

## "H" is *not* for Healthcare

### Comments on the New Guidance for H-1B Visas for Nursing Occupations

In a recent [Policy Memorandum](#)<sup>1</sup>, the United States Citizenship and Immigration Services ("the Service") acknowledged some trends and changes in the nursing profession and offered some updated guidance to its officers who review H-1B visa petitions filed on behalf of nurses. While the Service recognizes both that a shortage of nurses is projected nationwide over the next ten years, and that advanced baccalaureate training is being pursued by individuals and required by healthcare employers more frequently than before, this updated guidance still offers little relief to healthcare employers seeking to employ foreign nurses on H-1B visas. The root problem remains the Service's interpretation of what constitutes a "specialty occupation," a threshold requirement for the H-1B program.

#### **BACKGROUND**

The threshold requirement for a H-1B petition is to establish that the position offered to a foreign worker is a specialty occupation, meaning that a bachelor's degree or better in a specialized field is normally an entry-level requirement for the position due to its professional caliber and/or complexity. Industry requirements, the employer's historical requirements, or other information such as national employment statistics make the case that a position is sufficiently specialized.

The inherent problem with nursing is that no state in the U.S. requires a BSN as a minimum requirement for licensing, which signals to the Service that an employer's requirement of a bachelor's degree for a nursing position is not "normal." When an education requirement is not considered normal, it becomes the employer's unenviable task to rebut the Service's presumption that the requirement was "ginned up" for the sake of getting a visa. In any H-1B petition, an employer was historically permitted to demonstrate that a bachelor's degree is a standing internal requirement for a position, despite the industry norm, provided that an appropriate justification for the requirement is supplied and the employer can document a history of hiring degreed candidates. However, recent years have seen more and more denials of H-1B petitions predicated on this demonstration, meaning that employers cannot necessarily rely on their own hiring histories for a nursing position (or any position, for that matter) to prove that said position is of H-1B caliber. Unless, the employer can demonstrate that the nurse's duties are more complex and specialized than those of the average RN or staff nurse position.

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<sup>1</sup> Policy Memoranda are often issued by the Service's headquarters in Washington to guide the hundreds of regular and contract Service employees who process and adjudicate petitions for visas and green cards. Sometimes, Memoranda are generated in response to inconsistent results in the Service's decisions.

## UPDATED GUIDANCE

The bulk of this memo is devoted to enumerating specialties within the nursing profession that "may" overcome the barrier to nursing H-1B approvals, as they are complex enough to make a BSN requirement credible. Those specialties are: Addiction, Cardiovascular, Critical Care, Emergency Room, Genetics, Neonatology, Nephrology, Oncology, Pediatrics, Operating Room, and Rehabilitation. The Service also acknowledges that nursing positions requiring APRN certifications are generally considered H-1B caliber, due to the heightened analytical skills required for treatment decisions.

## ANALYSIS

While most of this memorandum is a confirmation and restatement of existing immigration policy, the Service's acknowledgment that more nursing positions require a bachelor's degree at the entry level is new and somewhat promising. This acknowledgment could signal that the Service is prepared to review H-1B petitions for nursing occupations with less skepticism, given that a bachelor's degree requirement is more likely to be normal than before based on current trends. However, healthcare employers are reminded that the merits of potential H-1B petitions must be reviewed on a case-by-case basis, and they are cautioned not to take this updated guidance as a sign that the H-1B program is readily available for standard RN and staff nurse positions. The take-away from this memorandum seems to be that nursing positions in a specialty and/or with heightened certification requirements are more likely to meet H-1B requirements and thus are more likely to be approved.

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