

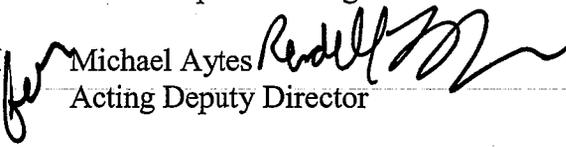


U.S. Citizenship
and Immigration
Services

MAR 13 2009

Memorandum

TO: Michael T. Dougherty
Citizenship and Immigration Services Ombudsman

FROM: Michael Aytes 
Acting Deputy Director

SUBJECT: Response to Recommendation 36, Improving the Processing of "Schedule A" Nurse Visas

Recommendation

The CIS Ombudsman recommends that USCIS separate and prioritize Schedule A green card nurse applications so that they can be expedited, without the requirement of a written request, upon immigrant visa availability; and centralize Schedule A nurse applications at one designated USCIS service center to facilitate more efficient and consistent processing of Schedule A applications. Additionally, the CIS Ombudsman suggests that USCIS regularly communicate with Department of Labor (DOL) and develop points of contact at DOL to discuss concerns and direct inquiries regarding the processing of nurse immigration petitions.

USCIS Response

USCIS recognizes the shortage of nurses and other healthcare workers in the United States, and the potential for a detrimental effect on the health care system. However, USCIS' ability to rectify this situation is more limited than the CIS Ombudsman's recommendation suggests. As the CIS Ombudsman's recommendation discusses, there are limited immigrant and nonimmigrant options available to nurses seeking employment in the United States. Currently, nurses desiring to come to the United States as a nonimmigrant may be eligible to come on an H-1B visa, a TN visa, or an H-1C visa. Hospitals seeking to sponsor a nurse to enter the United States as a Lawful Permanent Resident are eligible to file an I-140 petition and labor certification directly with USCIS (bypassing DOL processing of the labor certification prior to filing the I-

140 petition). I-140 petitions filed as a Schedule A occupation are considered Employment-Based Third Preference (EB-3) petitions and are subject to annual limits on visas. USCIS respectfully points out that we do not have the authority to create immigrant and nonimmigrant visa categories, we do not set the annual limits for visa numbers, and we cannot minimize the processing times for immigrant visas if a visa number is not available.

As stated in the CIS Ombudsman's recommendation, H-1B nonimmigrant visas can be utilized only in cases in which the nurse meets the qualifications of a "specialty occupation" as defined in the Immigration and Nationality Act (INA) section 214(i)(1). Due to the fact that most nursing positions do not require a bachelor's degree or higher form of education, most nurses will not qualify for H-1B nonimmigrant status. Only nurses employed in specialized nursing occupations requiring a bachelor's degree or higher, among other qualifications, will be eligible to apply for H-1B nonimmigrant status.

The use of TN nonimmigrant visas is limited to professionals who are citizens of Canada or Mexico. Created in 1993 under the North American Free Trade Agreement (NAFTA), TN visas may be obtained by professionals working in designated areas. Currently, registered nurses with a state/provincial license or Licenciatura Degree are eligible for TN visas. There are no limits on the number of TN visas issued each year.¹

The H-1C nonimmigrant visa category was introduced in 1999 specifically to address the shortage of nurses in the United States. Obtainment of an H-1C visa is a multi-step process that involves coordination from DOL and USCIS. Prior to filing a petition with USCIS for an H-1C visa, DOL must provide an attestation to petitioning hospitals certifying that they meet the qualifications as required by regulation.² Among the qualifications, hospitals are required to be located in a "health professional shortage area."³ A list of designated "health professional shortage areas" is provided on DOL's website⁴ as well as the application for H-1C attestation, ETA Form 9081. Currently, DOL lists 14 hospitals that are approved to petition for H-1C nonimmigrant workers; most of those hospitals have sponsored nurses to come to the United States. USCIS recognizes that the listed hospitals which have been granted attestation may not be current; however, updates to the list are within the jurisdiction of DOL and not USCIS.

In addition to the limited number of hospitals that have been granted an attestation by DOL, there are also a limited number of H-1C visas available annually. As mentioned in the CIS Ombudsman's recommendation, there are only 500 H-1C visas allocated each year. This number is set by Congress. The small number of visas available in combination with the lack of approved attestations of hospitals has resulted in a relatively small number of applicants. USCIS would welcome more I-129, Petitions for Nonimmigrant Workers, filed on behalf of H-1C beneficiaries; however, absent more DOL approved hospitals and an increase in the number of H-1C visas available, we are unable to be more accommodating in this nonimmigrant visa category.

