As demand for healthcare professionals continues to rise, more and more healthcare employers find themselves dealing with candidates for positions as physicians, nurses, therapists and other healthcare professionals who are not U.S. citizens or permanent residents. In order to deal with increasing shortages, employers have increasingly had to develop policies for utilizing the immigration system to sponsor foreign national workers to come to the United States and be employed at their facilities. Similarly, many employers find themselves wanting to hire foreign nationals who have come to the United States for schooling in the healthcare professions, and who now require their sponsorship in order to continue employment in the United States.

This article will explore current issues in immigration for healthcare professionals.

I. The Basics of Employment-based Immigration

Many non-U.S. citizens recruited by healthcare organizations will already have lawful permanent resident status, otherwise know as the “green card.” “Green card” holders, referred to as “permanent residents,” have the unrestricted right to live and work in the United States, so do not present an immigration issue for the employer. The employer can employ a permanent resident on the same basis as a U.S. citizen. Indeed, it is unlawful for an employer to discriminate against permanent residents in making hiring decisions. Individuals may have obtained permanent resident status through a family member, another employer, or through other means, but once the person holds permanent resident status, the employer no longer needs to be concerned with immigration sponsorship.

In addition to permanent residents, there are many foreign nationals in the United States in various nonimmigrant status. A nonimmigrant status, sometimes referred to as a nonimmigrant visa (though technically, the visa is only the entry document, and status is what a person holds in the United States), all represent specific, temporary purposes for which an
individual may come to the United States. Each temporary status is given a letter designator, corresponding to the list in the statute which defines the various nonimmigrant categories. Some of the commonly-encountered nonimmigrant categories are the following:

**B-1 and B-2 Visitor for Business and Pleasure**

Visitors for business and pleasure are just that: visitors. They are allowed to be in the United States either to pursue business activities for an overseas employer, or recreational activities, but not to be employed or attend school. Some business activities may bring the foreign nationals into contact with U.S. employers, as when foreign national physicians come to observe the practice of medicine in the United States. Foreign nationals in B-1 or B-2 status may apply for positions while visiting. Some even enter the United States in order to take credentialing and licensing examinations in their fields. While it is not lawful for individuals in these statuses to be employed while they hold that status, an employer may be able to petition for such foreign nationals to be granted an employment-authorized status.

**F-1 Students**

F-1 nonimmigrants are students at academic institutions. They may be students at a secondary, undergraduate or postgraduate level. Many students will be eligible for a period of work authorization at the conclusion of their studies, referred to as “practical training,” “optional practical training,” or “OPT.” This employment authorization allows an individual to commence employment without the need for any sponsorship by the employer, because the employment authorization is administered between the school the person is attending and Citizenship and Immigration Services. Employers considering hiring a foreign national with practical training, however, should be aware that they will need to sponsor the individual for an appropriate employment-authorized visa prior to the conclusion of their practical training period in order for the person to be able to continue employment with them.

**H-1B Professional Workers**

The H-1B nonimmigrant status is for foreign nationals who will be employed in a “specialty occupation,” defined as an occupation for which a bachelor’s degree in a specific field is required to enter the occupation. For example, the position of physical therapist is a specialty occupation, because a bachelor’s degree in physical therapy, or a graduate-level degree, is required for employment in the field. The position of registered nurse, however, is usually not considered to be a specialty occupation, because the minimum requirement in order to be licensed as an R.N. is only an associate’s degree. See the discussion of special issues for nurses below.

While the H-1B category is, generally, a very useful visa category for employers wishing to sponsor foreign nationals for employment in the United States, there are several important restrictions of which employers must be aware. Extra filing fees, prevailing wage requirements, and limitations on the number of H-1Bs who may be admitted to the United States each year all make planning for the employment of foreign nationals in H-1B status more complicated than simply filing a petition on behalf of a particular foreign national.
J-1 Exchange Visitors

The exchange visitor category includes a number of different subcategories, including trainees, academic students, professors and researchers, as well as medical residents and fellows. While the J-1 visa may be easier to qualify for than certain other categories, it contains an important drawback: many individuals who come to the United States in J-1 status are required to return to their home country for a period of two years prior to obtaining certain other work-authorized nonimmigrant status, or to obtaining permanent residence. More detail can be found below in the discussion of J-1 issues for physicians.

