

A GUIDE TO THE IMMIGRATION OF NURSES AND ALLIED HEALTH CARE WORKERS

by Karin Wolman¹

INTRODUCTION

U.S. immigration law treats healthcare workers differently than other aliens seeking employment-based visas. This is because there are legitimate public health and safety interests in ensuring that all foreigners who come to provide healthcare services to patients in the United States have been properly trained and licensed, and they possess the English language skills necessary to communicate effectively with their patients and fellow care providers. Keeping this principle in mind, the first step in representing any health care worker is to determine what options are available in a given case: What is the offered job, and what are the alien's credentials? The answers to these two questions will help determine which visas may be available and will help identify those documents needed to file an approvable petition.

To serve the policy interest in protecting U.S. patients, Congress enacted section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)². It sets forth a new ground of inadmissibility for uncertified foreign health care workers and lists seven occupations that require certification, commonly called a "Visa Screen." The issuance of a Visa Screen confirms that an independent, private credentialing organization approved by the U.S. Citizenship and Immigration Services (USCIS) has verified the validity of the foreign worker's educational and professional credentials, including (1) all licenses ever issued; (2) English-language ability; and (3) eligibility for licensure in the United States for work in any of the seven named health care occupations. A designated health care worker must obtain a Visa Screen before he or she may apply for

an immigrant or nonimmigrant visa to work in any of these occupations³.

The seven occupations that require certification are:

- Nurses—includes Registered Nurses (RNs), Licensed Vocational Nurses (LVNs), and Licensed Practical Nurses (LPNs);
- Occupational Therapists;
- Physical Therapists;
- Speech Language Pathologists and Audiologists;
- Medical Technologists (clinical lab scientists);
- Physician Assistants; and
- Medical Technicians (clinical lab technicians).

Supervisory positions within these occupations that may not entail any patient care but do have a direct effect on patient care also are subject to the certification requirement. Workers in research-oriented positions who are not involved in any direct patient care and do not have contact with any fluid or tissue samples may be classified as "non-clinical" and, thus, made exempt from the requirement.⁴

The final rule implementing IIRAIRA's changes was published on July 25, 2003.⁵ The rule initially provided an effective date of September 23, 2003, but it further authorized a blanket nonimmigrant waiver under INA §212(d)(3) to defer the certification requirement for one year, therefore exempting any healthcare worker admitted as a nonimmigrant prior to July 26, 2004.⁶ Then, in July 2004, a more

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² Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). This provision has been codified at §212(a)(5)(C) of the Immigration and Nationality Act of 1952, as amended, 8 USC §1182(a)(5)(C) (2000).

³ INA §212(a)(5); see 8 CFR §212.15(a) (2006).

⁴ Per 8 CFR §212.15(b)(2), the certification requirement does not apply to aliens seeking admission to perform services in a non-clinical health care occupation, defined by this section as "one in which the alien is not required to perform direct or indirect patient care," including, but not limited to, teachers, researchers and managers of health care facilities.

⁵ Certificates for Certain Health Care Workers, 68 Fed. Reg. 43901 (July 25, 2003).

⁶ This final rule created a transitional period that continued, but also provided a sunset date, for the blanket nonimmigrant waiver initially authorized in the first interim rule, 63 Fed. Reg. 55007 (Oct. 13, 1998), which proposed that the health-

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limited extension was granted to July 26, 2005, but only for nonimmigrants who were admitted in Treaty National (TN-1) status and already licensed in a U.S. jurisdiction prior to September 23, 2003.⁷ *As of July 26, 2005, no foreign worker may be admitted, readmitted, or granted an extension of stay or change of status in order to work in a designated healthcare occupation without a valid Visa Screen.*

In issuing a Visa Screen, the national credentialing organization must certify that:

- The alien's education, training, license and experience meet all statutory and regulatory requirements for entry into the United States;
- The alien's credentials are comparable with those required for an American health care worker in the same occupation;
- The alien's credentials are authentic, and in the case of licenses, unencumbered;
- The alien has an appropriate level of competence in oral and written English; and
- If not already licensed in the United States, the alien has passed a test that predicts success on state professional licensing exams—for an RN, this is either the Commission on Graduates of Foreign Nursing Schools (CGFNS) exam or the National Council Licensure Examination – Registered Nurse (NCLEX-RN).

All foreign health care workers must present a Visa Screen:

- Upon application for any immigrant or nonimmigrant visa at a U.S. Embassy abroad;
- Upon application for admission at a border post; or
- Upon change of status, renewal or extension of any employment-based visa status other than a student or trainee status.

With respect to adjustment of status, the former Immigration and Naturalization Service (INS) first promulgated an interpretative memorandum⁸ regard-

care worker certification requirement only apply to immigrants until final regulations were promulgated.

