BACKGROUND

There is a shortage of qualified physicians in the United States. It may not be so evident in the larger urban metro areas or in the more gentrified suburbs, but it is a problem in significant portions of the country, especially within low-income populations. As the overall population of the United States increases, the demographics of the US population are also changing. There is an increased incidence of debilitating diseases associated with aging. These factors necessitate an increased need for qualified physicians.

It is a fact that the US medical education system is not capable of graduating as many physicians as are needed every year. Therefore, there is an increasing shortfall which is only going to be made worse because of the increased coverage of millions of non-insured citizens under the Affordable Care Act.

Problem

The problem that we face is: “Where do we find additional qualified physicians?”

Solution

Since it takes years and an enormous investment to train additional medical school graduates, a domestic solution is not viable in the short-to-medium term. One facet of a multi-pronged solution would be to increase hiring of Foreign Medical Graduates (FMG’s). This “in-sourcing”, or bringing in physicians from other countries, may be just the solution the US needs to meet its’
growing demand for physicians. The FMG is a physician who has been trained and received his or her medical degree from a non-US jurisdiction. The FMG typically takes a US licensing exam - the 3-part USMLE (which also requires ECFMG certification for part-2 of the test) or the FLEX (if taken before 1994, when the USMLE was instituted), and obtains a certification that he or she has met the standards equivalent to a US issued medical degree. The alien must then look for employment within the USA. This is where the FMG becomes a vital asset in the US medical system. The following exposition of immigration law will provide a general road-map of the procedures needed to use this underutilized medical resource.

**IMMIGRATION OPTIONS**

There are several categories of FMG’s based on the various immigration statuses that they may hold. For each of these categories, the immigration treatment will be somewhat different.

As background, most FMG’s used to be permitted into the United States under “J-1” status. The J-1, or “exchange visitor” status required that the FMG return back to his or her home country for at least two years after completing his or her residency. The reason for this “home country” requirement was that the US government wanted J-1 medical professionals to use their US acquired medical experience and knowledge to improve the delivery of health care in their own countries, most of which were medically underserved, with significant rural and poor populations.

Therefore, the most commonly encountered FMG typically had J-1 status. However, the US government has recently relaxed some of its requirements for entry of physicians, and is now permitting physician FMG’s to enter the USA in H-1b work authorized visa status. We will consider this option below as well.

Finally, we come to the issue of other medical professionals, in this instance, registered nurses. Since RN’s can provide an incredible level of support for physicians within the healthcare system, they stand uniquely qualified to leverage physician strengths across a broader spectrum of the patient population. LPN’s do not qualify for skilled immigrant or non-immigrant work visa status. We will consider the issue of RN’s below as well.

**IMMIGRATION OPTIONS FOR J-1 FMG’S**

To complicate the matter further, within the subset of J-1 non immigrant visa FMG’s, there is a bifurcation, those subject to the two-year home country requirement, and those who are not.

**J-1's subject to the two-year home country residency requirement**

Remember that the two year home residency requirement is one imposed by the US government, not necessarily the foreign government. Therefore, obtaining a waiver of the two year home
residency requirement from the foreign government is not necessarily going to waive the two year home residency requirement issued by the US government.

The J-1's subject to the two year home residency requirement have to somehow convince the US government to waive that requirement. There are very few waivers available through the US Department of State, typically for extreme hardship to a US citizen relative of the alien FMG (for example a spouse or US Citizen children with severe medical conditions), or conditions that would make it unsafe for the FMG to return to his or her home country, (for example a fear of persecution by the government or other parties in the FMG’s home country, of either the FMG or his or her accompanying US citizen family members). The prospect of obtaining a waiver from the US State Department on the basis of these extreme requirements is therefore fairly remote for most FMG’s. However, all FMG’s can apply for and avail of another avenue to waive the two year home country residency requirement, and this is through service in the United States in a medically underserved area (MUA), or a health professional shortage area (HPSA).

**Resource: Health Resources and Services Administration**

It is fairly easy to determine whether the location of a particular FMG’s intended employment is either in a HPSA or an MUA. The US “Health Resources and Services Administration” describes these designated areas on its website at [http://bhpr.hrsa.gov/shortage](http://bhpr.hrsa.gov/shortage). The HRSA website also provides a very helpful tool that links US census data with the number of professionals in a given area, thus determining whether a particular location is an HPSA or an MUA, or serving a Medically Underserved Population (MUP): [http://datawarehouse.hrsa.gov/GeoAdvisor/ShortageDesignationAdvisor.aspx](http://datawarehouse.hrsa.gov/GeoAdvisor/ShortageDesignationAdvisor.aspx)

If the J-1's intended employment falls within an HPSA or MUA, the J-1 is eligible to seek a waiver through a multi-stage process involving several agencies.