O-1 Foreign Nationals of Extraordinary Ability

The O-1 category is for those nonimmigrants who have reached the top of their field. This field could be medical research, or could be in the practice of medicine. The person qualified for O-1 status will have sustained national or international recognition of his or her accomplishments in the field, and will be required to prepare substantial documentation of his or her achievements. The O-1 is particularly notable in that a person who is subject to the two-year foreign residence requirement because of a prior J-1 visa may qualify for O-1 in spite of the two-year requirement.

TN-1 NAFTA Professionals

The North American Free Trade Agreement created a special visa category for citizens of Canada and Mexico. The TN-1 category, as it is known, allows Canadian and Mexican professionals in a prescribed set of occupations (including, among others, nurses, physical therapists, medical technologists, professors and physicians conducting research) to come to the United States temporarily. There are generally streamlined procedures for obtaining TN-1 status, making it very useful for those individuals who qualify based on the list of occupations.

Employment-Based Immigrant Process

The process of immigrating through employment in the United States generally involves either documentation that there are no qualified U.S. workers available and interested for the employment which the foreign national will be taking in the United States, or documentation that the foreign national falls within one of the exceptions to that requirement. The process of obtaining a determination that a foreign national’s employment will not displace a U.S. worker is known as a “labor certification.” In order to obtain labor certification, the employer must show that it has recruited to find a U.S. worker, but has been unsuccessful within the last six months. Application is made to the Department of Labor, which reviews the employer’s attestations as to the recruitment steps that it took, the prevailing wage it determined for the occupation, and the employer’s job requirements to ensure that they are normal for the occupation. If the Department of Labor is satisfied that the employer conducted a good faith recruiting effort, it will issue a labor certification. If not, it will order an audit. In the event of an audit, the employer will be required to produce evidence to support its attestations regarding the recruitment steps it took. The employer’s recruiting steps must include two Sunday advertisements in a newspaper, along with several other prescribed recruiting steps such as attending job fairs, advertising on websites, and retaining head hunters.
In order to avoid the labor certification process, the employer must be eligible to file for the foreign national in one of the categories which does not require labor certification. Physical therapists and nurses, for example, are pre-certified, so that the employer is not required to obtain an individual labor certification. Rather, the employer simply documents to Citizenship and Immigration Services that it is offering a position of either registered nurse or physical therapist to the foreign national, and that the foreign national is qualified for those positions.

Another alternative to labor certification is showing that the individual possesses a very high level of qualifications, similar to the standard for the O-1 nonimmigrant status. The individual may either possess extraordinary ability, or the slightly lower exceptional ability. Physicians conducting research, or other researchers in the healthcare organization, can also qualify in the “outstanding researcher or professor” category.

Finally, labor certification is not required of physicians who agree to work in a health professional shortage area in a primary care specialization for a period of at least five years. They are granted permanent residence at the conclusion of their five years of service in the shortage area.

II. Strategies for Immigrant Professional Nurses

Immigration Issues

The central issue facing immigrant nurses and their prospective employers is that there is no visa specifically designed to allow nurses to work temporarily in the United States, though there is a “short cut” to permanent residence (a “green card”) for immigrant nurses. A strategy based on temporary visas, therefore, will have to work around the employment restrictions of temporary visa categories not designed to allow the full-time employment of an immigrant nurse. Fortunately, the permanent residence strategy provides a way for immigrant nurses to enter the U.S. and work for a sponsoring employer, even though the processing times are such that immediate needs for immigration to the U.S. for employment cannot be met.

Temporary Visa Strategies

The most common type of working visa for entry into the United States, the H-1B, is generally not usable for employment of professional nurses. To qualify for H-1B issuance, an occupation must require a bachelor’s degree in a specific field as the minimum qualification necessary to enter the occupation. Whether the nurse actually holds a Bachelor of Science in Nursing (BSN) or equivalent foreign degree is irrelevant, because the occupation of “nurse” does not, generally, require a BSN for entry into the profession (indeed, the only state licensing authority that requires a BSN in order to obtain a nursing license is North Dakota). Hence, the only categories of nursing professionals who are able to obtain H-1B status are those whose positions, arguably, require at least a bachelor’s degree (for example, nurse practitioners, nurse anesthetists and professors of nursing).

