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The following is not intended to be legal advice pertaining to your situation and should not be construed as such. The information provided is intended merely as a general overview with regard to the subject matter covered.

SPONSORING FOREIGN NURSES AN NONIMMIGRANTS AND IMMIGRANTS

SPONSORING NONIMMIGRANT FOREIGN NURSES

Nonimmigrant visa options for nurses are limited. Which combination of foreign nursing credentials and US nursing position requirements will qualify for which classification(s) require a fact-based determination. In some cases, more than one alternative may be available. In some cases, no alternative may be available.

H-1A

H-1A classification for foreign nurses is no longer available. This was a program authorized by Congress in the Nursing Relief Act of 1989 for five years the program expired on September 1, 1995.

H-1B

The H-1B is not designed specifically for foreign nurses, but for aliens coming to the United States temporarily to provide services in a “specialty occupation” or as a fashion model of distinguished merit and ability.

H-1C¹

Congress passed the Nursing Relief for Disadvantaged Area Act in 1999. The Immigration and Naturalization Service (INS) released regulations in 2001. This is a complex classification that is not frequently used. This program facilitates hiring of nonimmigrant nurses in *health profession shortage areas* in the US. The now-expired H-1a and the current H-1c programs are similar except the H-1c program (1) imposes more restrictions on the types of facilities that may petition for foreign nurses (less than 20 facilities nationwide have been identified as qualified), (2) requires these facilities to make a greater number of attestations to the United States Department of Labor (USDOL) using form ETA 9081, including that as of 3/31/97 they were located in health professional shortage areas, (3) places a 500 visa annual cap, as well as a state-by-state numerical cap (25 H-1c nurses a year for each state), on H-1c visas that may be issued, and (4) does not recognize nursing education received in Canada. H-1c beneficiaries must meet all licensing requirements for the state of intended employment.

H-2B²

H-2B status affords US employers the ability to bring skilled or unskilled workers from foreign countries to temporarily engage in non-agricultural employment in the US based on temporary need. Since most US nursing positions constitute permanent employment (this determination is made by the US Department of Labor rather than by the employer), an H-2B petition for a foreign nurse will rarely be approved, because the H-2B classification requires that the employer’s need to fill the position must be temporary.

¹ See 20 CFR 655.

² See Employer Information Bulletin 8.

TN³

Under NAFTA, the North American Free Trade Agreement (North American Free Trade Agreement), a citizen of Canada or Mexico may work in a professional occupation in the US provided that: 1) the profession is on the NAFTA list, 2) the alien possess the specific criteria for that profession, 3) the prospective position requires someone in that professional capacity, and 4) the alien is going to work for a US employer. The NAFTA classification, TN, includes 63 professions. The registered nurse is one of the 63 professions. For additional information about admission of Canadian or Mexican nurses as TN aliens under NAFTA, consult Employer Information Bulletin 11.

H-1B “SPECIALTY OCCUPATION”⁴

Since the expiration of the H-1A category, some petitioning employers have sought to have registered nurses classified as eligible for H-1B visas. However, most nurses do not typically meet the requirements for H-1B classification. Nursing is not a per se specialty occupation. Whether a particular nursing position qualifies as a specialty occupation depends on the specific facts of that particular case. Aliens in certain specialized RN occupations are more likely than typical RNs to be eligible for H-1b status.

If a prospective employer believes that a particular RN may qualify as an H-1B nonimmigrant, the prospective employer may file a Form I-129 with the appropriate Service Center.

a) RNs do not typically meet the General Requirements for H-1b Specialty Occupation Classification

A specialty occupation is defined as a field of employment, which requires:

- (A) Theoretical and practical application of a body of highly specialized knowledge; and
- (B) That the attainment of a bachelor’s or higher degree in the specific specialty (or its foreign degree equivalent) is a minimum for entry into the occupation in the United States.

H-1B status generally is not available to most nurses because, in most States, the minimum-entry requirement for most nursing positions is a two-year associate degree in nursing (A.D.N.) and not a bachelor’s degree (except that North Dakota requires a BSN) or higher degree. Nonetheless, certain nurses will be able to meet statutory and regulatory requirements and receive H-1B approval.

NOTE: The fact that a particular RN, in fact, has a BSN is not, by itself, enough to make that RN eligible for H-1B classification. In most States, a person is not *required* to have a BSN in order to obtain a license as an RN. Since one can enter the field of Registered Nursing with something less than a BSN, Registered Nursing is not, itself, a specialty occupation.