⁷ Extension of the Deadline for Certain Health Care Workers Required to Obtain Certificates, 69 Fed. Reg. 43729 (July 26, 2004).

⁸ William R. Yates, "Final Regulation on Certification of Foreign Health Care Workers: Adjudicator's Field Manual Update AD 03-31" (Sept. 22, 2003), published on AILA InfoNet at Doc. No. 03092641, (posted Sept. 26, 2003) (cit-
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ing the final rule's requirement that a Visa Screen had to be submitted at the time of filing for adjustment of status. However, USCIS has since found that the language of the rule compels the conclusion that a Visa Screen may be submitted later, "at the time of adjustment of status."⁹ USCIS Texas Service Center announced on May 1, 2006 that it would begin issuing Notices of Intent to Deny for any I-485 applications for health care workers that did not include a Visa Screen at the time of filing, thus giving applicants only 30 days to respond.¹⁰ Shortly thereafter, the Texas Service Center reversed itself, announcing to AILA on June 16, 2006 that it would revert to a policy of issuing a Request for Evidence in any case where a Visa Screen was not submitted with the initial I-485 filing, thus allowing the applicant 120 days to respond.¹¹

The certification requirement applies to foreign workers who seek any employment-based status to work in these occupations, even those who graduate from health care programs at accredited U.S. schools, although these U.S. graduates are treated on a par with candidates educated in English at foreign schools. Because it would be impracticable, the certification requirement cannot apply to any persons who have unrestricted employment authorization, such as F-1 students with practical training; J-2 dependents; E-1/E-2/E-3 spouses and L-2 spouses; any beneficiaries of family-based adjustment applications; dependent beneficiaries of employment-based adjustment applicants; Cuban adjustment applicants; asylees and refugees; and employment-authorized persons in removal proceedings.

As of this writing, only three organizations have been approved by USCIS to provide health care worker certificates, and they are named in the regulation at 8 CFR §212.15(e): the CGFNS, the National Board for Certification in Occupational Therapy (NBCOT), and the Foreign Credentialing Commission on Physical Therapy (FCCPT). Each organization offers the credentialing exam several times a year.

ing 8 CFR §103.2(b)(12) for the proposition that all requirements for eligibility must be met at time of filing for adjustment of status).

⁹ Texas Service Center Liaison Meeting Minutes, Question 4 (May 8, 2006), published on AILA InfoNet at Doc. No. 06060168 (posted June 16, 2006).

¹⁰ *Id.*

¹¹ Published on AILA InfoNet at Doc. No. 06060560 (posted on June 16, 2006).

Speech Language Pathologists/Audiologists, Physician Assistants, Medical Technicians, and Medical Technologists all must apply through CGFNS at present. With these other allied health care professions, be aware that some aliens may have earned a professional certification that is not recognized for immigration purposes, such as the certificate from the American Speech-Language Hearing Association (ASHA).

For a worker to be exempt from the English-language testing requirement¹², he or she must have received a degree from a school in one of the countries exempted by regulation at 8 CFR §214.3. Health care workers are exempt from the English-language testing requirement only if all of the following conditions are met:

- The country of professional education was Australia, New Zealand, Canada (except Quebec), Ireland, the United Kingdom, or the United States;
- The language of spoken instruction was English; and
- The language of the textbooks used was English.

Note that aliens educated in the Canadian province of Quebec are deemed Francophone even if they were educated in English, as the province requires bilingual instruction, so these workers must take the English-language test component.

Certain aliens are authorized under §212(r) of the INA, 8 USC §1182(r) (2000), to present a "certified statement" in lieu of a Visa Screen, in which case the list of countries also includes South Africa. The certified statement can come only from CGFNS, and it has most of the same prerequisites as the Visa Screen. The certified statement is both the alternative document for a health care worker exempted from the language test, and the updating document for anyone whose Visa Screen is more than five years old.

To be valid at the time of application, the Visa Screen must have been issued within the five years immediately preceding the date of application. If the certificate is older than five years, the alien will have to obtain a new statement from the organization issuing the credential, attesting that he or she still meets all of the requirements, including an unen-

cumbered license and up-to-date evidence of English proficiency.

NONIMMIGRANT VISA OPTIONS

A Visa Screen is not required for a nurse or allied health care worker who is completing an educational or training program under F-1 student, J-1 exchange scholar, or H-3 trainee status.¹³

F-1

F-1 visa status is available to aliens who come to the United States as students to complete a full-time course of study with an educational institution approved by USCIS to enroll foreign students. A foreign student may apply for a visa directly at a U.S. Embassy, or if a Canadian citizen, at a border post, with the authorizing Form I-20 issued by the school. F-1 students must register for inclusion in the Student and Exchange Visitor Information System (SEVIS) database so that their entry and maintenance of status can be monitored. Registration by the individual alien is required in addition to any data entered into SEVIS by the sponsoring school.

