

§ 655.1101

20 CFR Ch. V (4-1-08 Edition)

H-1C nonimmigrants as registered nurses.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts L and M of this part shall apply to the entry of a nonimmigrant who is a citizen of Mexico under the provisions of section D of Annex 1603 of NAFTA. Therefore, the references in this part to “H-1C nurse” apply to such nonimmigrants who are classified by INS as “TN.”

§ 655.1101 What are the responsibilities of the government agencies and the facilities that participate in the H-1C program?

(a) *Federal agencies’ responsibilities.* The United States Department of Labor (DOL), Department of Justice, and Department of State are involved in the H-1C visa process. Within DOL, the Employment and Training Administration (ETA) and the Wage and Hour Division of the Employment Standards Administration (ESA) have responsibility for different aspects of the process.

(b) *Facility’s attestation responsibilities.* Each facility seeking one or more H-1C nurse(s) must, as the first step, submit an Attestation on Form ETA 9081, as described in § 655.1110 of this part, to the Employment and Training Administration, Director, Office of Workforce Security, 200 Constitution Ave. NW., Room C-4318, Washington, DC 20210. If the Attestation satisfies the criteria stated in § 655.1130 and includes the supporting information required by § 655.1110 and by § 655.1114, ETA shall accept the Attestation for filing, and return the accepted Attestation to the facility.

(c) *H-1C petitions.* Upon ETA’s acceptance of the Attestation, the facility may then file petitions with INS for the admission or for the adjustment or extension of status of H-1C nurses. The facility must attach a copy of the accepted Attestation (Form ETA 9081) to the petition or the request for adjustment or extension of status, filed with INS. At the same time that the facility files an H-1C petition with INS, it must also send a copy of the petition to the Employment and Training Administra-

tion, Administrator, Office of Workforce Security, 200 Constitution Avenue, NW., Room C-4318, Washington, DC 20210. The facility must also send to this same ETA address a copy of the INS petition approval notice within 5 days after it is received from INS.

(d) *Visa issuance.* INS assures that the alien possesses the required qualifications and credentials to be employed as an H-1C nurse. The Department of State is responsible for issuing the visa.

(e) *Board of Alien Labor Certification Appeals (BALCA) review of Attestations accepted and not accepted for filing.* Any interested party may seek review by the BALCA of an Attestation accepted or not accepted for filing by ETA. However, such appeals are limited to ETA actions on the three Attestation matters on which ETA conducts a substantive review (*i.e.*, the employer’s eligibility as a “facility;” the facility’s attestation to alternative “timely and significant steps;” and the facility’s assertion that taking a second “timely and significant step” would not be reasonable).

(f) *Complaints.* Complaints concerning misrepresentation of material fact(s) in the Attestation or failure of the facility to carry out the terms of the Attestation may be filed with the Wage and Hour Division, Employment Standards Administration (ESA) of DOL, according to the procedures set forth in subpart M of this part. The Wage and Hour Administrator shall investigate and, where appropriate, after an opportunity for a hearing, assess remedies and penalties. Subpart M of this part also provides that interested parties may obtain an administrative law judge hearing and may seek review of the administrative law judge’s decision at the Department’s Administrative Review Board.

§ 655.1102 What are the definitions of terms that are used in these regulations?

For the purposes of subparts L and M of this part:

Accepted for filing means that the Attestation and any supporting documentation submitted by the facility have been received by the Employment

and Training Administration of the Department of Labor and have been found to be complete and acceptable for purposes of Attestation requirements in §§ 655.1110 through 655.1118.

Administrative Law Judge means an official appointed under 5 U.S.C. 3105.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under subparts L and M of this part.

Administrator, OWS means the Administrator of the Office of Workforce Security, Employment Training Administration, Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator, OWS under subpart L of this part.

Aggrieved party means a person or entity whose operations or interests are adversely affected by the employer's alleged misrepresentation of material fact(s) or non-compliance with the Attestation and includes, but is not limited to:

(1) A worker whose job, wages, or working conditions are adversely affected by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation;

(2) A bargaining representative for workers whose jobs, wages, or working conditions are adversely affected by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation;

(3) A competitor adversely affected by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation; and

(4) A government agency which has a program that is impacted by the facility's alleged misrepresentation of material fact(s) or non-compliance with the attestation.

Attorney General means the chief official of the U.S. Department of Justice or the Attorney General's designee.

Board of Alien Labor Certification Appeals (BALCA) means a panel of one or more administrative law judges who serve on the permanent Board of Alien Labor Certification Appeals established by 20 CFR part 656. BALCA con-

sists of administrative law judges assigned to the Department of Labor and designated by the Chief Administrative Law Judge to be members of the Board of Alien Labor Certification Appeals.

Certifying Officer means a Department of Labor official, or such official's designee, who makes determinations about whether or not H-1C attestations are acceptable for certification.

Chief Administrative Law Judge means the chief official of the Office of the Administrative Law Judges of the Department of Labor or the Chief Administrative Law Judge's designee.

Date of filing means the date an Attestation is "accepted for filing" by ETA.

Department and *DOL* mean the United States Department of Labor.

Division means the Wage and Hour Division of the Employment Standards Administration, DOL.

