

The Siskind Susser

Nursing Immigration Handbook

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VISAS FOR NURSES

A growing shortage of nurses in the United States has forced many health care employers to look overseas for the nursing talent needed to care for American patients. But bringing those nurses to the US is challenging.

What kind of status can a nurse coming to the US receive?

Nurses can enter the US in either non-immigrant or immigrant status. But before reaching the question of whether a nurse is best suited for immigrant or non-immigrant status, it's best to begin with an overview of immigration principles. "Immigrant" and "Non-Immigrant" are legal terms which have specific meanings. Every person applying for admission to the United States is considered to be an intending immigrant; and it is up to the person seeking admission to prove that they only intend to stay temporarily as a non-immigrant. This question becomes vitally important when a person applies for a visa because a consular officer has complete discretion to deny a request if he or she is not satisfied that the alien will leave the United States when their visa period expires. In short, if the alien is deemed to have immigrant intent when applying for a non-immigrant visa, the application will be denied.

Non-immigrant visas typically allow foreign nationals for a limited period for a specific purpose. Such purposes include undergraduate or graduate study or employment with a sponsoring company or organization. Non-immigrant visas are designated by letter, each letter corresponding to a different type of visa (B-2, F-1, H-1B, etc.).

Immigrant visas, on the other hand, permit foreign nationals to enter the U.S. to remain indefinitely as permanent residents. Rather than show that they only intend to stay in the U.S. for a limited time, a person applying for an immigrant visa needs only to prove that they meet the requirements of the visa classification and that they are not "inadmissible". The grounds for inadmissibility include certain criminal convictions, communicable diseases, and terrorist activity.

When a person comes to the United States with an immigrant visa, they enter as legal permanent residents and will be issued an Alien Registration Card as proof of their status. Permanent resident status is popularly known as having a "green card." Green cards are no longer green, but the popular name has remained the same. Permanent residents are entitled to work, travel freely, and to remain indefinitely. However permanent residence can be abandoned or taken away, and it does not give some of the rights that U.S. citizens enjoy. Therefore, some permanent residents opt to apply for naturalization and become U.S. citizens. One cannot apply for citizenship before being a permanent resident first.

I've heard that health care workers are barred from entering the US? So how are all these foreign nurses working in the US?

A key aspect of nursing immigration is a bar to the admission of health care workers – including registered nurses – seeking to enter the US. That bar does not apply, however, to health care workers who obtain a certification from an organization

approved by USCIS (formerly the Immigration and Naturalization Service) that states that the nurse's education and licensing credentials are equivalent to an American's. Currently, only one organization - the Commission on Graduates of Foreign Nursing Schools – is approved as an agency authorized to issue the certification document for nurses (CGFNS refers to the documents as a VisaScreen certificate). And right now, only green card applications are affected. The health care certification rules are set to change dramatically in July 2004 including the expansion of the program to non-immigrants (though several organizations are actively pushing to delay or drop the program's expansion to this category of visa applicants). An extensive discussion of the new rules is contained as an appendix to this document.

Non-Immigrant Visa Options

Under current U.S. immigration laws, non-immigrant visa options for nurses are limited, mainly because most employers only require a two year degree rather than four-year bachelor's degree and because most states do not require bachelor's degrees for a nurse license.

During the last nursing shortage, the U.S. Congress carved out a specific non-immigrant visa category, designated H-1A, for registered nurses. This visa type did not become a permanent part of the immigration laws, and was allowed to expire on September 1, 1995, when Congress believed the shortage had subsided. A similar provision, which would provide a new visa category for general registered nurses, is currently under consideration by Congress, and will be discussed separately below.

What is an H-1B non-immigrant visa?

The H-1B "Specialty Occupation" visa is available to individuals who can demonstrate qualification in a "specialty occupation" and who are sponsored by a U.S. employer to work temporarily in the U.S. in a "specialty occupation". The Immigration & Nationality Act defines a specialty occupation as "an occupation that requires (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Persons who typically will be eligible for this visa include members of the professions such as engineers, teachers, lawyers, as well as scientists and other highly qualified persons. Only 65,000 H-1Bs are granted each year. That limit was reached five months into fiscal year 2004 and visas are currently not available again until October 2004. Note that university employees and employees of non-profit and government research institutions are exempt from the cap. That would cover nurses in numerous university and research-oriented hospitals around the country.

Aren't nurses prohibited from getting H-1B visas?

Through policy memos and case decisions, the USCIS has determined that nursing, as a profession, is not a per se a specialty occupation, since a bachelor's degree is not generally required to become a registered nurse. This determination is based on the findings of the Department of Labor as to the educational preparation required

for most nurses published in the Occupational Outlook Handbook (1995) and the Dictionary of Occupational Titles (1991). Many people have criticized the USCIS because many employers have dropped the requirement for a bachelors degree precisely because of the severe shortage of nurses and not because the ideal nurse does not need such a degree. They argue that if the point of the H-1B visa is to help employers find qualified workers when there may be a shortage, then the USCIS policy totally thwarts the intention of Congress.

The USCIS does acknowledge, however, that there are areas of nursing where the specific duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Late in 2002, the USCIS issued a field memorandum that spelled out for the first time when H-1B visas are appropriate for nurses.

What kinds of nurses can qualify for H-1Bs?

The USCIS memorandum made it clear that normal RN positions will not qualify for H-1B visas unless the state where the nurse seeks a license requires a bachelor's degree. No state currently requires a bachelor's degree for RNs (the last state to do this – North Dakota – dropped the requirement in 2003). The USCIS did, however, list a number of more specialized RN positions that might qualify for an H-1B visa and the 2002 guidance will hopefully lead to greater consistency in reviewing H-1B petitions.

