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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 AS NONIMMIGRANTS AND IMMIGRANTS

SPONSORING NONIMMIGRANT FOREIGN NURSES

Nonimmigrant visa options for nurses are limited. Which combination of foreign nursing credentials and U.S. 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

The 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

The H-1C classification for foreign nurses is no longer available. The program authorized by Congress through the Nursing Relief for Disadvantaged Area Act of 1999 expired on June 13, 2005. No applications for initial H-1C status or for extension of H-1C status will be accepted. Those who are currently in H-1C status may maintain such status until his or her current visa expires, assuming that the individual continues to satisfy the terms and conditions of H-1C status.

H-2B²

The H-2B status affords U.S. employers the ability to bring skilled or unskilled workers from foreign countries to temporarily engage in nonagricultural employment in the United States based on temporary need. Since most U.S. nursing positions constitute permanent employment (this determination is made by the U.S. Department of Labor rather than by the employer), an H-

¹ See 20 CFR 655.

² See Employer Information Bulletin 8.

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.

TN³

Under the North America Free Trade Agreement (NAFTA), a citizen of Canada or Mexico may work in a professional occupation in the United States provided that: 1) the profession is on the NAFTA list, 2) the alien possesses 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 U.S. 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 (RNs) classified as eligible for H-1B visas. However, most nurses do not typically meet the requirements for H-1B classification. Nursing, per se, is not a 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. 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) A bachelor's or higher degree in the specific specialty (or its foreign degree equivalent), which is a minimum for entry into the occupation in the United States.

H-1B status generally is not available to most RNs because every state and the District of Columbia permits a person who does not hold a bachelor's degree in nursing, but who meets the educational and testing requirements set by law, to obtain an RN license. Nonetheless, certain nurses may be able to meet statutory and regulatory requirements and receive H-1B approval by establishing that they practice in a specialized field of nursing that does require a bachelor's degree in nursing as the minimum for entry into the specialty.

NOTE: The fact that a particular RN, in fact, has a Bachelor of Science in Nursing (BSN) is not, by itself, enough to make that RN eligible for H-1B classification. The critical factor is that 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.

Until recently, USCIS recognized an exception for RNs licensed in North Dakota. At one time, North Dakota law provided that no one who enrolled in a nursing program after January 1, 1987 was eligible for licensure as an RN without first obtaining a BSN. Chapter 361 of the 2003 North Dakota Session Laws, however, repealed this requirement. Since this amendment became effective (August 1, 2003), North Dakota now allows a person who has graduated from an

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).

approved RN program and who passes the required examination to be licensed as an RN, even if the person does not hold a BSN.

Specialty Occupation requirements:

- (A) Full state licensure to practice in the occupation, if such licensure is required to practice in the occupation;⁵
- (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 U.S. bachelor's degree or higher); and
(ii) Recognition of expertise in the specialty through progressively more responsible positions relating to the specialty.

In order to qualify an 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's/petitioner's industry. Alternatively, the 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.

⁵ A registered nurse needs to be fully licensed in the state in which they will work. In order to be licensed as an 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 passing the commission on Graduates of Foreign Nursing Schools (CGFNS) examination and other states require course-by-course evaluations.

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

Aliens in Certain Specialized RN Occupations May be Eligible for H-1B 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 BSN, and some additional graduate level education (such as a master's 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 (e.g., 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.

- **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 an RN and a graduate degree in nursing or health administration. (*See* Bureau of Labor Statistics, USDOL, Occupational Handbook at 75.)

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 is 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 United States. Second, the Form I-140 is filed at the USCIS Service Center with geographic jurisdiction over the place of employment. Once the Form I-140 is approved and it has been determined that the alien has the minimum requirements, the alien beneficiary becomes 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, aliens who seek to enter the United States in 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 U.S. workers, and available at the time of application for a visa and admission to the United States 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 U.S. 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 Form I-140 petition.⁸

Schedule A is a list of occupations which have been pre-certified by the DOL and it has been determined that there are not sufficient U.S. workers who are able, willing, qualified, and available for the occupations, and that the wages and working conditions of U.S. 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 DOL.⁹

It is important to note that this pre-certification only applies to “professional nurses.” Professional nurses’ duties generally include 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; and 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 vocational nurses, practical nurses, and nurse aids are not professional nurses.

