

The ABC'S Of Immigration: Visa Options for Nurses Part 1: Non-Immigrant Visa Options

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

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

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

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

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

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

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

A key aspect of nursing immigration is a bar to the admission of health care workers — including registered nurses — seeking to enter the US. That bar does not apply, however, to health care workers who obtain a certification from an organization approved by USCIS (formerly the Immigration and Naturalization Service) that states that the nurse's education and licensing credentials are equivalent to an American's. Currently, only one organization - the Commission on Graduates of Foreign Nursing Schools — is approved as an agency authorized to issue the certification document for nurses (CGFNS refers to the

documents as a VisaScreen certificate). And right now, only green card applications are affected. The health care certification rules are set to change dramatically in July 2004 including the expansion of the program to non-immigrants (though several organizations are actively pushing to delay or drop the program's expansion to this category of visa applicants). An extensive discussion of the new rules is contained as an appendix to this document.

Non-Immigrant Visa Options

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

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

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

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

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

Through policy memos and case decisions, the USCIS has determined that nursing, as a profession, is not a per se a specialty occupation, since a bachelor's degree is not generally required to become a registered nurse. This determination is based on the findings of the Department of Labor as to the educational preparation required for most nurses published in the Occupational Outlook Handbook (1995) and the Dictionary of Occupational Titles (1991). Many people have criticized the USCIS because many employers have dropped the requirement for a bachelor's degree precisely because of the severe shortage of nurses and not because the ideal nurse does not need such a degree. They argue that if the point of the H-1B visa is to help employers find qualified workers when there may be a shortage, then the USCIS policy totally thwarts the intention of Congress.

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

are appropriate for nurses.

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

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

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

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

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

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

What specific types of nurse positions can qualify?

Advance Practice Registered Nurses

The USCIS 2002 memorandum also discussed specific nurse positions. First, advance practice registered nurses (APRNs) will generally qualify for H-1B visas because these are advanced level positions requiring more education and training than the typical RN. An employer may require that the prospective employees hold advanced practice certification as one of the following: clinical nurse specialist (CNS), certified registered nurse anesthetist (CRNA), certified nurse-midwife (CNM), or certified nurse practitioner (APRN-certified). If the APRN position also requires that the employee be certified in that practice, then the nurse will be required to possess an RN, at least a Bachelor of Science in Nursing (BSN), and some additional graduate level education.

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

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

- Certified Nurse-Midwife (CNM).

Administrative Positions

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

States that Require Bachelors Degrees

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

Specialized Nurse Positions

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

Such nurses should meet the general requirements noted above. Evidence to show these requirements could include affidavits from independent experts or other means showing that the job duties are so specialized and complex that a bachelor's or higher degree is appropriate. The USCIS notes that these cases will be adjudicated on a case-by-case basis so the outcome of such applications is far from certain.

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

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

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

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

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

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

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

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

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

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

1. Beaumont Regional Medical Center, Beaumont, TX
2. Beverly Hospital, Montebello, CA
3. Doctors Medical Center, Modesto, CA
4. Elizabeth General Medical Center, Elizabeth, NJ
5. Fairview Park Hospital, Dublin, GA
6. Lutheran Medical Center, St. Louis, MO
7. McAllen Medical Center, McAllen, TX
8. Mercy Medical Center, Baltimore, MD
9. Mercy Regional Medical Center, Laredo, TX
10. Peninsula Hospital Center, Far Rockaway, NY

11. Southeastern Regional Medical Center, Lumberton, NC
12. Southwest General Hospital, San Antonio, TX
13. St. Bernard Hospital, Chicago, IL
14. Valley Baptist Medical Center, Harlingen, TX

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

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

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

A qualifying hospital will meet four requirements:

1. The hospital must be located in a Health Professional Shortage Area. You can find out which areas are HPSAs online at <http://www.bphc.hrsa.gov/databases/newhpsa/newhpsa.cfm>.
2. The facility must have at least 190 acute care beds
3. At least 35% of the facility's acute care inpatient days must be reimbursed by Medicare
4. At least 28% of the facility's acute inpatient days must be reimbursed by Medicaid

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

1. That it is a qualifying facility. If the ETA 9081 is the first one being filed by a facility, then the form must be accompanied by copies of the pages from the paperwork filed with the Department of Health and Human Services showing the number of acute care beds and the percentages of Medicaid and Medicare reimbursed acute care inpatient days. A copy of this paperwork must also be kept in a public access file.
2. That the employment of H-1C nurses will not adversely affect the wages or working conditions of similarly employed nurses.
3. That the facility will pay the H-1C nurse the facility wage rate.
4. That the facility has taken and is taking timely and significant steps to recruit

and retain nurses in order to reduce dependence on immigrant nurses. At least two such steps must be taken unless it can show that the second step is not reasonable. Documentation of these steps needs to be included in the facility's public access file for H-1C nurse petitions. Steps that may be taken can include:

- a. Operating a training program for registered nurses at the facility or financing or providing participation in a training program elsewhere.
- b. Providing career development programs and other methods of facilitating health care workers to become RNs.
- c. Paying registered nurses wages at a rate at least 5% higher than the prevailing wage for the area.
- d. Providing reasonable opportunities for meaningful salary advancement by registered nurses.
- e. Any other steps that would be considered significant efforts to recruit and retain nurses.

5. That there is not a strike or lockout at the facility, that the employment of H-1C nurses is not intended or designed to influence an election for a union representative at the facility and that the facility did not lay off and will not lay off an RN within the 90 day period and 90 day period after the date of filing an H-1C petition.

6. That the employer will notify other workers and give a copy of the attestation to every nurse employed at the facility within 30 days of filing. E-mail attachments are acceptable.

7. That no more than 33% of the nurses employed by the facility will be H-1C non-immigrants.

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

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

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

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

state where they will work and the regulations of the facility where they will work.

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

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