What are the general requirements for demonstrating that a nurse should qualify for an H-1B visa?

In order to qualify for an H-1B visa, an employer of a nurse must show the following:

1. A bachelor's or higher degree (or its equivalent) is normally the minimum requirement for entry into the position;
2. The degree requirement is common to the industry for parallel nursing positions (i.e., employers in the same industry require their employees to hold the degree when they are employed in the same or a similar position);
3. The employer normally requires a degree or its equivalent for the position or the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent).

Employers who can meet these requirements and can show they are paying the prevailing wage for the job can apply for an H-1B visa.

What specific types of nurse positions can qualify?

Advance Practice Registered Nurses

The USCIS 2002 memorandum also discussed specific nurse positions. First, advance practice registered nurses (APRNs) will generally qualify for H-1B visas because

these are advanced level positions requiring more education and training than the typical RN. An employer may require that the prospective employees hold advanced practice certification as one of the following: clinical nurse specialist (CNS), certified registered nurse anesthetist (CRNA), certified nurse-midwife (CNM), or certified nurse practitioner (APRN-certified). If the APRN position also requires that the employee be certified in that practice, then the nurse will be required to possess an RN, at least a Bachelor of Science in Nursing (BSN), and some additional graduate level education.

The USCIS lists the following positions that will normally qualify for an H-1B visa:

- Clinical Nurse Specialists (CNS): Acute Care, Adult, Critical Care, Gerontological, Family, Hospice and Palliative Care, Neonatal, Pediatric, Psychiatric and Mental Health-Adult, Psychiatric and Mental Health-Child, and Women's Health
- Nurse Practitioner (NP): Acute Care, Adult, Family, Gerontological, Pediatric, Psychiatric & Mental Health, Neonatal, and Women's Health.
- Certified Registered Nurse Anesthetist (CRNA); and
- Certified Nurse-Midwife (CNM).

Administrative Positions

The USCIS will also approve H-1B visas for certain administrative nurse positions. According to the USCIS memorandum, "upper level nurse managers" in hospital administration positions may work for H-1B visas since these positions usually require bachelor's degrees. Nursing Services Administrators should work since these positions involve supervisory functions and they typically require a graduate degree in nursing or health administration.

States that Require Bachelors Degrees

As noted above, the USCIS will consider an H-1B visa to be appropriate for any RN if the state where the nurse's position is requires a bachelor's degree. However, all states had dropped their requirements that nurses have bachelor's degrees.

Specialized Nurse Positions

Aside from the Advanced Practice Registered Nurses noted above, nurses in certain specialized areas may file for H-1Bs. The USCIS specifically cites critical care and peri-operative (operating room) nurses as two examples of positions requiring a higher degree of knowledge and skill than a typical RN or staff nurse position. The USCIS indicates that passing a certification examination for a particular type of position is an important indicator. Examples of these types of certification examinations are school health, occupational health, rehabilitation nursing, emergency room nursing, critical care, operating room, oncology and pediatrics.

Such nurses should meet the general requirements noted above. Evidence to show these requirements could include affidavits from independent experts or other means

showing that the job duties are so specialized and complex that a bachelor's or higher degree is appropriate. The USCIS notes that these cases will be adjudicated on a case-by-case basis so the outcome of such applications is far from certain.

Can Mexican and Canadian nurses qualify for visas under the NAFTA – The North American Free Trade Agreement?

Yes. TN-1 visas are available under the North American Free Trade Agreement ("NAFTA") to Canadian and Mexican citizens for a limited group of specialty occupations. Although not uniformly recognized as a specialty occupation for H-1B purposes, registered nurses were specifically included on the list of professions for which TN visas could be used and any registered nurse position can potentially qualify.

Under NAFTA, the applicant must possess the required credentials to be considered a professional under the TN category. Registered nurses must demonstrate eligibility by providing a provincial or state license or Licenciatura degree. However, in order to be admitted the registered nurse must present a permanent state license, a temporary state license, or other temporary authorization to work as a registered nurse, issued by the state nursing board in the state of intended employment.

Once admitted, a worker is granted an initial stay of one year. Thereafter, a TN professional may seek extensions of stay in one year increments. There is currently no limit on the number of extensions that may be granted.

Canadian nurses applying for TN visas can simply bring the required documentation to a port of entry and enter right away after being inspected by an examiner at the port of entry. A nurse can extend his or her status by mail with the USCIS Nebraska Service Center or by leaving and reentering with the required documents through a port of entry. Mexican nurses go through a similar process. However, they must first apply for a visa at a consulate and cannot simply show up at a port of entry (though the requirement of processing first with the USCIS ended per NAFTA's original provisions after NAFTA's tenth anniversary in January 2004).

Note that unlike H-1B visas, TN visa holders are supposed to be able to demonstrate an intention to leave the US when they complete their TN stay. So nurses who apply for permanent residency while in the US must be very careful about traveling outside the US or applying for a TN extension after a green card application has been submitted.

What is the H-1C visa for registered nurses?

Late in 1999, Congress passed the Nursing Relief for Disadvantaged Areas Act, which calls for the creation of a new H-1C visa for nurses going to work for up to three years in health professional shortage areas. Up to 500 nurses per year can get the visa, but each state is limited to 25 H-1C nurses a year. Under the law, facilities interested in sponsoring nurses for H-1C visas must submit documentation containing a number of attestations regarding the employment of H-1C nurses. This visa is rarely used both because it is weighed down with very strict rules and because so few actual visas are available under the category. In fact, only a small number of H-1C visas have actually ever been issued.

As with most immigration laws, the statute itself provided very little guidance on how the law would be applied, leaving it to the USCIS (and in most employment visa cases the Department of Labor as well) to develop regulations. The regulations for the H-1C program were released by the Department of Labor last summer, and became effective in September 2000. The USCIS released its regulations in June 2001.