There used to be a special category of temporary visas just for nurses, the H-1A category, but that category was allowed to expire in 1996. A replacement program, the so-called “H-1C” category, only applies to nurses who will serve in acute care facilities in “medically underserved
areas,” so is only potentially useful to a dozen hospitals in the entire United States. Restrictive attestation requirements also make the H-1C category somewhat unattractive, even for those locations; the visas are also strictly numerically limited.

There is one temporary visa category that does allow employment of professional nurses, called the “TN” category. Because this visa category was created by the North American Free Trade Agreement, only nurses who are Canadian or Mexican nationals may enter in this category. For Canadian nurses, procedures are straightforward, as the visa may be obtained at the border as the nurse enters the United States. For Mexican nurses, the nurse must obtain a visa in Mexico and enter the United States.

For non-Canadian and Mexican nationals, there are three visa categories that can be used in order to enter the United States, though none is designed to allow the full-time, long-term employment of nurses.

The first option is to bring foreign nurses to the United States for an academic program, such as a BSN program, using the student visa (F-1). Students, generally, can work part time (up to 20 hours per week) while “on campus,” and can be authorized for “practical training” at other locations during the course of study. Nurses wishing to enter may want to apply to a BSN program to enter the United States and improve their credentials, and employers may wish to partner with local nursing schools to offer placements to student nurses. This option has the advantage that, for licensing and immigration purposes, many foreign nurses will require some extra coursework not normally part of the nursing education in their country of origin in order to have the equivalent of a U.S. nursing degree.

The second option is to use the J-1 trainee visa, which allows entry of individuals for up to 18 months to receive training in a specific area. Such trainee programs are administered by outside program sponsors that approve training programs and issue visa documentation for nurses. The trainee category of J-1 visas will, generally, require establishing a training program of some sort (this might be a combination of coursework at a local nursing school, rotations at the hospital and seminars) and limit “productive” work to that which is necessarily required for the training program.

The third option is the H-2B category, which is for temporary workers in occupations that do not require a bachelor’s degree for entry into the occupation. The problem with this category is that, unlike the H-1B where the position being filled by the foreign worker may be a permanent position, the H-2B is only for workers coming to fill a “one-time,” “intermittent,” “peak-load” or “seasonal” need. (Examples of the H-2B include resort workers only needed for the summer, or cannery workers only needed during the season for a particular fish.) Assuming an employer wishes to use immigrant nurses to fill only a temporary need (generally, lasting less than 10 months), this category may be worth exploring.

One practical difficulty with the student, trainee and H-2B options is that these visas generally require the nurse to demonstrate that he or she intends to return to the home country after his or her education, training or temporary work, which may mean that some nurses will not be able to obtain the visas needed to come to the U.S. temporarily, and that these categories may be inconsistent with an employer’s wish to have the nurses for long-term employment.
Immigrant Visa Strategy

A more elaborate procedure, which should be considered as part of employer’s planning to meet longer-term nursing needs, is the strategy of recruiting nurses from abroad, but bringing them to the United States only after they have obtained permanent residence. Ideally, an employer would file an immigrant visa petition with the U.S. Citizenship & Immigration Services offering a position as a registered nurse to an identified candidate overseas. This immigrant visa petition will usually be adjudicated within four to six months, and notice cabled to the State Department for transmission to the U.S. Embassy or consulate in the nurse’s home country. Allowing another three to four months for the approved petition to be sent to the relevant consulate and an immigrant visa interview to be arranged, an immigrant nurse could be working for the employer as a permanent resident within seven to twelve months of having been identified. These processing times assume that quota limitations on the number of employment-based visas which can be issued each year do not delay the immigrant visa interview. Currently, quota backlogs for prospective immigrants born in the Philippines, India and China (the three largest immigrant nurse sending countries) will add at least one and possibly more years to the overall processing time, so employers may wish to consider prospective nurses from other countries.