Nurses and allied health care workers—such as those coming to complete a four-year bachelor of science degree—may be admitted as F-1 students to pursue further education and training in the United States. If the school has a formal affiliation agreement with a local teaching hospital or health care service facility for training that forms an established part of the school's curriculum, then a student may work for up to 20 hours per week at that facility during completion of the degree. However, students who use more than 12 months of full-time Curricular Practical Training (CPT) are not eligible for post-completion Optional Practical Training (OPT).¹⁴ Students in these occupations must keep in mind that they will need additional months of OPT after graduation to remain in the United States long enough to complete the Visa Screen process.

During the course of education, an F-1 student may work off-campus only if the employment is at a facility explicitly integrated with the educational program that has a formal affiliation agreement with the school. The formal affiliation must be associated with a school's established curriculum or with contractually-funded post-graduate research projects.¹⁵

¹² Currently limited to the Test of English as a Foreign Language (TOEFL) or International English Language Testing System (IELTS) exams.

¹³ 8 CFR §212.15(b)(3)

¹⁴ 8 CFR §214.2(f)(10)(i)

¹⁵ 8 CFR §214.2(f)(9)(i),(ii)

Off-campus employment with an employer affiliated with the school may not exceed 20 hours per week during the school year but can be full time during holidays and vacations. Moreover, off-campus employment with non-affiliated employers requires an Employment Authorization Document (EAD), and is available only to students who are utilizing OPT, or those who (1) have already carried a full course load for at least one full year; and (2) have demonstrated severe, unforeseen economic hardship. Off-campus employment during a course of study using an EAD based on severe economic hardship is deducted from the allotted 12 months of OPT that would otherwise be available following graduation. Every F-1 student who has been granted a period of post-completion OPT must apply for and obtain an EAD before he or she may commence work.

Because practical training only lasts for one year at most, it is imperative that nursing and other health care students who are hired to begin work under OPT with a U.S. employer shortly after they graduate be urged to take the NCLEX or CGFNS exams, and then to complete the Visa Screen process as expeditiously as possible.

J-1

J-1 visa status is available to aliens who come to the United States as scholars or trainees to complete an Exchange Visitor Program with a sponsor accredited by the Department of State (DOS). Aliens may apply for the visa directly at a U.S. Embassy, or if a Canadian citizen, at a border post, with the authorizing Form DS-2019 issued by the program sponsor. J-1 exchange visitors must register for inclusion in the SEVIS database so that their entry and maintenance of status can be monitored. Individual registration is required in addition to any data entered into SEVIS by the sponsoring institution.

While the law does not explicitly prohibit the use of J-1 professional training programs for nurses, in practice, DOS does not approve J-1 training programs in nursing sponsored by an employer. Generally, approved J-1 program sponsors are unwilling to entertain applications for employer training programs in health care occupations that entail direct patient care or contact, as doing so could cause the program sponsor to lose its accreditation with DOS. Employer training programs typically include many of the activities involved in employment in the field, so allowing such trainees to provide any patient care would be sidestepping the Visa Screen requirement.

In the unlikely event that a sponsor were to issue a Form DS-2019 for a health care training program, it is likely the applicant would face visa refusal if the training involved any sort of clinical patient contact. A successful J-1 training program application in a health care field would have to be entirely non-clinical, focusing on management, policy or research issues, and the employment setting would have to be such that no incidental patient contact would result. Therefore, the J-1 visa is not a practical option for most non-physician health care workers outside the context of formal educational institutions, even though there is no policy document prohibiting it. Individuals completing advanced degrees in the United States, such as a doctor of physical therapy or a master of science in nursing, may be accorded visa status as J-1 scholars, but this is likely to be the only legitimate use of the J-1 visa category by nurses and allied health care workers that most practitioners will encounter.

Once they complete their U.S. education and any authorized practical training, nurses from most countries¹⁶ no longer qualify for a nonimmigrant work visa status, so their alternatives are more limited than those of other allied health care workers.

H-3

H-3 visa status is available for training at a U.S. organization upon the filing of a petition with USCIS if the sponsoring organization can demonstrate:

- That it is necessary for the beneficiary to be trained in the United States;
- That such training is unavailable in the alien's home country; and
- Why the U.S. employer is willing to incur the cost of training, as the organization may not use such trainees to fill U.S. positions.

A trainee may not engage in productive employment unless it is incidental and necessary to the training, and may not engage in employment that will displace a U.S. worker.

As in cases involving J-1 status, a Visa Screen is not required for H-3 trainees. However, the training is provided in a work environment, so an H-3 training program is unlikely to be approved if it involves any clinical patient care or contact.