One of the most surprising elements of the Labor Department's regulations is a DOL finding that based on the restrictive definition of "facility" Congress put in the statute, only fourteen hospitals in the country could be initially determined to qualify to apply for H-1C visas. These facilities are:

1. Beaumont Regional Medical Center, Beaumont, TX
2. Beverly Hospital, Montebello, CA
3. Doctors Medical Center, Modesto, CA
4. Elizabeth General Medical Center, Elizabeth, NJ
5. Fairview Park Hospital, Dublin, GA
6. Lutheran Medical Center, St. Louis, MO
7. McAllen Medical Center, McAllen, TX
8. Mercy Medical Center, Baltimore, MD
9. Mercy Regional Medical Center, Laredo, TX
10. Peninsula Hospital Center, Far Rockaway, NY
11. Southeastern Regional Medical Center, Lumberton, NC
12. Southwest General Hospital, San Antonio, TX
13. St. Bernard Hospital, Chicago, IL
14. Valley Baptist Medical Center, Harlingen, TX

Note, however, that there are many more hospitals across the country that can potentially qualify for H-1C visas.

The attestation process is being administered by the Employment and Training Administration at the Department of Labor. Enforcement of the attestations is being overseen by the Employment Standards Administration's Wages and Hours Division.

The 1999 law is very similar to a 1989 law that created the H-1A visa for nurses. That visa category expired several years ago after unsuccessful efforts to extend its life. The key differences between the two programs are that a much smaller number of H-1C visas have been allocated and that the facility where the nurse will work must be in a health professional shortage area. There are also new requirements which limit a facility's dependence on H-1C nurses (something that is hard to imagine given that only 500 H-1C nurses permitted into the country each year, with no more than 25 allowed to work in a single state).

A qualifying hospital will meet four requirements:

1. The hospital must be located in a Health Professional Shortage Area. You can find out which areas are HPSAs online at <http://www.bphc.hrsa.gov/databases/newhpsa/newhpsa.cfm>.
2. The facility must have at least 190 acute care beds

3. At least 35% of the facility's acute care inpatient days must be reimbursed by Medicare
4. At least 28% of the facility's acute inpatient days must be reimbursed by Medicaid

The Department of Labor has created a new attestation form called the ETA 9081 that is submitted as part of the H-1C application process. On the form, the facility must attest to the following:

1. That it is a qualifying facility. If the ETA 9081 is the first one being filed by a facility, then the form must be accompanied by copies of the pages from the paperwork filed with the Department of Health and Human Services showing the number of acute care beds and the percentages of Medicaid and Medicare reimbursed acute care inpatient days. A copy of this paperwork must also be kept in a public access file.
2. That the employment of H-1C nurses will not adversely affect the wages or working conditions of similarly employed nurses.
3. That the facility will pay the H-1C nurse the facility wage rate.
4. That the facility has taken and is taking timely and significant steps to recruit and retain nurses in order to reduce dependence on immigrant nurses. At least two such steps must be taken unless it can show that the second step is not reasonable. Documentation of these steps needs to be included in the facility's public access file for H-1C nurse petitions. Steps which may be taken can include:
 - a. Operating a training program for registered nurses at the facility or financing or providing participation in a training program elsewhere.
 - b. Providing career development programs and other methods of facilitating health care workers to become RNs.
 - c. Paying registered nurses wages at a rate at least 5% higher than the prevailing wage for the area.
 - d. Providing reasonable opportunities for meaningful salary advancement by registered nurses.
 - e. Any other steps that would be considered significant efforts to recruit and retain nurses.
5. That there is not a strike or lockout at the facility, that the employment of H-1C nurses is not intended or designed to influence an election for a union representative at the facility and that the facility did not lay off and will not lay off an RN within the 90 day period and 90 day period after the date of filing an H-1C petition.
6. That the employer will notify other workers and give a copy of the attestation to every nurse employed at the facility within 30 days of filing. E-mail attachments are acceptable.
7. That no more than 33% of the nurses employed by the facility will be H-1C non-immigrants.

8. That the facility will not authorize H-1C non-immigrants to work at a worksite not under its control and will not transfer an H-1C nurse from one worksite to another.

The paperwork must also be accompanied by a filing fee. After the Attestation is approved by the Labor Department and used in support of an H-1C petition approved by the USCIS, the employer is required to send a copy of the H-1C petition and USCIS approval to the Labor Department. Also, as noted above, the employer must create a public access file that includes the Attestation and its supporting documentation. The file must be produced for any interested party within 72 hours upon written or oral request.

Under the USCIS regulations, there are three primary eligibility requirements for foreign nurses who wish to work in the US on an H-1C visa:

- They must have an unrestricted license to work as a professional nurse in the country where they received their nursing training, or have received that training in the US;
- They must pass an examination approved by the Department of Health and Human Services or have a license to work as a professional nurse in the state where they will work; and
- They must be eligible to work as a registered nurse under both the laws of the state where they will work and the regulations of the facility where they will work.

Currently, the acceptable examination is that offered by the Commission on Graduates of Foreign Nursing Schools (CGFNS). CGFNS certifies that the foreign nurse's training and license are equivalent to a similarly situated US nurse, that all their documents are authentic, that the foreign nurse has an unrestricted license, that the foreign nurse is sufficiently proficient in written and spoken English, and that the foreign nurse has in fact passed a state licensing exam. Questions about the exam may be directed to CGFNS through its website at <http://www.cgfns.org>.

Immigrant Visa Options for Nurses

The immigrant visa is normally the only option for nurses because most of the non-immigrant visa classifications are not available to the typical registered nurse seeking employment in the United States.