In North Dakota, however, no one who enrolled in a nursing program after January 1, 1987, may obtain licensure as an RN without first obtaining a BSN. For this reason, registered nursing generally would qualify as a specialty occupation if the alien will practice in North Dakota and enrolled in nursing program after January 1, 1987.

To meet the requirement of a specialty occupation the following is required:

- (A) Full state licensure to practice in the occupation, if such licensure is required to practice in the occupation⁵;
- (B) Completion of the degree required for the occupation; or
- (C) (i) experience in the specialty equivalent to the completion of such degree (in other words, have a combination of education, training, and work experience in the specialty occupation equivalent to a US bachelor’s degree or higher); and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

³ See Employer Information Bulletin 11.

⁴ See November 2002 memo, Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses 11/27/02 Johnny N. Williams HQOPS (Services/H-1).

⁵ A registered nurse needs to be fully licensed in the state they will work. In order to be licensed as a RN, an individual must look to see what the state they will work in requires. Some states require that the individual graduate from an approved nursing program and pass the National Council Licensure Examination for Registered Nurses (NCLEX-RN) exam, some states require CGFNS and other states require course-by-course evaluations.

In order to qualify a RN position as an H-1B, the petitioning employer must show:

- A bachelor or higher degree or equivalent⁶ is normally the standard minimum requirement for entry into the particular specialty occupation;⁷
- The degree required for the subject position must be commonly required for similar positions within the employer/petitioner's industry. Alternatively, petitioner must demonstrate that the subject position is so complex or unique that it can be performed only by an individual with the degree or equivalent that is listed as a job requirement;
- The employer must normally require the same degree or its equivalent for the subject position;
- The specific duties of the position must be so specialized and complex that knowledge required for performance of the duties is usually associated with attainment of a bachelor level or higher degree.

b) Aliens in Certain Specialized RN Occupations May be Eligible for H-1 Status

Although general RNs will not typically be eligible for H-1B status, certain specialized nursing occupations are likely to require a bachelor's or higher degree as the minimum requirement for entry into that specialized field, and consequently have a great chance of satisfying the H-1B requirements. Positions that require nurses who are certified advanced practice registered nurses (APRN) will generally be H-1B equivalent due to the advanced level of training and education required for certification. Furthermore, employers may require that the prospective employee hold advanced practice certification. (i.e. clinical nurse specialist, certified registered nurse anesthetist, certified nurse-midwife, or certified nurse practitioner.) If the APRN position 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 (such as a masters degree).

It is also important to note that there are also nursing specialties that require a higher degree of knowledge and skill than a typical RN. Certification examinations may be available to RNs who are not advanced practice nurses, but who possess additional clinical experience in certain areas. (i.e. school health, occupational health, rehabilitation nursing, emergency room nursing, critical care, operating room, oncology and pediatrics.) The petitioner may be able to demonstrate that the H-1B petition may be approved by demonstrating that the position meets the requirements outlined above and by demonstrating that the individual meets those requirements.

c) Nurses in Administrative Positions

Certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administrative position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree. (See Bureau of Labor Statistics, USDOL, Occupational Outlook Handbook at 269.) Nursing Services Administrators are generally supervisory level nurses who hold a RN and a graduate degree in nursing or health administration. (See Bureau of Labor Statistics, USDOL, Occupational Handbook at 75.)

⁶ A combination of education, training, and work experience may substitute for a bachelor's degree. In such cases, three years of specialized training and/or experience can substitute for one year of college study, if accepted by USCIS.

⁷ The reporting of a US or foreign degree is not required in a standard format on any of the INS or DOL forms, but is generally provided by the petitioning employer in supporting documentation. In cases where the degree was earned outside of the US, the employer may have to provide a credentials evaluation stating that the foreign degree is "equivalent to" a particular US degree. USCIS does not certify or recommend credentialing services.

SPONSORING FOREIGN NURSES AS LAWFUL PERMANENT RESIDENTS

Issuance of Employment-based immigrant visas typically involves three main steps. First, the employer must establish, through the labor certification process, that there are a shortage of sufficient workers willing and able to provide the services the alien nurse is to provide and that the immigration of the alien nurse will not adversely affect wage and working conditions in the U.S. Second, the I-140 is filed at the USCIS Service Center with geographic jurisdiction over the place of employment. Once the I-140 is approved and it has been determined that the alien has the minimum requirements, the alien beneficiary become eligible to apply for an immigrant visa, once the priority date is current.