¹ 8 CFR 214.6

² 20 CFR 655.1111

³ *Id.*

⁴ <http://www.foreignlaborcert.doleta.gov/docs/hpsa.html>

- 1. Separate and prioritize Schedule A green card nurse applications so that they can be expedited, without the requirement of a written request, upon immigrant visa availability.**

The Department of Labor (DOL) provided Schedule A designation for nurses in order to provide relief to the nursing shortage. A Schedule A occupation is one that DOL has determined that “there are not sufficient United States workers who are able, willing, qualified, and available”⁵ and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens in such occupations.⁶ DOL lists nurses and physical therapists as shortage occupations that do not need to undergo individualized labor certification, unlike other skilled or professional occupations in the EB-3 category. Rather, these aliens are, in effect, the beneficiary of a standing, blanket certification that satisfies the labor certification requirement of section 212(a)(5)(A) of the INA. This designation creates a streamlined process which allows employers to file the I-140 petition without undergoing the lengthy labor certification process. This streamlined means of satisfying the labor certification requirement does not, however, have any impact on the number of immigrant visas available in any given fiscal year.

Section 502 of the Real ID Act of 2005, Pub. L. 109-13, Division B, § 502, 119 Stat. 231, 302, 322, reallocated previously unused employment-based visa numbers from Fiscal Years 2001 through 2004 to beneficiaries of visa petitions supported by Schedule A labor certifications. This action allowed for visa numbers to become immediately available for the beneficiaries of these petitions. Thus, from June 2005 through October 2006, a visa number was readily available for employment-based visa petitions supported by Schedule A labor certificates. That special provision has now expired, and the normal rules for allocation of visas now apply to Schedule A cases.

USCIS recognizes that separating and prioritizing Schedule A cases is feasible; however, “separating and prioritizing” is not an option at this time. The “separating and prioritizing” process was necessitated by the special visa allocation for Schedule A cases and was discontinued when the special visa allocation was fully subscribed. Visa number limits are set by Congress and the U.S. Department of State controls the issuance of visa numbers; USCIS does not have any Congressional authority in the allocation and availability of visa numbers. Furthermore, USCIS does not have the Congressional authority to allocate visas *specifically* to Schedule A nurses when visas become available.

In 2005, Schedule A cases were manually sorted and staged separately as part of the Congressional mandate to recapture the 50,000 visas specifically set aside for Schedule A cases. USCIS made an extensive effort to accommodate this change in visa number availability for

⁵ 20 CFR 656.5

⁶ The Immigration Act of 1990 (P.L. 101-649 November 29, 1990) amended the Immigration and Nationality Act (INA) and gave separate visa classification to some groups that previously were included in Schedule A. As a result, DOL eliminated these groups from Schedule A, leaving only Group I, registered nurses and physical therapists, and Group II, aliens of extraordinary ability. Group I aliens are considered employment-based third preference immigrants (skilled workers), while Group II aliens are considered employment-based second preference immigrants (national interest waiver).

Schedule A petitions with our approvals of Schedule A I-140 petitions increasing by nearly 2000% from FY05 to FY06.⁷ Prior to this period, there had often been a several year wait for an immigrant visa to become available. Now that the special allocation has expired, it is necessary for Schedule A immigrants to wait for an immigrant visa to become available.

Currently, processing times for Schedule A petitions are approximately 15 months; however, the wait for an employment-based third preference immigrant visa to become available is between three to seven years.⁸ USCIS strives to ensure that all Schedule A petitions are adjudicated prior to the priority date of the petition becoming current; thus, expedited processing would not be required upon availability of an immigrant visa.

While the Schedule A designation creates a process to *streamline* the labor certification process, it does not create a process to *bypass* the petition review, adjudication process, or the statutory rules for visa allocation. A Schedule A nurse must still wait in the same line with other "skilled workers" (EB-3 category) for his or her priority date to become current before applying for an immigrant visa or adjustment of status. The priority date continues to determine the availability of immigrant visas under all preference categories, including the EB-3 category. Therefore, even if the petitions were prioritized, the beneficiary of an approved petition must still await visa availability before he or she could pursue an immigrant visa or adjust status. The visa allocation system is particularly important for nationals from certain countries with oversubscribed preference categories; such nationals may wait up to a decade for an immigrant visa to become available. The current visa allocation system, within the purview of the Department of State, ensures that all workers in the EB-3 category have an equal opportunity to visa allocation when the category becomes current.

Additionally, USCIS does not believe that expediting applications offers a feasible solution given the various requirements of the employment-based immigration process. The first step in the employment-based immigration process for Schedule A cases involves the filing and approval of the I-140 petition approval. Once an immigrant visa is available, the Schedule A nurse may proceed to the second step in which he or she applies for either adjustment of status or consular processing. However, in the vast majority of the petitions, an immigrant visa number is not available when the Schedule A nurse petition is filed. As a result, a Schedule A nurse in the United States cannot simultaneously apply for adjustment of status when his or her petition is filed with USCIS. The nurse proceeds with filing Form I-485, Application to Register Permanent Residence or Adjust Status, with USCIS, only if the I-140 petition is approved and if the nurse is eligible to apply for adjustment of status based on immigrant visa availability. Therefore, a "green card" (adjustment of status) application may not be on file when the immigrant visa

⁷ In FY05 there were 343 Schedule A I-140 nurse petitions approved. In FY06 there were 6,834 Schedule A I-140 nurse petitions approved.