What are the basic requirements for a worker to qualify for a green card?

Employment-based immigrant visas typically involve three main steps. First, the employer files a Labor Certification application with the U.S. Department of Labor. The purpose of the application is to test the employer's local labor market for available workers. If no qualified and available workers are located, the position is certified as open for a foreign worker.

Second, the employer files an I-140 Alien Worker Petition with the USCIS. The purpose of this petition is to verify that the foreign worker has the minimum requirements to fill the open position, and serves to classify the foreign person as eligible for a particular visa category.

Third, on the basis of the Labor Certification and Alien Worker Petition, the foreign worker makes an application for an immigrant visa at a U.S. Consulate. If the foreign worker is legally present in the U.S., he or she may instead apply for permanent resident status via a process called adjustment of status. A nurse in the US can simultaneously apply for the I-140 and for adjustment of status.

The entire process can take several years. Labor certifications can take anywhere from six months to three years depending on where in the country the application is filed. The I-140 can take anywhere from a month to a year. And another year to two years can be added for consular processing or adjustment of status. As explained below, however, nurses receive processing that is partially expedited.

Do nurses receive any sort of special treatment in green card processing that makes the green card application process faster or easier?

Yes, nurses seeking green cards do operate under an easier system and get their green cards faster than their counterparts in other professions.

As noted above, most employment immigration cases require the employer to first recruit and test the labor market for qualified citizens or permanent residents. After this test is complete, the Department of Labor will certify that no qualified, American worker is immediately available to fill the position. Only then will the employer be able to sponsor a foreign worker. While these labor certifications are often successful, they can be time intensive and do not reflect the immediate needs of the business world.

In 1996, Congress passed legislation that retained nurses on a very short list of pre-certified occupations for which a labor shortage was recognized. The list is included in Schedule A of the labor certification regulations and these types of green card cases are called "Schedule A labor certifications". The Department of Labor (DOL) has already determined that there are not enough American workers who are able, willing, qualified, and available to fill all of the openings for professional nurses. Therefore, no test of the labor market is required and the case can be directly filed with the USCIS. This does not necessarily mean that all cases are approvable or will be handled quickly. The importance of nursing being pre-certified is that it skips the first and most time consuming part of the employment based immigration process.

Note that this pre-certification is limited in scope. It only applies to "professional nurses". Schedule A is not available to Licensed Practical Nurses, Nurse Assistants, or other nursing aides. Professional Nursing is defined as a course of study in professional nursing resulting in a diploma, certificate, baccalaureate degree, or associate degree. More specifically, an acceptable course of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine. Whatever training the nurse has received should result in licensure in the country in which the training occurred. This

coursework may have been completed at a U.S. nursing school or an approved foreign nursing program. For an immigrant visa, it is not required that a nurse have a bachelor's degree in nursing, only that he or she completed a professional program in nursing and have subsequently been licensed.

What is the first step in filing for a green card for a nurse?

The initial step in a Schedule A case is to file a Form I-140 application package to the appropriate supporting documentation to the appropriate USCIS service center. There are four regional USCIS service centers. They are located in Vermont, Texas, Nebraska, and California and each service center has jurisdiction over a section of the country. A case is properly filed in the service center having jurisdiction over the place of employment or in the service center covering the region where the employer's office is located. When there is a choice of service centers, employers need to be cautious because the processing times can vary dramatically. This may account for varying experiences in the HR industry as to how long it is taking to obtain the approval necessary before the nurse can apply for consular processing or adjustment of status. For example, beginning in 2003, the Vermont Service Center began expediting cases for nurses. Processing at the VSC is down to less than two months in most nurse cases. However, the other service centers can take as long as a year for the same kind of petition.

What kind of documentation must be submitted with an I-140 employment-based immigrant petition?

Supporting documentation must be submitted with the I-140 as prescribed in 20 C.F.R. 656.22(c)(2). This supporting evidence includes the following:

1. ETA Form 750 Parts A and B, in duplicate (these are the labor certification forms);
2. A posted notice of the job opening. This notice must include a job description, work hours, and rate of pay. The notice must be posted in the worksite for a minimum of ten business days;
3. Evidence that the petitioning employer has the financial ability to pay the salary offered to the nurse. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. If the U.S. employer employs 100 or more workers, the USCIS may accept a statement from a financial officer of the organization;
4. CGFNS certificate or nurse license from state where the nurse will be working or proof of passing the NCLEX licensing exam and evidence that the nurse cannot obtain a license because he or she cannot obtain a social security number.
5. Nursing diploma or degree;

6. Nursing registration/licensure from the country where the degree was obtained.

The CGFNS certificate provides evidence that the nurse has complied with a three step review of their nursing skills: 1. a credentials evaluation; 2. passage of an English language proficiency exam; and 3. passage of the CGFNS qualifying exam. Once these requisites have been met, the Commission on Graduates of Foreign Nursing Schools will issue the nurse a CGFNS certificate. The purpose of this certification program is to serve as a predictive evaluation process to accurately judge which nurses will be able to meet the requirements for U.S. licensure once admitted to the country. If the nurse has already passed the NCLEX-RN exam, they are exempted from the requirement of obtaining a CGFNS certificate.

When does the health care workers credentialing certificate (the "VisaScreen") come into the picture?

The VisaScreen certificate must be presented to the USCIS prior to adjustment of status and a US consulate prior to issuance of a permanent residency visa. The certificate is NOT required at the start of adjustment application or prior to an I-140 application's approval.

What steps are required aside from submitting the I-140 and getting the VisaScreen certificate?

Upon approval of the I-140 and receipt of the VisaScreen certificate, a nurse is eligible to obtain their immigrant visa through consular processing. If they are in the United States in a lawful status they may adjust their status to that of permanent resident. Adjustment of status applications can be submitted at the same time as an I-140 application or at any time after the I-140 is submitted or approved. See the discussion below for more information on adjustment of status.