¹⁶ Canada and Mexico are notable exceptions. See *supra* note 4, and accompanying text.

Unlike the J-1 visa, the H-3 is petition-based, so the sponsor must describe the training program in the petition, and USCIS must approve all of the elements of the training program before a visa application may be made at an embassy or consulate. In addition to the clinical contact problem, H-3 petitioners face the additional hurdle of having to demonstrate that such training is not available in the beneficiary's home country. For these reasons, the H-3 is not widely used in healthcare occupations.

TN

Health care workers who are citizens of Canada and Mexico may enter the United States under TN-1 status to work in any of the occupations listed in the North American Free Trade Agreement (NAFTA) and its implementing regulations.¹⁷ TN classification is generally available to RNs, Physical Therapists/Physiotherapists, Occupational Therapists, and Medical Technologists, but not to Licensed Practical Nurses, Licensed Vocational Nurses, or Speech Language Pathologists.

Again, any employment-based visa status requires the health care worker to have a Visa Screen certificate before he or she may apply for a visa, seek admission at the border, or file a petition with a request for a change of status. If the alien is already in the United States in a non-work-authorized status, he or she must obtain a Visa Screen certificate before applying for any change of status or extension of stay.

Until July 26, 2005, there existed a special temporary waiver of the Visa Screen requirement for an individual who was employed already in a designated health care occupation, who had been working under TN-1 status in that occupation, and who also had held an unrestricted U.S. state license to practice the occupation prior to September 23, 2003. Because this waiver expired on July 26, 2005, TNs who renewed their status earlier in 2005 had to comply with the Visa Screen requirement before their status expiration date in 2006, or else risk their lawful status in the event of any attempt to travel and re-enter, change employers, or extend their stays.

TN classification is available for many non-Visa Screen jobs in health care, such as Biochemists, Dentists, Dietitians, Epidemiologists, Nutritionists, Pharmacists, Pharmacologists, Psychologists, Rec-

reational Therapists, Rehabilitation and Vocational Counselors, Social Workers, and Veterinarians, as well as for Physicians in non-clinical teaching and research positions. However, nearly all of these TN occupations require a state license to practice in the United States, so at the time of admission the applicant must present either a valid Canadian license, a valid U.S. state license, or proof that a license will be issued upon admission to the United States in work-authorized status and issuance of a Social Security number.¹⁸

A TN applicant must present all documents in the original if applying at the border or airport (Canadian citizens) or at a U.S. Embassy (Mexican citizens), but photocopies will suffice if applying to a USCIS Service Center for an extension of stay or change of status via petition by the U.S. employer on Form I-129. Documents the TN applicant must present include the following:

- Proof of citizenship¹⁹;
- Visa Screen certificate or certified statement,²⁰ if applicable to the occupation;
- Valid U.S. state or Canadian provincial license for that occupation, or proof of eligibility for prospective licensure, if applicable;²¹

¹⁸ INS Memorandum HQ 70/6.1.3, from Thomas E. Cook, Acting Assistant Commissioner, Adjudications, "Adjudication of Form I-140 Petitions for Schedule A Nurses Temporarily Unable to Obtain Social Security Cards" (Dec. 20, 2002), published on AILA InfoNet at Doc. No. 03010840 (posted Jan. 8, 2003). Although this memorandum only applies to immigrant visas, it observes that many nurses are admitted in a non-work-authorized visa status to take the NCLEX-RN exam and, thus, cannot obtain state licensure until they are granted some other visa status that permits the issuance of a social security card. The memo notes, "In such cases, the common practice is for the state nursing board to issue a letter to the nurse informing him or her that because he or she has passed the NCLEX-RN examination, the nurse will be granted a license to practice nursing in that state upon obtaining and submitting a valid SSN." *Id.* at 2.

¹⁹ Travelers by air are already required to present a passport as of January 23, 2007, under phase I of the Western Hemisphere Travel Initiative. "Documents Required For Travelers Departing From or Arriving In the United States at Air Ports-of-Entry from Within the Western Hemisphere, Final Rule," 71 Fed. Reg. 68412 (Nov. 24, 2006). Phase II, which will require travelers entering at land and sea ports to present a passport, has not been the subject of a final rule yet, but the DHS press release and proposed rule at 71 Fed. Reg. 46155 (Aug. 11, 2006) suggest this requirement could become effective as early as January 1, 2008.

²⁰ INA §212(r), 8 USC §1182(r).

¹⁷ NAFTA, Annex 1603, App. 1603.D.1, (Dec. 17, 1992), 32 I.L.M. 289; see 8 CFR §214.6(c) (2006).

