

H-1A Requirement for Foreign Nurses

By Reuben S. Seguritan

March 1990

The immigration policies of the United States for foreign nurses have recently been in a state of flux. As you well know, in a span of two and half years as of this writing, there have been two very important immigration acts signed into law.

The first was the Nursing Relief Act of 1989 which basically allowed qualified foreign nurses to apply for green cards, while increasing the restrictions and rules for employers of foreign nurses. In addition, foreign nurses were given a new classification of H-1A group. Only registered nurses who arrived in the US before September 1989 and have worked for at least three years were deemed qualified to apply under this law.

The second was passed the year after. The Immigration Act of 1990 essentially relaxed its rules pertaining to nurses who were allowed to apply for green cards. The new act broadened the requirements so that other foreign nurses previously not qualified to apply for green cards, such as those who have had entered unauthorized employment, or whose stay had at one time expired, could now apply.

For purposes of easy reference, we will refer to the 1989 Immigration Nursing Relief Act as the INRA, the 1990 Immigration Act as the IA 1990, and the previous law which the 1990 Act amends as the INA (for the Immigration and Nationality Act.)

While a moderate number of Filipino foreign nurses had been qualified for immigrant status under the amnesty law or INRA without regard to the 3rd or 6th Preference visa availability, continued availability of nonimmigrant visas under the INRA will depend on employers' adherence to specified directives. These directives, made effective since September 1990, were outlined to break US employers' growing dependence on foreign nurses.

The most notable regulation the INRA had stipulated for employers is their compulsory filing for a labor certification with the Department of Labor. If approved, this certification, which establishes that petitioner-employer has taken great efforts to recruit and keep US nurses, but are still in need of new recruits to maintain efficient service in the business, will be valid for a year. This approved attestation (Form 9029) accompanies every petition for new foreign nurses as well as every application for their extension of stay.

Accordingly, six statutory elements must be met by employer-petitioners to fulfill the labor attestation requirements:

First, a health care facility must show that its services would be substantially disrupted if it could not hire a foreign nurse;

Second, a health care facility must show that employing foreign nurses will not adversely affect the wages and working conditions of similarly employed US nurses;

Third, an employer must prove that it will pay the same wage rate as other similarly employed US nurses in the same health care facility;

Fourth, an employer must show that it has been taking "significant" steps to recruit and keep US nurses or that the facility is currently subject to an approved state plan to recruit and keep such nurses;

Fifth, an employer has to attest that there is no strike or lockout at the health care facility; and

And sixth, an employer has to notify the nurses' union whenever an attestation or H-1A petition has been filed. If there is no union, a notice of the filing must be posted at a conspicuous place for a period of at least one year.

This attestation will be valid for one year. Even if an attestation is approved by the Labor Department, there is always the danger that the approval be reversed, and the attestation suspended or invalidated. The reversal of decision may be due to a labor officials' erroneous review of the attestation, or a successful challenge by a union. Enforcement action may also result if an employer fails to comply with the terms of the attestation.

Penalties for violation include hefty fines and back wages assessment. Erring health care facilities will also be prevented from filing any more H-1A petitions or from extending the H-1A visa of their nurses.

Extensions and new petitions that have been filed on or after September 1, 1990, were classified under the H1A category pursuant to INRA. All petitions and applications filed thereafter have and will be accompanied by the employer's approved attestation. The H-1A visa expires at the end of five years.

On the other hand, "the 1990 Act" introduced amendments to the INRA. Among the changes is the waiver of exclusion of some independent worksites, such as privates households that use nurses through nursing contractors, from filing attestations to avoid duplicative forms.

Every I-129H petition for a registered nurse must be accompanied by the following:

1. Foreign License & education, or a US education. Nurse must show evidence that she has obtained a license to practice nursing in the country where she has obtained nursing education.
2. CGFNS or state license. Nurse must pass the examination given by the Commission on Graduates of Foreign Nursing Schools (CGFNS), and a permanent (full and unrestricted) license to practice as registered nurse in the state of intended employment. Or nurse must have obtained a permanent license in any state of the United States and has received temporary authorization to practice as a registered nurse in the state of intended employment; and
3. Must have obtained a temporary or interim license and takes the first available examination for permanent licensure.

INRA had somehow reduced requirements for those applying for H-1A extension. For one thing, no I-129H petition form is required if status remains current, and only the I-539 Form is required accompanied by the usual document such as a copy of the original H-1 or H-1A petition approval notice, letter from petitioning facility which describes beneficiary's duties, hours of work and salary (which gives reasons for extension, gives dates of alien's periods of stay in US for previous 6 years, specifies the new date of employment); a copy of Department of Labor's notice of acceptance of employer's attestation (ETA 9029); and beneficiary's current nursing license.