For a facility with an ongoing need for nursing professionals, advance planning will make it feasible to use immigrant nurses to meet at least part of their nursing staff needs.

Non-Immigration Issues for International Nurses

While immigration issues are foremost when considering international relocation as a nurse or considering hiring immigrant nurses as an employer, there are important non-immigration issues that relate to the immigration process and that must be addressed before the nurse can begin working in the United States.

Licensure Requirements

Nurse licensing is regulated by the 50 states, each of which has its own criteria for issuing a nursing license to a nurse educated abroad. State Boards of Nursing may require a certificate of educational equivalence from the Commission on Graduates of Foreign Nursing Schools (see “Credentialing Requirements”) in order to allow an international nurse to take the NCLEX examination, though some will not. In addition, Canadian nurses may be eligible for licensure through reciprocity in many jurisdictions. Nurses and employers should consult with the Board of Nursing in the state where the nurse will be employed for the particular requirements of that state.

For nurses educated abroad, immigration law also requires that they hold a nursing license in the country where they were educated, in addition to any U.S. licenses they hold. For nurses educated in the United States, licensure in the state of intended practice is all that is required.
Credentialing Requirements

In addition to state licensure, the immigration laws provide two additional credentials that must be obtained prior to immigration to the United States as a nurse. The first of these credentials applies only to nurses educated abroad, while the second is required of all immigrant nurses (even those educated in the United States).

For nurses educated abroad, the Commission on Graduates of Foreign Nursing Schools (CGFNS) administers an examination and educational evaluation service used by many state licensing boards as a prerequisite for permission to take the NCLEX exam (the national nurse licensing exam) in their state. In addition, for a nurse coming from abroad with no U.S. license yet, the CGFNS certificate is required in order to file the immigrant visa petition on behalf of the nurse (the immigrant visa petition may be filed without the CGFNS certificate if the nurse holds a U.S. license in the state of intended practice). A nurse seeking to immigrate to the U.S. should contact CGFNS at +1.215.349.8767 or on the internet at http://www.cgfns.org.

In addition to the CGFNS examination required at the start of the process, the process cannot be completed until the nurse has obtained a “Visa Screen” certificate from the International Commission on Healthcare Professions (ICHP), a part of CGFNS. The Visa Screen must be obtained whether the nurse’s education was obtained in the U.S. or abroad, and is a certification that:

1) The nurse’s education, training and experience are comparable to a U.S. nurse’s, and are authentic;

2) The nurse’s overseas and U.S. licenses are authentic and not restricted in any way; and

3) The nurse is fluent in English, as demonstrated by either a passing score on a standard test of English fluency or the fact that the nurse was educated in English in one of six countries (Australia, Canada (except Quebec), Ireland, New Zealand, the United Kingdom and the United States).

Because of the processing times at USCIS and ICHP, nurses should contact ICHP as soon as possible once they decide to immigrate and should use the time that the immigrant petition is pending with USCIS on their behalf to obtain the ICHP certificate, so that the entire process can be completed as quickly as possible.
III. Immigration Issues Relating to Foreign Doctors

When faced with the task of recruiting the best qualified physicians, the first consideration for a hospital or private practice group is locating physicians who have distinguished themselves in their respective residency training and research programs. Very often, the most highly qualified individuals are foreign nationals who are in the United States as nonimmigrant visa holders. Particular issues arise for physician recruitment because of immigration issues. The following section outlines the key issues in foreign physician recruitment.

Is the Doctor Subject to the Two-Year Return Requirement?

A foreign doctor is only subject to a two-year home country return requirement if he or she was admitted in, or changed status to, J-1; and

1. received government financing from the U.S. government or the home country government; or

2. is on the skills list of the country of nationality or last residence; or

3. received “graduate medical education or training” in the United States.

- “Graduate medical education or training” does not include a program of observation, consultation, teaching or research, even if that program includes “incidental patient care.”

