



*A Union of Professionals*

## Nurses with Visas – AFT Healthcare Fact Sheet on Foreign Nurses Working in the U.S.

With employers finding it more and more difficult to recruit registered nurses for vacant positions, it is likely that they may start looking overseas for potential candidates. This fact sheet will explore briefly the various mechanisms employers can use to bring foreign nurses to the United States to work.

### **Temporary Visa Programs**

**H-1A (no longer available)** -- In 1989, Congress passed the Immigration Nursing Relief Act (INRA), creating the H-1A classification exclusively for registered nurses for a period of four years. According to the U.S. Department of Labor (DOL), between 6,000 and 7,000 foreign-trained nurses were granted H-1A visas in each of the four fiscal years from 1992 to 1995. Most came from the Philippines, Canada, Ireland, the United Kingdom, India and China.

While it is true that some employers abused the H-1A, (hiring experienced foreign nurses at new graduate rates, for example), studies did not detect adverse effects on wages, benefits or working conditions as a result of the H-1A program. Although foreign nurses have never represented more than one percent of nurses working in the United States, even during the height of the shortage in the late 1980s, a few metropolitan areas experienced significant concentrations.

**H-1B** -- H-1B is a temporary work visa that permits entry into the U.S. for up to six years and is often thought of as the most common and most accommodating worker visa. There is a cap set on the total number of H-1B visas issued every fiscal year. For fiscal year 2000, the limit was set at 115,000. President Clinton increased that number to 195,000 for 2001, 2002 and 2003. After that, the cap reverted back to its 1990 level of 65,000. Applications are accepted on a first-come, first served basis.

For the five years that the H-1A visa was available, RNs were ineligible for the H-1B visa. In 1990, Congress reconfigured the H-1B visa program to include persons qualified to perform services in a "specialty occupation." Congress defined specialty occupations as requiring: "(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 minimum for entry into the occupation in the United States."

Nursing, as defined by the statute, is not a "specialty occupation" because it does not require a bachelor's degree. The Immigration and Naturalization Service (INS) regulation is somewhat more lenient, permitting a nurse (or other worker) to qualify if he or she meets any of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or if the employer can show that its particular position is so complex or unique that it can be performed only by a person with a degree;
3. The employer normally requires a degree or its equivalent for the position; or

4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with attainment of a bachelor's or higher degree.

Generally speaking, the INS will deny H-1B status to a qualified nurse, even under its own regulations, unless the bachelor's degree is a state licensing requirement, the employer uniformly requires a degree or the nurse will be used in a nursing specialty that is particularly complex and ordinarily associated with a degree. The Court of Appeals for the Fifth Circuit upheld an INS decision to deny H-1B visas to foreign RNs in a case involving Vintage Health Resources, an employment agency that specializes in placing foreign nurses in U.S. hospitals. Even though Vintage required all of its nurses to possess a bachelors degree, it failed to prove that the nurses would be working in a "specialty occupation" -- that is, an occupation in which a bachelor's degree or higher is the minimum for entry into the profession in the U.S.

To obtain an H-1B visa, the employer must file a "Labor Condition Application" (LCA) with the U.S. Department of Labor stating that there is no strike or lockout in progress at the facility and that employment of the nonimmigrant nurse will not adversely affect the wages or working conditions of similarly situated U.S. employees. There is no requirement that the employer must prove U.S. worker unavailability. The LCA must include the job classification and pay level and the employer must either post the LCA in two conspicuous locations within the workplace for 10 days or, if the workplace is unionized, provide notice to the bargaining representative. In addition, the LCA must be available for public review.

Those wishing to challenge an H-1B application can file a complaint with the DOL within 12 months of the date of alleged misrepresentation or failure of conditions. If the DOL finds that the employer failed to comply with any of the attestation requirements or misrepresented facts, the employer can be fined or be required to pay back wages, or both, and will be barred from filing many kinds of work-related immigrant and nonimmigrant visa petitions with the INS for at least one year.

If the DOL approves the LCA, it will give the employer permission to file a "Petition for Nonimmigrant Worker" with the INS. The petition must convince the INS that the potential hire will be working in a specialty occupation.

Each H-1B visa application takes six to 10 weeks to complete and costs the employer approximately \$2,500, including attorney's fees.

**H-1C** -- On September 21, 2000, the Nursing Relief for Disadvantaged Areas Act went into effect. The bill allows up to 500 foreign nurses per year for four years to work in designated U.S. healthcare facilities under a new H-1C visa program. H-1C visas are valid for three years and are nonrenewable.

Only 14 hospitals in nine states qualify for this program. The bill's strict requirements include the following for hospitals applying for H-1C nurses: the hospitals must have at least 190 acute care beds, service certain ratios of patients with Medicare (35 percent) and Medicaid (28 percent) and have a U.S. Department of Health and Human Services designation as a health professional shortage area dating back to March 31, 1997. In addition, the hospital would have to prove it had made significant efforts to fill nursing positions with domestic applicants and not be involved in recent labor disputes or strikes.

States with populations of 10 million or more will be limited to 50 H-1C visas per year; those with fewer than 10 million are limited to 25. Hospitals cannot use H-1C nurses for more than 33 percent of their staff. In addition, hospitals must take steps to recruit and re-train nurses from the American workforce. Wages paid to H-1C nurses must be the same as those paid to domestic nurses in similar jobs. Employers cannot interfere with the right of a foreign nurse to join a union.

**TN** -- TN status was created in conjunction with the North American Free Trade Agreement. Applicants for TN status must only show that they perform "activities at the professional level." There is no limit on the number of TN visas available for Canadians. Mexican nationals must provide most of the same documentation required for the H-1B visa and the number of TNs is limited to 5,500 per year. TN visas are good for one year but can be renewed.

### **Permanent Visa Programs**

**EB-3** -- EB-3 is a permanent work visa for nurses who possess any level of education and wish to acquire citizenship. Approval of an EB-3 application often takes months longer to process than that of an H-1B and the DOL must certify that there are not sufficient workers able, willing and qualified for the position and that employment of the foreign worker will not adversely affect wages and working conditions of U.S. workers. The employer is required to give notice to bargaining representatives in unionized workplaces.

All foreign-trained nurses applying for green cards (permanent residence) must pass the NCLEX-RN, receive licensure in the state in which they will practice and be proficient in English.

For more information, contact AFT Healthcare at 202/879-4491.