- Education and experience credentials—*i.e.*, the relevant diploma, license, or experience letters specified for the occupation in NAFTA Appendix 1603.D.1, with an equivalency evaluation if the degree is from an institution outside the United States, Canada or Mexico;
- A letter from the U.S. employer affirming the professional nature of the job, purpose of entry, anticipated length of stay (which cannot exceed one year), and how the beneficiary's education and compliance with state laws are appropriate to the offered employment; and
- Application fee of \$50.00.²²

H1B / E-3

For most RNs, the options for nonimmigrant work visa status were severely limited after 1995 by a series of policy memoranda.²³ These memoranda stated that the H-1B visa category for temporary workers in a "professional specialty occupation" was not available to RNs *per se* because most states allow nurses to sit for state licensing exams after completion of a two-year associate's degree. While North Dakota presents an exception, as that state requires all nurses to have a Bachelor of Science in Nursing (BSN) to be eligible for state licensure, to qualify for H-1B classification anywhere else requires that a nursing job must be significantly more complex, senior, and discretionary than a "staff nurse" position.

²¹ INS Memorandum, Michael R. Hrinyak, "Additional TN Occupations" (Oct. 26, 2004), *published on* AILA InfoNet at Doc. No. 05033173 (*posted* Mar. 31, 2005); Letter from Efrén Hernandez, Director, Business and Trade Branch, to Sylvia Boecker (Feb. 27, 2003) *published on* AILA InfoNet at Doc. No. 03031142 (*posted* Mar. 11, 2003).

²² 8 CFR §214.6(d), (e) (2006); 9 FAM 41.59, Note 7.1.

²³ See Letter from Michael R. Aytes, Acting Assistant Commissioner, Adjudications, to all Center Directors, HQ214h-C (Aug. 28, 1995), "Sunset date for filing of Petitions for H-1A Classification" *reprinted in* 72 Interpreter Releases 1247 (Sept. 11, 1995); see also Michael Aytes, "Eligibility of Registered Nurses for H-1B Classification" (Nov. 17, 1995) *published on* AILA InfoNet at Doc. No. 95121290 (*posted* Dec. 12, 1995). Clarifications of the policy set forth in these documents limiting the use of H-1B visas for nurses may be found in the USCIS Employer Information Bulletin 19 (Dec. 7, 2004), *reprinted in* 81 Interpreter Releases 1749-56 (Dec. 13, 2004), and in the memorandum of Johnny N. Williams, Executive Associate Commissioner, Adjudications, HQISD 70/6.2.8-P, "Guidance on Adjudication of H-1B petitions Filed on Behalf of Nurses" (Nov. 27, 2002) *published on* AILA InfoNet at Doc. No. 02121746 (*posted* Dec. 17, 2002).

The government clarified its position in a November 27, 2002 memorandum entitled, "Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses." This memorandum stated that, although general staff RNs are not classifiable as H-1B, numerous certified specialties that typically do require at least completion of a BSN would meet the H-1B standards. These specialties were listed in the memorandum as:

- Advanced Practice Registered Nurses (APRNs) or Licensed Nurse Practitioners (LNPs) in the fields of acute care, adult care, critical care, gerontology, family care, hospice and palliative care, neonatology, pediatric care, psychiatric and mental health care, women's health care;
- Certified Registered Nurse-Anaesthetists (CRNAs); and Certified Nurse-Midwives (CNMs).

Also, senior nurse managers at the policy-setting level who are not providing direct patient care nor acting as direct supervisors typically qualify for H-1B classification.

Thus, H-1B visa status can be used for nursing jobs that explicitly require at least a four-year bachelor's degree if (1) the job description states a BSN or MSN degree as a minimum requirement; and (2) the employer does not employ anyone in those positions who lacks a four-year degree. The employer must not only substantiate its own internal requirement of a BSN, but must also prove (1) that similar positions throughout the industry typically require at least a four-year degree; and (2) that the foreign nurse to whom the job is offered does in fact possess such a four-year degree. Examples of nursing positions that have met the H-1B standard of "professional specialty occupation" are Directors of Nursing, Assistant Directors of Nursing, and head nurses supervising specialty units, such as Intensive Care Units, where the nurses are certified in critical care and supervise other staff nurses.

It should be noted that USCIS is extremely skeptical of "degree-equivalency" arguments equating a nurse's combined training and work experience to a four-year degree, as that would essentially nullify the degree requirement. Nursing jobs are not deemed "professional" in the H-1B context because most states offer licensing exams to nurses with two-year associate's degrees. Accordingly, if the nurse does not have a four-year degree, that individual is unlikely to be granted H-1B status even if the offered job qualifies as professional.

Furthermore, because the standards being applied to the recently-created Australian E-3 visa category for professionals are identical to those that have been applied in the past to H-1B professional specialty occupations, it is prudent to assume it will be equally difficult to classify an RN as an E-3 professional.