If the alien is present in the United States in a lawful status, approval of the Form I-140 may permit the alien to apply for adjustment of status, instead of going abroad to obtain an immigrant visa.

Schedule A Labor Certification

As noted above, any alien who seeks to enter the US in a specified employment-based permanent visa categories are excluded from the United States unless the Secretary of Labor has certified to the Secretary of State and Attorney General that there are not sufficient workers who are able, willing, and qualified US workers, and available at the time of application for a visa and admission to the US and at the place where the alien is to perform such skilled or unskilled labor, and the employment of such alien will not adversely affect the wages and working conditions of US workers similarly employed. This process is normally called a labor certification.

Every petition must be accompanied by an individual labor certification from the DOL or by an application for Schedule A designation. To apply for Schedule A designation, a fully executed uncertified Form ETA 750 in duplicate must accompany the I-140 petition.⁸

Schedule A is a list of occupations which have been pre-certified by the DOL and have been determined that there are no sufficient US workers who are able, willing, qualified, and available for the occupations, and that the wages and working conditions of US workers similarly employed will not be affected by the employment of aliens in Schedule A occupations. Nursing is an occupation that has been pre-certified by the DOL⁹.

It is important to note that this pre-certification only applies to “professional nurses.” “Professional nurses” generally includes the making of clinical judgments concerning the observation, care, and counsel of persons requiring nursing care and administering of medicines and treatments prescribed by the physician or dentist; the participation in activities for the promotion of health and the prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as: obstetrics, surgery, pediatrics, psychiatry, and medicine. Certified nurses assistants, licensed vocation nurses, practical nurses, and nurse aids are not professional nurses.

⁸ An employer seeking a Schedule A labor certification as a professional nurse, shall file as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination; or that the alien holds a full and unrestricted (permanent) license to practice professional nursing in the state of intended employment.

⁹ Professional nurses seeking permanent labor certification on Schedule A must document that he/she passed “the Commission on Graduates of Foreign Nursing School (CGFNS) Examination; or ... hold a full and unrestricted license to practice professional nursing in the State of intended employment.” 20 CFR 656.10. On December 20, 2002, the Immigration and Naturalization Service issued a memorandum addressing the adjudication of I-140 petitions filed on behalf of schedule A nurses, which was issued pursuant to DOL guidance. Specifically, employers may receive a Schedule A labor certification on behalf of a nurse, if the nurse has successfully passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) examination in lieu of either having passed the CGFNS examination or being in full possession of a full and unrestricted license to practice nursing in the state of intended employment.

I-140

Classification for a nurse will typically be in the third Employment Based category (EB-3), either skilled worker or professional. Note that, as with the H-1B, a registered nurse would have to be coming to work in a position that *requires* a bachelor's degree in order for the registered nurse to qualify for EB-3 classification as a professional. Supporting documentation must be submitted with the I-140.

The sponsoring employer should include the following documentation:

- Properly filed petition/Form I-140
- Either DOL certified labor certification, ETA 750 Parts A and B, or application for Schedule A designation (uncertified ETA 750 Parts A and B) - in duplicate¹⁰
- Form G-28 if represented by an attorney
- Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation, which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.
- Evidence that the prospective US employer has the ability to pay the proffered wage. Evidence of this ability shall be either in the form of copies of annual reports, federal taxes returns, or audited financial statements. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be requested.
- Evidence of beneficiary's qualifications such as proof of nursing diploma or degree, proof of nursing registration/licensure from the country where the degree was obtained, etc.¹¹

Section 343 of IIRIRA/ CGFNS Certification Program¹²

Section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), created a new ground of inadmissibility for any immigrant or nonimmigrant¹³ alien who seeks to enter the US to perform labor as a health-care worker. This rule applies to aliens coming to the US – whether as immigrants or nonimmigrants -- for the primary purpose of performing labor in the nursing occupation. Section 343 requires certification that verifies that the nurse's education, training, licensing, experience and English competency. CGFNS has been designated to provide the certificate to applicants who seek to perform labor as a professional nurse. As of the date of this Employer Information Bulletin, no other organization has been authorized to provide these certifications for nurses. Once the screening is successful, the certifying organization (currently, only CGFNS for nurses) issues what is called a Visa Screen certificate. The certificate is evidence that the alien has met the requirements of section 343 of IIRIRA and nothing more. Do not confuse the certificate with other requirements, such as state license requirements and other requirements. The alien must still meet all other regulatory and statutory requirements for the employment-based classification sought as well as for adjustment of status. In particular, the issuance of a Visa Screen certificate would not preclude a nurse's is being sanctioned for practicing in a particular State without any license that that State may require.