**Step 1: the US Department of State**

As a first part of the multi part process, the FMG must apply to the US Department of State for a waiver. The waiver application will generate a US Department of State waiver application number, which is a crucial number to link up the applicant’s various processes during the non-immigrant visa phase.

**Step 2: The Conrad-30 state waiver application**

Once the application is filed and the waiver number is obtained the applicant then has a choice of applying for a position within an MUA or MUP, or a HPSA. The application may be filed as a “Conrad 30” waiver, which is a limited number (upto 30) of slots permitted by the US federal government to be issued by individual states to FMG’s who are serving within the state at a MUA/HPSA. The number of visas is limited to 30 for each state during any given fiscal year.
and states tend to limit these slots for primary care physicians only. However, some states do reserve some of their specialist 30 slots for specialist care as well.

The application for a Conrad 30 waiver is not simple. Most states require a huge amount of evidence to support the waiver application and some require the payment of a significant application fee. However, once the state approves the application and grants the FMG one of the coveted 30 slots, the employer can move forward to the next stage, filing the “H-1b” application with the USCIS.

Step 3: The H-1b application with the USCIS

The USCIS grants H-1b’s in three year increments. The H-1b is limited to that particular alien and only for employment with the petitioning employer. If the alien wishes to change jobs to a new employer, then the new employer needs to file a new H-1b application for the alien.

For the Conrad 30 waiver to vest with the alien, the alien must work for at least three years in H-1b status in the MUA/HPSA. Again, that three year employment must be in H-1b status. Therefore, given the processing time and the overlap between the USCIS and the Department of State processing times, an alien may require an extension of his or her H-1b in order to complete his or her three years in that status in the HPSA/MUA. The law permits the USCIS to extend H-1b’s for another period of three years upon filing an extension application and paying the additional filing fee together with the requisite supporting documentation.

Once the alien physician has obtained the Department of States recommendation that the USCIS grant the 2-year home country residency the waiver, the USCIS will the issue the H-1b approval. The alien must then commence employment within ninety days of receiving the H-1b approval from the USCIS.

Keep in mind that the H-1b is only a work-authorized non-immigrant visa status. It is not the “green card” (Legal Permanent Resident, or “LPR” status). During the FMG’s employment, the employer can commence on processes that would lead to the eventual grant of the “green card” to the FMG. These processes involve a test of the US labor marked (“labor certification” or “PERM”), and the application for an “immigrant visa” (also referred to as I-140, or EB-2). When these two requirements have been met, and the FMG has also satisfied his or her 3 year service obligation, the FMG can then file for the “green card”.

The Labor Certification and Immigrant Visa requirements are discussed below.

What if a Conrad-30 waiver is not possible?

There is also another option which does not involve HPSA or MUA’s. The FMG can apply for
employment through one of the interested government agencies ("IGA") that sponsor FMG’s. The IGA will place the physician within its network in order to serve a particular population. Examples of IGA’s which are accepting FMG’s at this time include the Appalachian Regional Commission and the Department of Veterans Affairs. In order to qualify for a waiver through employment by the IGA, the FMG physician must typically serve out a five year term of employment at the IGA. In order to remain in valid immigration status within the USA and work with the IGA, the IGA must apply for H-1b status for the FMG. At the conclusion of that employment, the waiver will have vested with the FMG and the FMG can then move forward with further immigration precesses for the immigrant visa and the “green card” as discussed below.

**IMMIGRATION PROCEDURES FOR FMG’S WHO ARE NOT J-1**

Many FMG’s, as discussed above, are permitted enter the United States directly on H-1b status to work for a US employer. Those FMG’s do not require any kind of waiver processing. Those FMG’s are able to apply for green cards as well through the normal immigration process. Furthermore, a FMG without an H-1 and who has completed his or her three years of labor service can now work for an employer who is not located within a HPSA/MUA after the conclusion of such service. Therefore, the employee FMG will need a new H-1b from that new employer to work in the new location. Only the employer may apply for a H-1b visa on behalf of an employee FMG. The new employer can apply for an obtain for the balance of whatever time is remaining of the FMG’s six year maximum H-1b. During that time, if an additional extension on the H-1b is required in order to complete immigration processes for the labor certification or the immigrant visa, it is possible to obtain that extension.

An extension of an H-1b post six years is available if the employer has an application for Labor Certification filed and pending for over one year, or the employer has an I-140 petition which has been filed and pending for over one year, or it is impossible to obtain a immigrant visa number due to priority date backlogs. If any of these criteria applies, the employer may petition for an extension of the H-1b over and above the maximum six years permitted.

There may also be other H-1b’s who may qualify for immigrant visas as Aliens of Exceptional Ability or Aliens of Extraordinary Ability. These FMG’s may not need to pursue the Labor Certification or PERM process described above, but can move directly to the I-140 “Immigrant Worker” stage and from there, the “green card” stage.