- Incidental patient care may be more than a minimal percentage as long as it is incidental to the primary purpose of observation, consultation, teaching or research.

- “Medical” excludes dentistry and other nonmedical fields.

- Not all ECFMG-sponsored doctors fall in the definition; e.g., research fellowships.

It is important to note that the two-year return requirement does not only mean two years outside of the United States. To satisfy the requirement, the doctor must be physically present in his or her country of nationality or last residence. A doctor from Lebanon, for example, who comes to the United States as a J-1 resident and then immigrates to Canada and lives there for four years is still subject to the requirement to reside for two years in Lebanon, even if the doctor has become a citizen of Canada.

If Subject to the Two-Year Return Requirement, Does the Doctor Need a Waiver?

The two-year return requirement only prevents the doctor from obtaining an H or L visa, changing status from J-1 to another status in the U.S., or obtaining permanent resident status. The doctor can obtain visas other than H or L at a U.S. Consulate outside of the U.S., or other benefits, including:

A. E-2 treaty investor visa

B. J-2 visa (if spouse is J-1)
C. F-1 student visa (if the doctor is admitted to the United States in F-1 status, he or she could change status to H-1B even though he or she could not obtain a H-1B visa)

D. Asylum

E. TN-1 for Canadian or Mexican nationals

- TN-1 physicians can perform patient care only if incidental to teaching and/or research positions.
- Factors to determine whether patient care is incidental: time spent doing patient care, payment for services, substantiality of salary and responsibility for regular patient load.
- Licensing regulations of each state should be reviewed to ascertain whether foreign medical graduate may perform incidental patient care or contact in TN-1 status.

F. O-1 visa for doctor of extraordinary ability

- Standard is “sustained national or international acclaim and recognition” in the field.
- The key is defining the field as specifically and restrictively as possible.
- The doctor is compared with others in the field, not with other doctors of his age group.
- Credentialing examinations are not required.
- Employer sponsorship is required.
- The key is usually reference letters.
- Doctor must obtain O-1 visa at U.S. Consul abroad before working in O-1 status.
- O-1 visa can be issued for three years with unlimited one-year renewals; two-year return requirement still exists.

If a Waiver of the Two-Year Return Requirement Is Needed, What Types of Waivers Are Possible?

A. No objection statement waiver is not available for a doctor who is subject based on graduate medical education or training.

B. Persecution waiver may be available if doctor would be subject to persecution in home country.
C. **Exceptional Hardship Waiver**

- Must prove exceptional hardship to U.S. citizen or permanent resident spouse or children both if the spouse or children remain in the U.S. and if the spouse or children return to the home country with the J-1 doctor.

- Focus is on the U.S. citizen or permanent resident spouse or child and not on the J-1 doctor.

- Chances improve if the children are older; if the country of nationality or last residence is a third-world country or a country that is not favorably disposed to U.S. citizens or to people of the religion, ethnicity or other characteristics of the spouse or child.

- Evidence may include psychological reports, proof of unavailability of prescription medications, Travel Advisories and State Department health reports.

- If waiver is approved, doctor does not need to work in any particular geographical area or change status to H-1B for any particular period of time.

D. **Interested Government Agency Waiver**

1. **Non-Clinical (Biomedical Research)**

   Application filed with Department of Health and Human Services ("HHS") Exchange Visitor Waiver Review Board.

   - More interested in bench research than clinical research.

   - Must prove importance of research, critical contribution of the alien, credentials of the alien, relationship of the alien’s work to others, funding and unavailability of U.S. workers.

   - May take six months or longer to obtain HHS recommendation to Department of State ("DOS").

     - If approved, doctor is not required to change status to or be H-1B for any particular period of time

2. **Clinical**

   a. Sponsorship by State (Conrad 30 Program)

   - Most states participate, but each state has different rules, different timing and different allocation of 30 waivers available.

   - Some states limit to primary care.
- Facility must be physically located in a Health Professional Shortage Area (HPSA) or Medically Underserved Area (MUA) (not sufficient for patient population to come from HPSA). States have the option of allotting up to 5 of their slots to physicians who will be serving shortage populations from a facility in a non-shortage area.