Finally, Physical and Occupational Therapists are both recognized as qualifying for H-1B classification. Physical Therapists were previously required to have earned at least a bachelor's degree to be eligible to take state exams, a master's degree then became the industry standard, and now schools and state licensing boards are collaborating in a nationwide effort to raise the standard still further to a new type of doctoral degree, the Doctor of Physical Therapy.

Documents the U.S. employer must present to USCIS to obtain approval of an H-1B petition include:

- Forms I-129, I-129 H Supplement, and H-1B Data Collection, in duplicate original, with Form G-28 if submitted by an attorney;
- Petition filing fee, fraud prevention and detection fee, U.S. worker-training fee;
- Labor Condition Application, certified by the U.S. Department of Labor;
- Statement of the petitioner;
- Visa Screen, if requesting change or extension of status; otherwise, proof that a Visa Screen will be presented at time of visa application;
- State license, or proof of eligibility for licensure in state of intended employment (*i.e.*, passage of NCLEX-RN and letter from state board stating license will be granted upon issuance of a social security number);
- Alien's degree(s), with U.S. evaluation and certified translations, if necessary;
- Materials describing the petitioner's business. If seeking exemption from the H-1B cap, these must include tax-exempt IRS letter and proof of cap-exemption as an institution of higher education, research institution, or affiliate.²⁴

Documents the H-1B visa applicant must present at a U.S. Embassy abroad include:

- Form I-797 Notice of Approval of petition from USCIS, preferably with a complete copy of the I-129 petition;
- Valid passport;
- Form DS-156, photo, visa application fee, and Form DS-157, if applicable;
- Visa Screen, in the original;
- Proof of maintenance of valid visa status during past stays in the United States;
- Letter from petitioner, reaffirming job offer.

Australian nationals outside the United States may apply directly at a U.S. Embassy or consulate for an E-3 visa, without a petition to USCIS. E-3 applicants should present the following documents, in the original:

- Labor Condition Application, certified by the Department of Labor;
- Statement of the petitioner;
- Visa Screen;
- State license, or proof of eligibility for licensure (*e.g.*, passage of NCLEX-RN and letter stating that license will be granted upon issuance of a social security number);
- Alien's degree(s), with U.S. evaluation, if needed;
- Materials describing the petitioner's business;
- Valid passport;
- Form DS-156, photo, visa application fee, and Form DS-157 if applicable;
- Proof of maintenance of valid visa status during past stays in the United States;
- Signed statement of nonimmigrant intent by applicant.

H-1A/H-1C Visas – Defunct, and Revived

Two successive temporary visa categories were explicitly set aside for nurses, the H-1A and the H-1C. Both were allowed to expire, but the latter has been reauthorized until December 20, 2009. The H-1A provision, created by the Immigration Nursing Relief Act of 1989²⁵, actually allowed for the admission of a significant number of registered nurses. It sunset in 1995, was briefly revived,²⁶ and then ex-

²⁵ Pub. L. No. 101-238, 103 Stat. 2099 (Dec. 18, 1989)

²⁶ Extension of Stay in United States for Nurses, Pub. L. No. 104-302, 110 Stat. 3657 (Oct. 11, 1996).

²⁴ 8 CFR §214.2(h)(4)(iii)

pired for good on September 30, 1997. Congress later replaced the H-1A visa category with the much narrower H-1C, through enactment of the Nursing Relief for Disadvantaged Areas Act of 1999²⁷. This was drafted so restrictively that only 500 of these visa numbers can be granted per year, with some states limited to 50 per year, but the numbers are further curtailed by additional restrictions. Per the 2005 USCIS Yearbook of Immigration Statistics, actual usage was limited to 31 H-1C visas in 2005, 70 in 2004, and 48 in 2003. The H-1C provision sunset on June 13, 2005,²⁸ and remained defunct for a year and a half. It was revived by the Nursing Relief for Disadvantaged Areas Act of 2005²⁹, signed into law on December 20, 2006, authorizing an additional three years.

Very few health care facilities qualify as eligible sponsors under the H-1C provisions—to date, there are 14 qualified facilities. Before filing the petition, a sponsoring facility must file an attestation with the Department of Labor (“DOL”), asserting that the facility meets all the requirements set forth at 20 CFR §655.1111, namely:

- That it is a “subpart (d) hospital;”
- That it was located in a Health Professional Shortage Area as of March 31, 1997;
- That it had at least 190 acute care beds, with at least 35% of acute care inpatient days reimbursed by Medicare and at least 28% reimbursed by Medicaid;
- That the employment of the H-1C nurse(s) will not adversely affect wages and working conditions of similarly employed registered nurses;
- That the H-1C nurses employed at the facility will be paid the prevailing wage;
- That it has completed at least two out of eleven possible types of timely and significant recruitment and retention efforts, to reduce the facility’s dependence on nonimmigrant nurses;
- That there has not been nor will there be any strike, lockout or layoff of nurses during the period for 90 days preceding or following the filing of any H-1C petition; and
- That the total number of H-1C nurses may not exceed 33% of the facility’s total nursing staff.