Nurses are also required to adhere to licensing requirements of the state in which they intend to work. Licensing requirements for registered nurses are maintained on a state-by-state basis, and each state has slightly different requirements for licensing. To demonstrate eligibility and preparedness for the NCLEX exam, most states require a combination of materials be submitted with the license application. The documents may include CGFNS certification, copies of foreign academic credentials with certified translations, an education/credentials evaluation and a demonstration of proficiency in English (e.g. TOEFL exam results).

All states permit an individual to obtain a license through examination, and some state permit licensing by endorsement, or acceptance of a registered nurse license from another state or country as evidence of the person's credentials.

Consult the license chart included as an appendix to this handbook for more information on requirements in each of the states.

How does a nurse in the US Adjust Status

If a nurse is in the United States, then processing via adjustment of status will typically be easier and it will be possible to get authorization to work much more quickly than through consular processing.

A nurse's employer must file an I-140 for a nurse in the United States just like a nurse residing abroad. But a nurse in the US has the ability to take the NCLEX examination. If the nurse can pass the NCLEX exam, then it is not necessary to take the CGFNS examination. Otherwise, the nurse would still need to present a CGFNS certificate or proof that the nurse has a full and unrestricted license as an RN. A nurse can file an adjustment of status application as well as an application for an employment authorization document at the same time they submit the I-140 application. Once the nurse is licensed by a state and the nurse is in possession of an employment authorization document, the nurse can begin work. License processing times vary between the states. USCIS regional service centers are required to process employment authorization documents in less than 90 days (applicants have the right to request an interim employment document at a local USCIS office if 90 days pass after applying). Adjustment applications typically take 18 to 24 months at USCIS regional service centers. A nurse still needs to present a VisaScreen Certificate prior to completing adjustment of status.

Are there any prospects for improvements in nurse immigration in the future?

A highly significant piece of legislation to affect immigration for nurses was introduced in the summer of 2001. HR 2705, the Rural and Urban Health Care Act of 2001, makes changes to section 212(m) of the Immigration and Nationality Act regarding H-1C workers. The H-1C program is designed to permit nurses to come to the U.S. as nonimmigrant or temporary workers. The H-1C program, as noted above, has failed to provide the promised relief from the current nursing shortage in the U.S. Presently, employers must rely primarily on filing Schedule A applications with petitions for immigrant visas. As we noted earlier, these applications suffer long service center backlogs followed by the inefficient mechanism of consular processing. The result is waiting periods of at least a year from starting the process for immigrant workers to the employees' arriving in the United States.

HR 2705 proposes substantial changes in a variety of areas including the number of H-1C visas issued per fiscal year, as well as in the employer's attestation requirements. The result could be the first major relief from a nursing shortage that has continued to tighten its grip on the United States despite the availability of Schedule A processing for immigrant visas for nurses and the, now defunct, H-1A nonimmigrant nursing program of the mid-1990s. Below is a comparison of the existing law for H-1C workers and the new HR 2705.

Perhaps the most significant difference in the two statutes is the number of H-1C

visas that are available under the existing law and the proposed law under HR 2705. The existing law limits the number of visas available each year to 500 with additional per state limits that allow only 25 visas per year for states with a population of fewer than 9 million people and 50 visas per year for states with a population of 9 million or more people. These limits have made the H-1C functionally irrelevant as a means of relief from the current nursing shortage. HR 2705, on the other hand, provides substantial relief, permitting a total of 195,000 visas for each fiscal year with no per state limits. These 195,000 visas are provided each year with no reduction, progressive or otherwise, in the number available.

In addition to increasing the overall number of H-1C visas, HR 2705 substantially lengthens the life of the H-1C program. The existing H-1C statute was passed in 1999 and was given a life of 4 years before its sunset in 2004. HR 2705, on the other hand, has no provision that limits the life of the H-1C program.

As added relief from what the health care industry generally accepts as a nationwide nursing shortage, HR 2705 significantly increases the pool of eligible petitioners for H-1C workers. HR 2705 removes the component from the employer attestation that requires the employer facility be a hospital in a Health Professional Shortage Area (HPSA) as determined by the department of Health and Human Services. HPSA areas are generally limited to rural and underserved urban areas. The change would significantly increase the number of eligible petitioners.

In addition to removing the HPSA requirement, HR 2705 provides further relief by broadening the definition of a qualifying facility from simply "hospital" to, "a hospital, nursing home, skilled nursing facility, registry, clinic, assisted-living center, and employer who employs nurses in a home setting."

The attestation requirement between the existing law and HR 2705 is similar in that both schemes require that hiring the H-1C worker does not adversely affect the wages and working conditions of registered nurses similarly employed. However, HR 2705 specifically restricts the adverse affect requirement to those registered nurses, "at the facility." This removes the requirement that employers attest that they will not adversely affect the working conditions of employees at other facilities in the same geographic area. Currently most employers sponsoring an alien worker must attest that the employment will not affect any similarly situated worker within commuting distance of the petitioning employer.

HR 2705 also proposes a change in the attestation requirement of the existing law where it removes the requirement that the employer will not employ greater than 33% of the number of registered nurses employed at the facility. The change, along with the proposed increase to 195,000 visas available each year, would provide much needed relief for woefully understaffed facilities.

Other changes in the law include limits on state licensing authority to tighten restrictions for those applying to sit for the examination. HR 2705 limits the number of times that the individual may sit for the exam to two times, but also states that the failure of the alien to obtain a social security number will not disqualify that individual from sitting for the exam.