- Facility can be private, for-profit medical practice; facility need not have any specific commitment to serving the poor or the underserved in some states.

- Most states require significant proof of recruitment and unavailability of U.S. doctors.

- No objection statement from home country only required if doctor has contractual financial obligations to that country.

- Doctor should begin employment at the facility within 90 days of receiving the waiver.

- Doctor can delay procedure if still working under training program contract, but expediting procedure can be difficult.

- Doctor must remain at facility in H-1B status for three years; if he or she leaves facility, two-year return requirement is reinstated.

- Doctor eligible for extraordinary circumstances waiver of Section 222(g).

b. Federal Government Agencies

(1) Issues in Common among All Federal Government Agencies:

(a) Must work 40 hours per week in HPSA or MUA (exception: Veterans Administration, where the requirement is to work 40 hours per week in a VA facility).

(b) Must be primary medical care (general practice, family practice, internal medicine, pediatrics, OBGYN) for programs other than the Veterans Administration.

(c) Must be H-1B at the facility for at least three years.

(d) Contract cannot contain a covenant not to compete.

(e) Must provide proof of significant recruitment for U.S. workers.

(f) Facility must provide medical care to Medicaid or Medicare-eligible and indigent uninsured patients.
(g) Sponsoring federal government agency makes recommendation to DOS, which makes recommendation to USCIS, which issues the waiver.

(2) Specific Federal Government Agencies

(c) Veterans Administration

- Doctor must hold at least a 5/8 staff appointment at a VA facility where doctor has a joint appointment.
- Waiver request must be initiated by individual VA facility and approved by VA Central Office.
- National and internal recruitment requirement.
- Need not be HPSA or MUA or primary medical care.

(d) Appalachian Regional Commission

- Applies to rural counties in Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia.
- Application filed with the state (some states will not accept applications).
- Doctor must not have engaged in specialty medical training.
- Doctor cannot be out of status for more than six months.

(e) HHS Clinical Waiver Program

- Applies to all states
- Doctors must enroll in Federal Credentialing Program (120-day processing)
- State health department must acknowledge or support
- Application must be within 12 months of physician’s completion of primary care residency
- Physician must practice primary care only
- Must be HPSA, not MUA. HPSA must have an appropriate “score;” i.e., only more severe shortage areas will be eligible.

(f) Delta Regional Authority (DRA)

- Applies to counties along the Mississippi Delta in Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, and Tennessee.
- Physician must practice primary care only (although okay if had specialty training).

Options for Permanent Residence after Two-Year Requirement Waived

A. Options Not Related to Employment
   1. Family-based petitions
   2. Asylum
   3. Investor Petition

B. Extraordinary Ability Immigrant Petition
   - Same standard as O-1 petition
   - Credentialing examination not required
   - Employer sponsorship not required

C. National Interest Waivers
   - Credentialing examination required except graduates of U.S. medical school or non-clinical medical practice (VQE; FMGEMS; FLEX I and II; NBME I, II and III; or USMLE 1, 2 and 3).
   - Available for physicians working full-time in a HPSA or MUA or for a VA facility for a minimum of 5 years.
   - Only applies to family or general medicine, pediatrics, internal medicine, OBGYN and psychiatry.
   - Physician can apply for permanent residence before completing five years, but cannot be approved until completion.
   - Requires letter from state or federal agency attesting that the physician’s work furthers the public interest.

D. Labor Certification Application
   - Credentialing examination required (see above).
   - Permanent employment required, but possible to file labor certification application for residency program.
   - Reduction in recruitment expedites procedure (examples of recruitment include physician recruitment firms, letters to residency program directors, physician job fairs and advertising).
- Special handling labor certification available if some classroom teaching involved in position.
- Employer sponsorship required.
- Issues include prevailing wage, unduly restrictive job requirements, proof of unavailability of U.S. workers.

**IV. Conclusion**

Immigration of healthcare workers is particularly complicated, in that all of the complications of immigration law must be coordinated with all of the complications of state licensing rules. These complications can be managed, however, and healthcare workers have always been, and will continue to be, an important contributor to employment-based immigration to the United States.