⁸ The March 2009 visa bulletin shows that the Department of State is currently processing employment-based third-preference, India petitions that were filed on or before October 15, 2001; employment-based third-preference, China petitions that were filed on or before October 22, 2002; employment-based third-preference, Mexico petitions that were filed on or before August 15, 2003; employment-based third-preference, Philippines petitions that were filed on or before May 1, 2005; and employment-based third-preference, all chargeability areas except those previously listed petitions that were filed on or before May 1, 2005.

number becomes immediately available to the nurse. In such case, there may not be an application on file to expedite.

USCIS also believes that the automatic expediting of Schedule A petitions for nurses could circumvent the visa allocation process, as determined by priority date. Under section 203(e)(1) of the Act, immigrant visas in each classification are made available to aliens in the order in which their prospective employers filed the respective visa petitions. Thus, an alien whose priority date is January 1, 2005, should have his or her case adjudicated before someone with a priority date of January 1, 2007. Expediting Schedule A cases would not change this rule. Indeed, it would violate section 203(e)(1), if Schedule A nurses were to receive visas before equally qualified EB-3 immigrants who are not Schedule A nurses but who have earlier priority dates. The Immigration and Nationality Act does not specifically distinguish Schedule A nurses from other third-preference skilled workers, therefore, USCIS does not have any legal authority to process one type of skilled worker over another. In fact, such preferential treatment could be perceived to be fundamentally unfair to other workers which could leave the agency open for public scrutiny and litigation. However, normal expedite procedures remain a viable alternative. A Schedule A nurse may request expedited processing if he or she has an approved visa petition, a current priority date, and a filed adjustment of status application. USCIS will review such expedite requests based on the established criteria.

In both situations mentioned above, it would require Congressional action or an executive order for visa numbers to be allocated specifically for Schedule A nurses or for third-preference visa numbers to be increased. Also, the authority to modify the Immigration and Nationality Act designating Schedule A nurse petitions as a separate employment-based immigration category lies with Congress and not with USCIS.

2. Centralize Schedule A nurse applications at one designated USCIS service center to facilitate more efficient and consistent processing of Schedule A applications.

Schedule A petitions are processed at only two centers within USCIS to ensure more efficient and consistent processing. The CIS Ombudsman's recommendation suggests that the processing of I-140 petitions is inconsistent between the Nebraska Service Center and the Texas Service Center. The CIS Ombudsman attributes the inconsistencies in the number of Requests for Evidence (RFE) and the longer processing times to lack of regular communication among the centers. USCIS disagrees with this assessment.

USCIS strives for consistency across the service centers. In October 2008, leaders from the Nebraska Service Center visited the Texas Service Center to discuss best practices in processing I-140 petitions. While such communication efforts are in place to provide uniform adjudication, an RFE may still be necessary in order to adjudicate a petition. It is important to remember that each visa petition filing is a separate proceeding and is decided on the basis of the evidence in the record of that particular proceeding. An RFE may be necessary to establish eligibility.

The two service centers are also in regular contact with one another in an effort to ensure that processing times for Schedule A I-140 petitions, as well as all other categories of I-140 petitions,

are similar. Both centers have similar systems for processing I-140 petitions—cases that will have a visa number readily available are given priority. Both service centers have teams dedicated to processing I-140 petitions exclusively, including Schedule A petitions. Each adjudicator on these teams has received training specific to the I-140 petition in addition to the general training received by all adjudicating officers.

USCIS will take the CIS Ombudsman's recommendation under consideration. However, USCIS must balance this recommendation with the value and importance of bi-specialization. It is important to continue to have teams trained specifically in the intricacies of I-140 adjudications at two centers instead of one to provide for the continuity of operations should an emergency, such as a hurricane, close one of the facilities for an extended period. Under the current structure, work can easily be shifted to the other center to ensure that processing of petitions continues with minimal interruption.

3. Regularly communicate with DOL and develop points of contact at DOL to discuss concerns and direct inquiries regarding the processing of nurse immigration petitions.

The CIS Ombudsman suggests that USCIS regularly communicate with DOL and develop points of contact at DOL to discuss concerns and direct inquiries regarding the processing of nurse immigration petitions. Inter-agency cooperation and coordination would provide clarification regarding immigration issues for Schedule A nurse petitions and would also improve customer service.

USCIS agrees that a forum which facilitates open communication with DOL would assist in identifying concerns and problems before they develop into significant issues.