²⁷ Pub. L. No. 106-95, 113 Stat. 1312 (Nov. 12, 1999)

²⁸ 66 Fed. Reg. 31111 (June 11, 2001)

²⁹ Pub. L. No. 109-423, 120 Stat. 2901 (Dec. 20, 2006)

Any facility filing an H-1C attestation for the first time is required to attach a copy of its Form HCFA 2552 filed with the Department of Health and Human Services (HHS) in the cost reporting period for fiscal year 1994, to document the number of acute care beds, and the percentage of Medicare/Medicaid reimbursements.

This attestation must be filed with the DOL on Form ETA-9081, with a \$250 filing fee. However, the existing form expired on May 31, 2004 and is no longer accepted, and the DOL has not published a revised version of the form since the NRDA was reauthorized in December 2006. As of this writing, a revised Form ETA-9081 has yet to be sent to the Office of Management and Budget for review and approval, but the DOL anticipates that the filing fee will not change.

The H-1C visa does not permit any off-site employment. The maximum period of stay allowed is three years, which may not be renewed or extended. The original restrictions remain intact; it is still capped at 500 visas per year, for nurses to work at one of the designated facilities in underserved areas that meet all of the above attestation requirements. As of this writing, the original 14 facilities designated by HHS in 1999 and approved by the DOL remain the only ones authorized to file H-1C petitions.

PERMANENT RESIDENCE

Schedule A, Group I

Registered Nurses and Physical Therapists are the only two occupations explicitly exempted from the labor market test of permanent alien labor certification, as these two positions have been designated as “Schedule A, Group I,” referring to occupations for which the DOL has acknowledged a chronic shortage of qualified U.S. workers.³⁰ For a U.S. employer to avoid the full test of the labor market, the employer must obtain a prevailing wage determination from the State Workforce Agency (“SWA”), and then post on the premises of the proposed work location for 10 business days a notice of job availability, reflecting at least the prevailing wage, which must state that any person may provide evidence bearing on the application to the appropriate office of the DOL.³¹ After waiting the prescribed interval,

³⁰ 20 CFR §656.15 (2005).

³¹ *Id.* §656.10(d) (2006).

the employer may file an immigrant visa petition with USCIS. That interval, known as the “quiet period,” encompasses at least 30 but not more than 180 days after the posting period is completed.³² If the petition is filed before 30 days have elapsed since the last day of posting, USCIS may return it as untimely filed but, more likely, will cash the filing-fee check, generate a receipt, and deny the petition. It is therefore important to count the days and, to be conservative, wait to file the Form I-140 until the thirty-first day after the last day of posting.

Note that the nurses who qualify for Schedule A, Group I, classification are called “registered professional nurses,” even though a four-year BSN is not required in the DOL’s definition of a registered professional nurse at 20 CFR §656.5(a)(2). This definition encompasses all registered nurses for purposes of Schedule A, and is at odds with the longstanding opinions of USCIS, both in the H-1B context that RNs are *not* professionals even if they have a four-year bachelor of science in nursing (BSN) degree, and in the general definition of professionals for immigrant visa purposes at 8 CFR §204.5(1)(2). Thus, BSN-holding staff nurses who cannot obtain temporary H-1B status on the basis of that degree do qualify for immigrant visa status as registered professional nurses, as do registered nurses holding two-year degrees.

Documents needed to successfully file a complete Schedule A, Group I immigrant visa petition include:

- Form I-140;
- Form G-28, if submitted by an attorney;
- Uncertified Forms ETA-9089, in duplicate original, bearing original signatures of employer, alien and attorney;
- Prevailing wage determination from the SWA;
- Posted notice of job availability, signed by the employer and showing the wage offer, the dates posted, and displaying the full name and address of the DOL facility where a copy of the ETA-9089 will ultimately be sent if the petition is approved;³³
- Visa Screen, or certified statement per INA §212(r);
- The alien’s degree;

- Valid state license, if the person is already working in the United States, or proof of compliance with all other prerequisites for state licensure, and letter of assurance from the state that a license will be granted upon issuance of a Social Security Number;
- Employer’s supporting letter describing the permanent position offered and qualifications required for the job; explaining how the alien meets those requirements; and setting forth the nature and scope of employer’s operations;
- Evidence of employer’s financial ability to pay the offered salary; and
- Petition filing fee.

