, and mathematics workers by increasing the quotas on the H-1B visa discussed above, eliminating green card caps for certain advanced degree holders to alleviate the backlog, and streamlining the processing of employment-based green cards.[32] Anti-immigration advocates have spoken loud and clear on their feelings on immigration reform, and if any positive change is to be seen, it is up to employers within the healthcare industry to make their needs and demands known. ■

ENDNOTES

1. American Association of Colleges of Nursing, http://www.aacn.nche.edu/Media/FactSheets/NursingShortage.htm.
2. Health Worker Shortages and the Potential of Immigration Policy, *Immigration Policy in Focus,* Vol. 3, Issue 1, February 2004, http://www.ailf.org/ipc/ipf031104.asp.
3. INA §214(i)(1); 8 C.F.R. §214.2(h)(4)(ii).
4. USCIS Reaches FY 2008 H-1B Cap. http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf.
5. INA §101(a)(15)(H)(i)(c); 8 C.F.R. §214.2(h)(3).
6. 8 C.F.R. §214.6.
7. NAFTA Appendix 1603.D.1.
8. Commission on Graduates of Foreign Nursing Schools (CGFNS) Visa Screen Program, http://www.cgfns.org/sections/programs/vs/.
9. 20 C.F.R. §656.15.
10. 20 C.F.R. 656.
11. INA §203.
12. Visa Bulletin, http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.
13. INA §101(a)(15)(J); 22 CFR §62.20, §62.21, §62.24.
14. INA §212(e); 8 USC §1182(e).
15. The most recent "skills list" governing programs can be found at 62 FR 2447 *et seq*. (Jan. 16, 1997).
16. INA §212(e); 8 USC §1182(e).
17. 8 CFR §212.7(c); 22 CFR §41.63(a)(2) *et seq*.
18. 22 CFR §62.2.
19. 8 CFR §209.2(b).
20. 22 CFR §41.63.
21. 22 CFR §41.63 *et seq*.
22. INA §212(e).
23. 8 USC §1101(a)(15)(H)(i)(b).
24. 8 CFR §214.2(h)(13)(iii).
25. 8 USC 1184(g)(8)(C).
26. 8 USC 1184(l)(2)(A).
27. For guidance on this issue, see the U.S. Department of State's Foreign Affairs Manual ("FAM"), 9 FAM 41.53 N.4.2-7. *See also* letter, Bednarz, Chief of the NIV Branch of Adjudications, HQ 1815-C (March 13, 1995).
28. INA §203(B)(ii).
29. 8 CFR §204.12(a)-(c)
30. INA §203(b)(1)(B).
31. 8 USC §1101 et seq.
32. S. 2691 (109th), Securing Knowledge, Innovation, and Leadership Act of 2006.