¹⁰ On October 2, 2002, DOL advised the Immigration and Naturalization Service that, in adjudicating EB-3 petitions on behalf of nurses, the Service may accept documentation that the alien beneficiary has passed the NCLEX-RN examination as eligibility for a Schedule A labor certification in addition to a CGFNS certificate or nurse license. See INS Memorandum December 20, 2002 which instructs all Service Centers to favorably consider the I-140 petition for a foreign nurse, as being eligible for a Schedule A labor certification, upon presentation of a certified copy of a letter from the state of intended employment which confirms that the alien has passed the NCLEX-RN examination and is eligible to be issued a license to practice nursing in that state.

¹¹ See instructions to I-140 form.

¹² For more details on the CGFNS Certificate Program go to www.cgfns.org.

¹³ Section 343 provisions are currently waived for all health care workers (including nurses) entering the US as nonimmigrants. There is however a proposed rule that was introduced October 11, 2002 in the Federal Register, Vol. 67, No. 198.

Immigrant Visa Processing/Adjustment of Status

A Visa Screen certificate must be obtained before an immigrant visa will be issued. So once the I-140 has been approved and a Visa Screen certificate obtained, a nurse is then eligible to apply for an immigrant visa through consular processing. If they are in the US in a lawful status they may apply to adjust their status to that of a lawful permanent resident.

Contrary to the regulations that once applied to applicants for H-1A visas, there is no requirement that the applicant be certified by the state licensing agency where he/she intends to work. Rather, presentation of the "Visa Screen" certificate indicates that the alien's education, training, license, and experience suggest that she/he should not have any problem in getting licensed following entry.

For applicants as yet unlicensed in the state in which they intend to work, rather than requiring proof that the alien has enrolled for such testing, post should just judge the alien's intent to work for the petition health care provider. If post is satisfied that the alien intends to work for the petitioner, it should accept the presumption that the alien will take all necessary steps to follow through on state licensing.

Once in the US, nurses are required to adhere to licensing requirements of the state in which they intend to work. Requirements vary from state to state. It is imperative to look up each state's requirements.

Nonimmigrants

As noted, section 343 applies to nonimmigrants as well as to immigrants. While working to develop the Visa Screen rules, however, Legacy INS and the Department of State jointly exercised their discretion to waive the foreign health care worker certification requirement for nonimmigrant health care workers.

With the promulgation of the Final Rule on July 25, 2003, the requirements of section 343 will now affect the admission of nonimmigrants as well as immigrants. The Final Rule became effective on September 23, 2003, and requires nonimmigrant health care workers to obtain and present certification to the DHS each time they apply for admission, an extension of stay, or change of status. To provide for a smooth transition, however, the Department of Homeland Security and the Department of State will continue to waive the ground of inadmissibility for nonimmigrants seeking admission before July 26, 2004. Until July 26, 2004, DHS will admit and approve applications for extensions of stay and/or change of status for nonimmigrant health care workers who have not yet satisfied the Visa Screen requirements. The waiver allows these aliens temporary admission for a period no longer than one year from the date of the decision. The alien must obtain the certification within one year of date of admission or decision. This waiver provision will expire on July 26, 2004.

Accordingly, on or after July 26, 2004, if an alien seeks admission, change of status, or extension of stay, the alien must provide evidence of the health care worker certification if his or her primary purpose for coming to or remaining in the United States is employment in one of the affected health care occupations

Aliens who seek admission as TN nonimmigrants under NAFTA are subject to the section 343 certification requirements to the same extent as all other nonimmigrants. As with other nonimmigrants, a waiver of the section 343-certification requirements will continue until July 26, 2004.

How long will this process take?

It is difficult to estimate how long the entire process will take. First, it cannot be estimated how long it takes a foreign nurse to receive his/her CGFNS Certificate. Second, there are different processing times for the Form I-129 or Form I-140 at each USCIS Service Center. In addition, it cannot be estimated how long it will take a foreign nurse to gather the information required to receive his/her VisaScreen certificate as well as be approved for the certificate. Finally, once the approved petition is sent to the US Embassy or Consulate abroad where the nurse applies for the immigrant or nonimmigrant visa, the processing time varies from country to country.