While HR 2705 makes some significant changes to the H-1C program, there are a number of similarities in the existing H-1C statute and HR 2705. In reviewing the attestation requirements, both the existing law and 2705 require that the employer

pay the H-1C worker at the same wage rate as similarly employed workers in the facility. Also, both statutes restrict the employer's ability to transfer the H-1C worker to another location. Outside the attestation requirement, the statutes are similar in that they both forbid the employer to penalize the employee for departing prior to an agreed date.

HR 2705 is the first legislative response in several years to what amounts to a true labor crisis in the United States. The existing H-1C scheme plays lip service to the crisis but is so narrowly drawn that its effect is virtually negligible. HR 2705 addresses a number of employer concerns that would provide immediate relief for facilities who must currently meet market expectations that they provide the best health care services in the world without the ability to meet even their most fundamental staffing needs.

While HR 2705 did not pass last year, it is very possible that the bill will be reintroduced this session and the ever-growing nurse shortage means that the odds of passage will continue to improve.

Aside from this legislation, there have also been developments in green card processing that could make legislation from Congress less important. For example, many expect the Nebraska, Texas and California Service Centers to follow the lead of Vermont and begin expediting I-140 processing for nurses. And the California Service Center has recently begun a program to expedite I-140/I-485 concurrently filed cases across the board. That processing is promised to get the overall approval time down to a remarkable 90 days or less.

Conclusion

The immigration process may seem somewhat like a maze. However, with proper guidance and some practical experience, it should not discourage a potential employer from pursuing prospective employees. Those who have been successful in obtaining international employees often find them to be very dedicated staff members. Given the current labor crisis in the healthcare industry, the international labor market should not be discounted.

HEALTH CARE WORKER CERTIFICATES

Why do health care workers require special certification?

In 2003, the Department of Homeland Security issued long-awaited final regulations governing health care workers on non-immigrant visas. The rule follows the October 2002 release of proposed regulations and represents the final implementation of health care worker provisions included in Section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("The 1996 Act"). That law created a new ground of inadmissibility for health care workers unless the workers have a certificate from an approved organization verifying the worker's credentials.

Section 343 of the 1996 Act provided a new ground of inadmissibility for health care workers unless the worker could present a certificate from the Commission on Graduates of Foreign Nursing Schools or an equivalent credentialing organization approved by both USCIS and the Department of Health and Human Services. The credentialing must verify:

1. The alien's education, training, license, and experience meet all applicable requirements for admission into the US, are comparable with that required for a similar American health care worker, and the license is unencumbered.
2. The alien has the level of competence in oral and written English considered by HHS and the Department of Education to be appropriate for health care work of the kind in which the alien will be working.
3. If a majority of states licensing the profession recognize a test predicting an applicant's success on the profession's licensing or certification examination, the alien has passed such a test or examination.

For nurses, Section 212(r) of the Immigration and Nationality Act provides that CGFNS can alternatively certify a nurse who has a valid and unrestricted license in a US state where the nurse intends to be employed, the nurse has passed the National Council Licensure Examination (NCLEX) and the nurse meets the following requirements:

1. The course instruction was in English; and
2. The nursing program was located in a country which was designated by CGFNS as having nursing programs of sufficient quality and English instruction; and
3. The nursing program was in operation on or before November 12, 1999 or has been approved by CGFNS if it was later established.

CGFNS has designated the following countries for purposes of the alternate certification process: Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and the United States.

If the law requiring health care worker certificates was passed in 1996, how come they still are not required in all cases?

The 1996 Act's health care provisions have been implemented in three interim rules.

The first was released in 1998 following the filing of a class action law suit challenging the long delay in implementing interim regulations following passage of the 1996 Act. From the passage of the 1996 Act until that regulation was issued, no health care workers were admitted to the US. Two more regulations - one in 1999 and one in 2001 - were issued finally allowing all health care workers covered under the 1996 Act to be admitted.

The first regulation identified seven categories of health care workers subject to the 1996 Act. They are nurses, physical therapists, occupational therapists, speech-language pathologists, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians) and physician assistants. In that rule, CGFNS as well as NBCOT, the organization that credentials occupational therapists, were authorized to certify nurses and occupational therapists, respectively. The rule also established the appropriate English testing levels for RNs and OTs and specified exemptions from the English rules. The first interim rule only applied to immigrants and not non-immigrants. The law was waived for non-immigrants until issuance of a final regulation. Until now, such non-immigrant workers have been granted one-year periods of admission to the US.

The second interim rule temporarily authorized CGFNS to issue certificates to physical therapists and occupational therapists seeking immigrant visas. It also authorized the Foreign Credentialing Commission on Physical Therapists (FCCPT) to issue certificates to immigrant physical therapists. Appropriate English test scores were also determined for PTs.

The third interim rule finally included the rest of the designated health care professions and listed English scores for them.

In October of 2002, the USCIS proposed a final rule for certifying health care workers. The rule had the following major proposals:

1. A list of organizations authorized to issue certificates
2. A description of a certificate
3. The English language requirements
4. Alternative certification rules for nurses
5. A streamlined process for nurses, PTs, OTs and speech language pathologists and audiologists
6. The procedures for qualifying as a certifying organization
7. A list of standards that an organization must meet to certify health care workers and
8. A requirement to review periodically the performance of certifying organizations.

The proposed rule would also for the first time cover non-immigrants.

What will happen to the approvals for previously authorized certifying organizations?

The organizations previously authorized under the prior interim rules to certify health care workers (except CGFNS) shall be required to be re-certified. However, those organizations will retain interim authority to continue issuing certifications. These organizations will have until January 28, 2004 to submit an I-905 Application for Authorization to Issue Health Care Worker Certificates. CGFNS will still have to

submit an application (without paying a fee) by that date as well and CGFNS will still have to be subject to ongoing review by USCIS.

