The ABC'S Of Immigration: Visa Options for Nurses, Part 2: Immigrant Visa Options for Nurses

by Gregory Siskind

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

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

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

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

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

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

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

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

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

In 1996, Congress passed legislation that retained nurses on a very short list of pre-certified occupations for which a labor shortage was recognized. The list is included in Schedule A of the labor certification regulations and these types of green card cases are called "Schedule A labor certifications". The Department of Labor (DOL) has already determined that there are not enough American workers who are able, willing, qualified, and available to fill all of the openings for professional nurses. Therefore, no test of the labor market is required and the case can be directly filed with the USCIS. This does not

necessarily mean that all cases are approvable or will be handled quickly. The importance of nursing being pre-certified is that it skips the first and most time consuming part of the employment based immigration process.

Note that this pre-certification is limited in scope. It only applies to "professional nurses". Schedule A is not available to Licensed Practical Nurses, Nurse Assistants, or other nursing aides. Professional Nursing is defined as a course of study in professional nursing resulting in a diploma, certificate, baccalaureate degree, or associate degree. More specifically, an acceptable course of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine. Whatever training the nurse has received should result in licensure in the country in which the training occurred. This coursework may have been completed at a U.S. nursing school or an approved foreign nursing program. For an immigrant visa, it is not required that a nurse have a bachelor's degree in nursing, only that he or she completed a professional program in nursing and have subsequently been licensed.

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

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

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

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

1. ETA Form 750 Parts A and B, in duplicate (these are the labor certification forms);

2. A posted notice of the job opening. This notice must include a job description, work hours, and rate of pay. The notice must be posted in the worksite for a minimum of ten business days;

3. Evidence that the petitioning employer has the financial ability to pay the salary offered to the nurse. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. If the U.S. employer employs 100 or more workers, the USCIS may accept a statement from a financial officer of the organization;

4. CGFNS certificate or nurse license from state where the nurse will be working or proof of passing the NCLEX licensing exam and evidence that the nurse cannot obtain a license because he or she cannot obtain a social security number.

5. Nursing diploma or degree;

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

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

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

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

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

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

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

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

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

How does a nurse in the US Adjust Status?

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

A nurse's employer must file an I-140 for a nurse in the United States just like a nurse

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

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

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

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

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

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

As added relief from what the health care industry generally accepts as a nationwide nursing shortage, HR 2705 significantly increases the pool of eligible petitioners for H-1C

workers. HR 2705 removes the component from the employer attestation that requires the employer facility be a hospital in a Health Professional Shortage Area (HPSA) as determined by the department of Health and Human Services. HPSA areas are generally limited to rural and underserved urban areas. The change would significantly increase the number of eligible petitioners.

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

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

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

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

While HR 2705 makes some significant changes to the H-1C program, there are a number of similarities in the existing H-1C statute and HR 2705. In reviewing the attestation requirements, both the existing law and 2705 require that the employer pay the H-1C worker at the same wage rage as similarly employed workers in the facility. Also, both statutes restrict the employer's ability to transfer the H-1C worker to another location. Outside the attestation requirement, the statutes are similar in that the both forbid the employer to penalize the employee for departing prior to an agreed date.

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

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

Aside from this legislation, there have also been developments in green card processing that could make legislation from Congress less important. For example, many expect the Nebraska, Texas and California Service Centers to follow the lead of Vermont and begin

expediting I-140 processing for nurses. And the California Service Center has recently begun a program to expedite I-140/I-485 concurrently filed cases across the board. That processing is promised to get the overall approval time down to a remarkable 90 days or less.

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