

Blog Post

Handling Foreign National Healthcare Workers in the Pandemic

April 20, 2020

Healthcare workers – critical to the U.S. response to the COVID-19 pandemic – are needed more now than ever, yet the bureaucracy surrounding employment of foreign national healthcare workers creates roadblocks. With the closing of Consulate offices and suspension of Premium Processing, employers must be creative in navigating options for obtaining approval for foreign national healthcare workers and must be mindful of issues that would arise if they furlough such workers.

An Overview of the Standard Process

- The H-1B visa is available for certain specialty occupations. While physicians and physical therapists are considered to be part of that category, most nurses and other healthcare professionals are not. Although, several hospitals throughout the nation are H-1B cap exempt, and therefore can file H-1B Petitions year-round on behalf of medical professionals who will work in specialty occupations, other petitions are subject to a cap. Due to the limited number of these visas, an employer had to have registered with U.S. Citizenship and Immigration Services (USCIS) by March 20, 2020, in order to file a petition for the worker. And those who do have an H-1B petition approved are usually restricted to a specific geographical location. In prior years, there was an H-1A visa available for nurses, but that is no longer available.

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- The J visa is a cultural exchange visa used mostly by physicians. Except for the few physicians already in the U. S., most of these programs require the physician to process the visa at a U.S. Embassy or Consulate overseas. However, on March 20, 2020, the United States Department of State (DOS) announced that it would no longer process visas. Moreover, the majority of J visas holders are subject to a two-year foreign residency requirement after the end of their term in order to change status to another visa.
- A Conrad 30 Waiver is available for medical doctors if they will be working in underserved areas. However, similar to the H-1B annual lottery, the yearly application window has already closed for this fiscal year.
- The O visa for doctors of extraordinary ability requires that such individuals have their visa petitions approved by USCIS before they may obtain a visa abroad or change status to O-1. However, the agency announced the suspension of Premium Processing on March 20, 2020, for all nonimmigrant and immigrant visa petitions. This means that these O-1 petitions may take up to 11 months to be adjudicated, depending on the Service Center, or even longer if the case falls outside of the normal processing times.

In Light of the Foregoing Limitations, What Can Be Done?

Congress could pass legislation to address this critical issue. Although Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), on March 21, 2020, it did not include any relief for immigrant healthcare workers.

When Congress does not act, government agencies can sometimes fill the void.

The DOS has stepped up. On March 26, 2020, DOS announced that it would process visas for

medical professionals. Any medical professionals with an approved U. S. non-immigrant or immigrant visa petition or certificate of eligibility in an approved exchange visitor program may contact the nearest Embassy or Consulate for updated procedures. The DOS announcement also notes that foreign medical professionals in the U.S. have other options, such as extensions or changes of status. The DOS states that alien Physicians should consult their program sponsors for an extension of their program.

Employers should also note that the general travel restrictions announced by the President in January and March allow the entry of those whose admission would be in the “national interest” to the United States. However, that would be subject to interpretation at Customs and Border Protection. The travel restrictions between Canada and Mexico do mention these workers as “essential” and therefore exempt from the travel restrictions from these border countries.

USCIS could expedite petitions and/or lift the suspension of Premium Processing for petitions filed on behalf of healthcare workers. Premium Processing allows the petitioner to pay an additional \$1,440.00 to USCIS to speed up the adjudication. It could also expedite work permits for healthcare professionals who have petitions pending.

Other government agencies could take action that would assist employers with foreign healthcare workers. The Department of Homeland Security (DHS) has the authority to implement policies and procedures for foreign healthcare workers, but it has not done so. The secretary of DHS could provide benefits based on memoranda. For example, Deferred Action for Childhood Arrivals was created by a memorandum issued on June 2012 by then Secretary Janet Napolitano and allows these individuals to obtain work permits. Moreover, in the past, Immigration and Customs Enforcement (ICE) has used “prosecutorial discretion” to grant a benefit or stop removal from the U.S. For example, ICE has

deferred removal for certain individuals who had asylum applications pending, and has granted work permits to cooperating witnesses.

Be Careful Furloughing Foreign Nationals

Employers of foreign nationals with non-immigrant visas also have to tread lightly with respect to furloughing, transferring to another location, or terminating their employees. Visas such as the H-1B, H-1B1 and E-3, commonly used by healthcare workers, are jointly regulated by USCIS and DOL and the employer must abide by the agreement with DOL on the working conditions, worksite location, salary, and position. Transferring to a remote location may require a new visa petition, and furloughing the foreign employee or “benching” would render the employee “out of status” after their grace period. Once “out of status,” the employee would have to leave the U. S. or find another employer to petition for them. Each case must be individually evaluated.

Employers have limited options at the moment for processing visas for foreign healthcare workers, and now more than ever, they should seek assistance from experienced immigration counsel. For assistance with immigration needs, contact your Akerman attorney.

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