Are Non-Immigrants Covered by the New Law?

Yes. Beginning on July 25, 2004, non-immigrants are covered by the VisaScreen rules (see below for more information on this). However, spouses and dependants of immigrants or non-immigrants who are the primary applicants are not covered even if the spouse intends to work in health care. But all people applying for H, J and O visas are covered. Also, TN visa holders are covered despite protests that the NAFTA Treaty prohibits this. Non-immigrants coming in for training under F, H-3 and J visas are NOT covered either.

Note that at the time of publication (April 2004), several key organizations and individuals – including CGFNS, the American Hospital Association and a number of members of Congress – had urged the USCIS to delay the implementation date of the certification rules for non-immigrant applications.

Which Kinds of Health Care Workers are Covered by the Certification Requirements?

As in the proposed rule and the interim rules, seven occupations are covered. They are

1. Registered Nurses
2. Physical therapists
3. Occupational therapists
4. Speech-language pathologists
5. Medical technologists (also known as clinical laboratory scientists)
6. Medical technicians (also known as clinical laboratory scientists) and
7. Physician Assistants

The USCIS considered and has chosen not to expand this list and has also decided not to define these health care occupations. Instead, they will continue with the practice of reviewing the duties of a worker on a case-by-case basis.

How Will Health Care Workers Trained in the US be Treated?

The USCIS has retained the controversial requirement from the proposed rule that health care workers who possess state licenses or who were trained in the US must still be certified. According to USCIS, they are strictly interpreting the law and Congress expressed no intention to exempt these workers.

Also, the USCIS argues that the state screening processes alone would not demonstrate applicants' English skills and comparable training and unencumbered licensing.

The USCIS did, however, accept the suggestion of CGFNS in the final rule to allow for a more streamlined certification process for those nurses who trained in the US or who already are licensed here. Under the CGFNS proposal, a nurse who graduated from an entry-level program accredited by the National League for Nursing

Accreditation Commission (NLNAC) or the Commission Collegiate Nursing Education (CCNE) would be exempt from the educational comparability review and English language proficiency testing. Also, nurses educated in the US in any other named discipline and who have graduated from a program accredited by the discipline would be evaluated under this same process. The USCIS believes that this will substantially shorten the certification process and ease the paperwork burdens on nurses.

The USCIS and the Department of Health and Human Services have also agreed to use the same kind of streamlining for the following groups:

1. For occupational therapists, graduation from a program accredited by the Accreditation Council for Occupational Therapy Education (ACOTE) or the American Occupational Therapy Association (AOTA).
2. For physical therapists, graduation from a program accredited by the Commission on Accreditation in Physical Therapy Education (CAPTE) of the American Physical Therapy Association (APTA); and
3. For speech language pathologists and audiologists, graduation from a program accredited by the Council on Academic Accreditation in Audiology and Speech Language Pathology (CAA) of the American Speech-Language-Hearing Association (ASHA).

For now, other health care workers not listed above need to go through a normal certification.

When and How will the Certification be Presented to the USCIS?

First, certifications will only be valid for a five-year period. So it is possible that some nurses may have to go through the process more than once if they are in the US for an extended period on a non-immigrant visa or they simply wait several years before applying for admission to the US.

In the *proposed* regulation, the USCIS said that it would NOT be necessary to present the credentialing certification each time a worker enters the US. The presentation of an I-94 or a fee receipt showing that the worker was processed for admission under NAFTA can be used as evidence that the worker previously presented a certificate. **NOTE, HOWEVER, that the USCIS has changed its mind.** It will now only accept a valid health care worker certificate or certified statement as evidence that the worker is admissible. According to the USCIS, the proposal would not work because I-94s are supposed to be surrendered for many travelers and I-94s don't always contain information on a worker's occupation. Green card holders, however, do not need to show the certificate to be admitted each time.

How Will Certificates Be Presented When Applying for a Change of Non-Immigrant Status in the US?

The new rule adds a section that outlines the procedure for submitting a certificate when a change of nonimmigrant status is requested in the US.

Due to concerns that requiring workers already in the US in nonimmigrant visas to

immediately get certifications could disrupt the delivery of health care, the USCIS has decided that they will continue waiving the certification requirement for ONE year for health care workers already in the US. The USCIS believes this will allow plenty of time for workers to meet the requirements for certification and for the credentialing organizations to get ready for a much bigger workload.

Therefore, any nonimmigrant health care worker admitted on or before July 26, 2004 will have the certification requirement waived. Furthermore, any petition or application to extend a worker's authorized stay or change his or her status will be denied unless the alien obtains the required certification no later than one year after the date of the worker's admission.

How Will Certificates Be Presented When Applying for an Immigrant Status in the US?

Any applicant coming to the US as an immigrant or is applying for adjustment of status to perform labor in a health care occupation must submit a certification at the time of visa issuance or adjustment of status. So it should not be necessary to have VisaScreen completed at the time of filing the I-140.

How Will Organizations Qualify to Issue Health Care Worker Certificates?

CGFNS is the only organization that can - at least initially - certify workers in any of the seven covered professions. They will still be subject to oversight and could lose their accreditation if the USCIS finds problem with their credentialing process.

All organizations must submit an I-905 Application for Authorization Workers (though CGFNS does not need to pay the \$230 fee). All applications are going to be handled by the USCIS Nebraska Service Center.

The USCIS will notify the public of new organizations approved for certifying by publishing a public notice in the Federal Register and on its web site at www.immigration.gov. The list will also identify organizations whose authorization has been terminated.

More than one organization can be approved to issue certificates for the same occupation and such approvals shall be valid for five years at a time.

The USCIS has laid out in the final rule the specific standards that must be met in order to qualify to issue certificates.