Form 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 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 Form I-140.

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 or she passed “the Commission on Graduates of Foreign Nursing Schools (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 the Form 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.

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 an application for Schedule A designation (uncertified ETA 750 Parts A and B) in duplicate.¹⁰
- 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 U.S. 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 tax 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 the 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 United States to perform labor as a healthcare worker. This rule applies to aliens coming to the United States – 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. The Commission on Graduates of Foreign Nursing Schools (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 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 Form 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 the Form I-140.

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 United States 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 Form 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 United States 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 or she intends to work. Rather, presentation of the Visa Screen certificate indicates that the alien's education, training, license, and experience suggest that he or she 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, the post should just judge the alien's intent to work for the petitioning health care provider. If the 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 United States, 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 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 a change of status. To provide for a smooth transition, however, the Department of Homeland Security and the Department of State continued to waive the ground of inadmissibility for nonimmigrants seeking admission before July 26, 2004. Until July 26, 2004, DHS admitted and approved applications for extensions of stay and/or change of status for nonimmigrant health care workers who had not yet satisfied the Visa Screen requirements. The waiver allowed these aliens temporary admission for a period no longer than one year from the date of the decision. The alien had to obtain the certification within one year of date of admission or decision. This waiver provision expired 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. On July 22, 2004, however, the Secretary of Homeland Security published an interim regulation, 69 *Fed. Reg.* 43729, amending the Department of Homeland Security regulations to extend until July 26, 2005 the deadline by which certain health care workers from Canada and Mexico must obtain health care worker certifications.

This rule applies only to Canadian and Mexican health care workers who, before September 23, 2003, were employed as “trade NAFTA” (TN) or “trade Canada” (TC) nonimmigrant health care workers and held valid licenses from a United States jurisdiction.

A TN nonimmigrant may establish eligibility for the waiver of the health care certification requirement by providing evidence that the initial admission as a TN or TC nonimmigrant health care worker occurred before September 23, 2003, and employment and licensing as a health care worker was before September 23, 2003. Evidence may include, but is not limited to, copies of prior TN or TC approval notices, Forms I-94, employment verification letters, pay stubs, and state health care worker licenses. In addition, DHS electronic records evidencing admission as a TN or TC may be considered.

DHS understands that many TN nonimmigrants actually live in Canada or Mexico and regularly travel to their jobs in the United States. Because many of the aliens protected by this interim rule are regular travelers, it is not necessary for them to have been physically present in the United States on September 23, 2003, in order to benefit from this deadline extension.

This extension does not apply to any alien whose initial admission as a TN nonimmigrant health care worker occurred on or after September 23, 2003. Any alien whose initial admission was on or after September 23, 2003, was admitted on notice of the certification requirement and does not benefit from the additional extension.

An alien whose initial TN admission was on or after September 23, 2003, and before midnight on July 26, 2004, must have the appropriate health care worker certification to be admissible after July 26, 2004, even if applying for admission during a period of time previously authorized on Form I-94 issued at the time of a prior admission between September 23, 2003 and before midnight on July 26, 2004.

Any alien not described in the interim rule who seeks admission after July 26, 2004 to work in a covered health care field will be inadmissible if the alien has not obtained the required certificate. As provided in section 212(d)(3) of the Immigration and Nationality Act and Title 8, Code of Federal Regulations 212.15(n), the Secretary may waive this ground of admissibility on a case-by-case basis.

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 or 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 or her Visa Screen certificate as well as be approved for the certificate. Finally, once the approved petition is sent to the U.S. Embassy or Consulate abroad where the nurse applies for the immigrant or nonimmigrant visa, the processing time varies from country to country.