Employed or *employment* means the employment relationship as determined under the common law, except that a facility which files a petition on behalf of an H-1C nonimmigrant is deemed to be the employer of that H-1C nonimmigrant without the necessity of the application of the common law test. Under the common law, the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). The determination should consider the following factors and any other relevant factors that would indicate the existence of an employment relationship:

(1) The firm has the right to control when, where, and how the worker performs the job;

(2) The work does not require a high level of skill or expertise;

(3) The firm rather than the worker furnishes the tools, materials, and equipment;

(4) The work is performed on the premises of the firm or the client;

(5) There is a continuing relationship between the worker and the firm;

(6) The firm has the right to assign additional projects to the worker;

(7) The firm sets the hours of work and the duration of the job;

(8) The worker is paid by the hour, week, month or an annual salary, rather than for the agreed cost of performing a particular job;

(9) The worker does not hire or pay assistants;

(10) The work performed by the worker is part of the regular business (including governmental, educational and nonprofit operations) of the firm;

(11) The firm is itself in business;

(12) The worker is not engaged in his or her own distinct occupation or business;

(13) The firm provides the worker with benefits such as insurance, leave, or workers' compensation;

(14) The worker is considered an employee of the firm for tax purposes (*i.e.*, the entity withholds federal, state, and Social Security taxes);

(15) The firm can discharge the worker; and

(16) The worker and the firm believe that they are creating an employer-employee relationship.

Employment and Training Administration (ETA) means the agency within the Department of Labor (DOL) which includes the Office of Workforce Security (OWS).

Employment Standards Administration (ESA) means the agency within the Department of Labor (DOL) which includes the Wage and Hour Division.

Facility means a "subsection (d) hospital" (as defined in section 1886(d)(1)(B) of the Social Security Act (42 U.S.C. 1395ww(d)(1)(B)) that meets the following requirements:

(1) As of March 31, 1997, the hospital was located in a health professional shortage area (as defined in section 332 of the Public Health Service Act (42 U.S.C. 245e)); and

(2) Based on its settled cost report filed under title XVIII of the Social Security Act (42 U.S.C. 1395 *et seq.*) for its cost reporting period beginning during fiscal year 1994—

(i) The hospital has not less than 190 licensed acute care beds;

(ii) The number of the hospital's inpatient days for such period which were made up of patients who (for such

days) were entitled to benefits under part A of such title is not less than 35% of the total number of such hospital's acute care inpatient days for such period; and

(iii) The number of the hospital's inpatient days for such period which were made up of patients who (for such days) were eligible for medical assistance under a State plan approved under title XIX of the Social Security Act, is not less than 28% of the total number of such hospital's acute care inpatient days for such period.

Full-time employment means work where the nurse is regularly scheduled to work 40 hours or more per week, unless the facility documents that it is common practice for the occupation at the facility or for the occupation in the geographic area for full-time nurses to work fewer hours per week.

Geographic area means the area within normal commuting distance of the place (address) of the intended worksite. If the geographic area does not include a sufficient number of facilities to make a prevailing wage determination, the term "geographic area" shall be expanded with respect to the attesting facility to include a sufficient number of facilities to permit a prevailing wage determination to be made. If the place of the intended worksite is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA will be deemed to be within normal commuting distance of the place of intended employment.

H-1C nurse means any nonimmigrant alien admitted to the United States to perform services as a nurse under section 101(a)(15)(H)(i)(c) of the Act (8 U.S.C. 1101(a)(15)(H)(i)(c)).

Immigration and Naturalization Service (INS) means the component of the Department of Justice which makes the determination under the Act on whether to grant H-1C visas to petitioners seeking the admission of nonimmigrant nurses under H-1C visas.

INA means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Lockout means a labor dispute involving a work stoppage in which an employer withholds work from its employees in order to gain a concession from them.

Nurse means a person who is or will be authorized by a State Board of Nursing to engage in registered nursing practice in a State or U.S. territory or possession at a facility which provides health care services. A staff nurse means a nurse who provides nursing care directly to patients. In order to qualify under this definition of "nurse" the alien must:

(1) Have obtained a full and unrestricted license to practice nursing in the country where the alien obtained nursing education, or have received nursing education in the United States;

(2) Have passed the examination given by the Commission on Graduates for Foreign Nursing Schools (CGFNS), or have obtained a full and unrestricted (permanent) license to practice as a registered nurse in the state of intended employment, or have obtained a full and unrestricted (permanent) license in any state or territory of the United States and received temporary authorization to practice as a registered nurse in the state of intended employment; and,

(3) Be fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to practice as a registered nurse immediately upon admission to the United States, and be authorized under such laws to be employed by the employer. For purposes of this paragraph, the temporary or interim licensing may be obtained immediately after the alien enters the United States and registers to take the first available examination for permanent licensure.

Office of Workforce Security (OWS) means the agency of the Department of Labor's Employment and Training Administration which is charged with administering the national system of public employment offices.

Prevailing wage means the weighted average wage paid to similarly employed registered nurses within the geographic area.

Secretary means the Secretary of Labor or the Secretary's designee.

Similarly employed means employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week, and in the same specialty area.

State means one of the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

State employment security agency (SESA) means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with OWS in the operation of the national system of public employment offices.

Strike means a labor dispute in which employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations.

United States is defined at 8 U.S.C. 1101(a)(38).

United States (U.S.) nurse means any nurse who is a U.S. citizen; is a U.S. national; is lawfully admitted for permanent residence; is granted the status of an alien admitted for temporary residence under 8 U.S.C. 1160(a), 1161(a), or 1255a(a)(1); is admitted as a refugee under 8 U.S.C. 1157; or is granted asylum under 8 U.S.C. 1158.

Worksite means the location where the nurse is involved in the practice of nursing.

§ 655.1110 What requirements does the NRDA impose in the filing of an Attestation?

(a) *Who may file Attestations?* (1) Any hospital which meets the definition of "facility" in §§ 655.1102 and 655.1111 may file an Attestation.

(2) ETA shall determine the hospital's eligibility as a "facility" through a review of this attestation element on the first Attestation filed by the hospital. ETA's determination on this point is subject to a hearing before the BALCA upon the request of any interested party. The BALCA proceeding shall be limited to this point.

(3) Upon the hospital's filing of a second or subsequent Attestation, its eligibility as a "facility" shall be controlled by the determination made on