Do *not* submit the original Visa Screen with the I-140. If the alien will visa process abroad, the original Visa Screen must be presented at the embassy interview. If the alien is in the United States and will seek adjustment of status under INA §245, submit a photocopy prior to adjudication of the Form I-485, although the original must be presented if the case is scheduled for an interview. As noted above, while there is a USCIS memo permitting the submission of the Visa Screen after the I-485 filing but prior to adjudication, the new bi-specialization process means that all adjustment applications must go to either the Nebraska or Texas Service Centers, where filing for adjustment without a Visa Screen may result in the issuance of a notice of intent to deny.

It is also noteworthy that Licensed Practical Nurses and Licensed Vocational Nurses are subject to the Visa Screen requirement, but are ineligible for Schedule A classification, so they must go through the regular labor certification process.

PERMANENT ALIEN LABOR CERTIFICATION (PERM)

Explaining and documenting all of the required recruitment and audit-file preparation steps required in connection with the PERM electronic filing process for alien labor certification is beyond the scope of this article, which is limited to requirements specific to health care workers. Interested readers should look to other sources for guidance regarding that process. However, assuming that a U.S. employer has conducted all the required steps and kept records of the recruitment process prior to filing and approval of an application for labor certification, the list below indicates what documents should be filed with an I-140 immigrant visa petition for a health

³² *Id.* §656.10(d)(3)(iv).

³³ *Id.* §656.15(a), (f).

care professional or skilled worker who does not qualify for Schedule A, Group I classification:

- Form I-140;
- Form G-28, if submitted by an attorney;
- Certified Form ETA-9089, in single original, bearing original signatures of employer, alien, and attorney;
- Visa Screen, or certified statement per INA § 212(r);
- The alien's degree, with U.S. evaluation;
- If job requirements include work experience, original letters confirming the alien's prior work experience;
- Valid state license, if the person is already working in the United States, or proof of compliance with all other prerequisites for state licensure, and assurance that a license will be granted upon issuance of a Social Security Number;
- Employer's supporting letter, describing the permanent position offered, qualifications required for the job, how alien meets those requirements, and the nature and scope of employer's operations;
- Evidence of employer's financial ability to pay the offered salary; and
- Petition filing fee.

CONCLUSION

A Quick Review of Case Planning Alternatives & Strategy

Job Requires a Visa Screen

- Registered Nurse: *Usually not H-1B*, TN – Schedule A, Group I
- Licensed Practical or Vocational Nurse: *not H-1B, not TN* – Labor Certification
- Physical Therapist: H1B/E-3, TN – Schedule A, Group I
- Occupational Therapist: H-1B/E-3, TN – Labor Certification
- Speech Language Pathologist or Audiologist: H-1B/E-3, *not TN* – Labor Certification
- Physician Assistant: H-1B/E-3, *not TN* – Labor Certification
- Medical Technician: some H-1B, *not TN** – Labor Certification

- Medical Technologist: some H1B, TN – Labor Certification

*Many medical laboratory technicians may qualify as medical technologists for TN purposes.

Job Requires a State License

H-1B/E-3, TN – Labor Certification is required, unless position is non-clinical research or academic and the alien qualifies for immigrant visa classification as an alien of extraordinary ability or outstanding researcher/professor; a national interest waiver; or Schedule A, Group II classification, based on exceptional ability in the sciences (*e.g.*, Social Workers, Psychologists, Dentists, Pharmacists, and Veterinarians).

Job Offer is in an Unlicensed Occupation

In health care services where a job entails direct contact with any patients, tissue, or fluid samples, it is the general rule that the position is either a professional job that requires a license, or it is unlicensed precisely because it is not at the professional level. Certified Nurse Assistants, Physical Therapy Assistants, Occupational Therapy Assistants, and the like, fall into this latter category. These specific examples are troublesome from an immigration perspective because they are in the occupations that demand a Visa Screen, but at a junior level where no Visa Screen is available, so the foreign worker must first progress to a more advanced level of the occupation before he or she may seek work in the United States.

Exceptions to this general rule, where a job is unlicensed but still professional, may be found in occupations that arguably may not be healthcare at all, such as Vocational Rehabilitation Counselors and Nutritionists, and in jobs that are more closely connected with research than with patient care, such as Biostatisticians and Epidemiologists.

The basic principle for practitioners to keep in mind is that clinical health care services are closely regulated to protect public health and safety, and ensuring that these concerns are addressed makes for a stronger case. The more an occupation has a direct effect on patient health and safety, the more likely it is that the occupation requires a state license and a Visa Screen. If the occupation is clearly related to clinical services, then any case strategy that attempts an end-run around the Visa Screen or state licensing requirements may meet with heightened skepticism from the government. Any strategy that attempts to frame the job so as to eliminate clinical patient contact to avoid the licensing or certification require-

ments may be self-defeating, as it will tend to make the job nonprofessional.