There are four guiding principles to the standards:

1. The USCIS will not approve an organization unless the organization is independent and free of material conflicts of interest regarding whether an alien receives a visa.
2. The organization should demonstrate an ability to evaluate both the foreign credentials appropriate for the profession and the results of examinations for proficiency in the English language appropriate for the health care field in which the alien works.

3. The organization should also maintain comprehensive and current information on foreign educational institutions, ministries of health and foreign health care licensing jurisdictions.

4. If the health care field is one for which a majority of states require a predictor examination (such as nursing), the organization should demonstrate an ability to conduct the examination outside the US.

A change from the proposed regulations is the addition of language clarifying that a not-for-profit corporation that has a self-perpetuating board of directors may still demonstrate that it is independent and free of material conflicts of interest regarding whether the alien receives a visa.

Another addition to the proposed rules is that credentialing organizations will be required to request evidence of a worker's degree and transcript from the issuing educational and licensing authorities rather than from the applicants. This new rule is designed to reduce fraud.

The regulations also have a number of specific requirements that must be met by certifying organizations including the following:

- the organization must be independent of any other group that functions as a representative of the occupation or profession or serves as or is related to a recruitment/placement organization
- the organization must be able to render impartial advice regarding an individual's qualifications regarding training, experience and licensure.
- the organization must be completely independent in all of its day-to-day activities.
- the organization should provide applicants with their results as quickly as possible and if an applicant fails, the applicant should be quickly provided with information on his or her areas of deficiency
- the organization should take steps to ensure applicants' information is kept confidential
- the certifying organization must have a formal policy for renewing the certification if an applicant's original certification has expired before the individual first seeks admission to the US or applies for adjustment of status
- the organization shall provide all qualified applicants with a certificate in a timely manner
- the organization shall examine, evaluate and validate the academic and clinical requirements applied to each country's accrediting bodies or the educational institution
- the organization should evaluate the licensing and credentialing systems of each country or licensing jurisdiction to see which systems are equivalent to that of the majority of licensing jurisdictions in the US
- the organization shall be prepared to submit information requested by USCIS for use in investigating allegations of non-compliance with standards
- the organization shall establish procedures to track the ability of certificate holders to pass US licensing or certification exams. Information on passage rates shall be supplied to HHS on an annual

basis or the USCIS as part of the five-year reauthorization application.

What Kinds of Organizations Can Qualify to Be a Credentialing Organization?

According to the USCIS, any organization, including a state agency, can be found eligible for authorization to issue certificates as long as it meets the majority of the standards noted above.

How Will the USCIS Monitor Credentialing Organizations?

The USCIS has stated that it intends to develop a process to monitor credentialing organizations to ensure that the organization continues to follow the standards in the new rule. As part of this process, the USCIS will review and reauthorize programs every five years. If the USCIS makes adverse findings, it can initiate termination proceedings. It also may conduct additional reviews at any time in the five-year period. CGFNS sought to be exempt from this requirement, but were rebuffed by USCIS.

How Much Time Will Credentialing Organizations Have to Issue Certificates?

The USCIS considered requiring organizations to issue certificates in a specified period of time. But instead they decided to simply state in the regulations that organizations must issue certificates in a timely manner to as to minimize any delays that may affect a worker's ability to proceed with his or her application for an immigration benefit. It did, however, state in the regulation's preamble that it reserves the right to initiate termination proceedings against organizations that are unduly slow in issuing certificates. It also can waive the certification requirement in individual cases upon request.

How Much Can a Credentialing Organization Charge for a Certificate?

The USCIS does not specify how much an organization can charge, but the regulation does state that the fee charged should not unduly impair a worker's ability to seek an immigration benefit.

How Can a Certificate Be Revoked from a Worker?

A credentialing organization must develop policies and procedures for revoking certificates if it finds that a worker was not eligible to receive the certificate at the time it was issued. Also, for workers whose certificates are revoked, credentialing organizations are responsible for notifying the Nebraska Service Center, which may revoke the visa petition and initiate removal proceedings.

The USCIS has added a requirement since the proposed regulation that requires an organization issuing certificates include in its revocation process a mechanism to revoke a certificate when it learns that a holder is no longer eligible to hold a certificate.

What Does the Certificate Need to Include?

The certification needs to include the following information:

1. The name, designated point of contact to verify the validity of the certificate, address and telephone number of the certifying organization;
2. The date the certificate was issued?
3. The health care occupation for which the certificate was issued; and
4. The alien's name and date and place of birth.

What are the Testing Organizations and Scores Approved for the English Language Certification Requirement?

The tests and scores will be published periodically in the Federal Register and on the USCIS web site at www.immigration.gov.

Score requirements are currently as follows:

1. Physical and Occupational Therapists -

ETS: TOEFL: Paper-based 560, Computer-based 220; TWE: 4.5; TSE: 50;

2. Nurses and other health care workers requiring a bachelors degree -

ETS: TOEFL: Paper-based 540, Computer-based 207; TWE: 4.0; TSE: 50;
TOEIC Service International: TOEIC: 725; plus TWE: 4.0 and TSE: 50; or
IELTS: 6.5 overall with spoken band score of 7.0 (this would require the Academic module).

3. Occupations requiring less than a bachelor's degree -

ETS: TOEFL: Paper-based 530, Computer-based 197; TWE: 4.0; TSE: 50;
TOEIC Service International: TOEIC: 700; plus TWE: 4.0 and TSE: 50; or
IELTS: 6.0 overall with spoken band score of 7.0 (this would require the Academic or the General module).

Note that graduates of health profession programs in Australia, Canada (except Quebec), Ireland, New Zealand, the United Kingdom and the United States are deemed to have met the English language requirements.