**LABOR CERTIFICATION - THE “PERM” PROCESS**

Once the FMG has obtained his or her waiver job, or is on an H-1b which does not require a waiver and is working with the petitioning employer, the employer can petition for the FMG to obtain “Labor Certification” approval. What this basically means is that the employer has to test the US job market to ensure that there are no ready willing and qualified US citizens or US
workers available who can fill the position that the alien FMG is working in. If it can be proven that there are no US workers to fill that position, the US Department of Labor issues the “Labor Certification”. Using this Labor Certification, the employer can then petition on behalf of the alien FMG for the next step of the process, that is, the “Immigrant Visa” or USCIS Form I-140 application. FMG’s, by virtue of their advanced medical degree, are typically placed by the USCIS in the preference category of EB-2 under the immigration laws. The preference category and the country of the applicant dictates how soon the applicant receives his or her “green card”.

THE IMMIGRANT VISA PETITION

So far, the FMG has been on his or her valid, work authorized H-1b status, working for the petitioning employer. Recall this is a non-immigrant visa status, and is not the “green card”. Once the employer has successfully completed the PERM process, and has received approval of the Labor Certification from the US Department of Labor, the employer must file the I-140 or the immigrant visa petition with the United States Citizen and Immigration Services within 180 days of receiving the approved Labor Certification.

The I-140 or immigrant worker stage, may be predicated on several underlying options:

• The alien FMG is an alien of extraordinary ability;
• The alien FMG is an alien of exceptional ability;
• The alien FMG is an alien with an advanced degree and has tested the US market through the PERM process; or
• The alien is an exceptional ability alien under schedule A, Group 2 of the Immigration and Nationality Act.

At the I-140 stage, the USCIS will make sure that the petition meets several criteria, of which two are the most important:

• The alien’s qualifications for the position; and
• The employer’s ability to pay the prevailing wage

The USCIS will also verify whether the position actually requires the services of the professional, ie, the FMG. Typically, unless the position is for someone who could provide the services without a medical degree, the USCIS should have no problem with the job requirements needing the services of a FMG.

Once the I-140 immigrant visa petition is approved, and the priority date is current, the alien physician can then apply for “adjustment of status” or the “green card”.

“GREEN CARD” (ADJUSTMENT OF STATUS)
Finally - the light at the end of the tunnel! FMG applies for “adjustment of status”. This is the “green card” application. At this stage of the application, the FMG’s dependent family members (a non-US-Citizen spouse, and any non-US-citizen children) may also be included. Each individual needs a separate application for the USCIS. The applications may be filed only if the “priority date” is current. At the present time, there are substantial backlogs for individuals who were born in India and in the People’s Republic of China. The wait times are between 8 to 10 years for FMG’s from those countries to even be able to apply for a green card. Therefore, these would need regular extensions of their H-1b status and their family member’s status in order to keep those aliens legally present in the USA.

Once a priority date is current, the FMG can file his or her application for adjustment of status together with the applications for any family members as discussed above. Adjustment of status applications are reviewed by the USCIS to ensure there are no debilitating conditions which would preclude the FMG or any dependent from being granted permanent resident status. These include health related issues, criminal issues, lack of ability to support oneself, previous immigration violations, and any other item of particular interest to the US government or national security. If the adjustment application is approved, any applicant will receive a “green card”. They will then become legal permanent residents of the United States and may apply for naturalization within five years of obtaining such permanent residency.

IMMIGRATION OPTIONS FOR REGISTERED NURSES

Only registered nurses can qualify for a H-1b. RN’s who are not US citizens or Permanent residents can seek employment with US employers and the employer can apply for a H-1b for the RN. The employer can then skip the labor market test because the Department of Labor deems RN’s are a “shortage occupation.” However, the difficulty is in convincing the USCIS that the job requires the services of an RN, with a minimum of a bachelor’s degree, and that an LPN will not do. If the prospective employee can secure an H-1b, the employer can then seek an immigrant visa on the RN’s behalf.

RN’s from Canada or Mexico can enter the USA on the TN visa, which is approved for upto 3 years at a time, and has no maximum on the number of times it can be renewed.

The H-1C option for nurses serving in underserved areas lapsed in 2009, and Congress has not renewed it as of the time of this writing, though a bill remains pending in the House to do so.

CONCLUSION:

A great deal of material has been covered in the above explanation. However, this is by no means a complete exposition of all of the legalities and factual scenarios encountered in processing immigration options for FMG’s and nurses. For further details on any of the individual processes mentioned above, please visit my website at www.usimmigration.biz.
always, please note that the above was only general legal information concerning immigration options for FMG’s and nurses. It is not intended to be specific legal advice for your particular situation. For such advice, please contact a qualified immigration attorney.

© Farhad Sethna, 2012

A presentation of the Law Offices of Farhad Sethna
80 South Summit Street, Suite 500
Akron, OH 44308
Phone: 330-384-8000; Fax: 330-384-8060
email: fsethna@immigration-america.com
web: www.usimmigration.biz