

The ABC'S Of Immigration: Certifications of Foreign Health Care Workers by Gregory Siskind

Why do health care workers require special certification?

In 2003, the Department of Homeland Security issued long-awaited final regulations governing health care workers on non-immigrant visas. The rule follows the October 2002 release of proposed regulations and represents the final implementation of health care worker provisions included in Section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("The 1996 Act"). That law created a new ground of inadmissibility for health care workers unless the workers have a certificate from an approved organization verifying the worker's credentials.

Section 343 of the 1996 Act provided a new ground of inadmissibility for health care workers unless the worker could present a certificate from the Commission on Graduates of Foreign Nursing Schools (CGNFS) or an equivalent credentialing organization approved by both USCIS and the Department of Health and Human Services. The credentialing must verify:

1. The alien's education, training, license, and experience meet all applicable requirements for admission into the US, are comparable with that required for a similar American health care worker, and the license is unencumbered.
2. The alien has the level of competence in oral and written English considered by HHS and the Department of Education to be appropriate for health care work of the kind in which the alien will be working.
3. If a majority of states licensing the profession recognize a test predicting an applicant's success on the profession's licensing or certification examination, the alien has passed such a test or examination.

The following health care workers are covered under the health care worker certificate rules:

Nurses (including Registered Nurses and Licensed Vocational/Practical Nurses)

Occupational Therapists

Physical Therapists

Medical Technologists (Clinical Laboratory Scientists)

Medical Technicians (Clinical Laboratory Technicians)

Speech Language Pathologists and Audiologists

Physician Assistants

Which organizations are authorized to issue health care worker certificates?

For nurses, Section 212(r) of the Immigration and Nationality Act provides that CGFNS (www.cgfns.org) can alternatively certify a nurse who has a valid and unrestricted license in a US state where the nurse intends to be employed, the nurse has passed the National Council Licensure Examination (NCLEX) and the nurse meets the following requirements:

1. The course instruction was in English; and
2. The nursing program was located in a country which was designated by CGFNS as having nursing programs of sufficient quality and English instruction; and
3. The nursing program was in operation on or before November 12, 1999 or has been approved by CGFNS if it was later established.

CGFNS has designated the following countries for purposes of the alternate certification process: Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and the United States.

CGFNS is also authorized to issue health care worker certificates for any of the other six kinds of health care workers.

Also note that the National Board for Certification in Occupational Therapy (www.nbcot.org) can certify occupational therapists and the Federal Credentialing Commission on Physical Therapy (www.fccpt.org) can certify physical therapists.

If the law requiring health care worker certificates was passed in 1996, how come they still are not required in all cases?

The 1996 Act's health care provisions have been implemented in three interim rules. The first was released in 1998 following the filing of a class action law suit challenging the long delay in implementing interim regulations following passage of the 1996 Act. From the passage of the 1996 Act until that regulation was issued, no health care workers were admitted to the US. Two more regulations - one in 1999 and one in 2001 - were issued finally allowing all health care workers covered under the 1996 Act to be admitted.

The first regulation identified seven categories of health care workers subject to the 1996 Act. They are nurses, physical therapists, occupational therapists, speech-language pathologists, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians) and physician assistants. In that rule, CGFNS as well as NBCOT, the organization that credentials occupational therapists, were authorized to certify nurses and occupational therapists, respectively. The rule also established the appropriate English testing levels for RNs and OTs and specified exemptions from the English rules. The first interim rule only applied to immigrants and not non-immigrants. The law was waived for non-immigrants until issuance of a final regulation. Until now, such non-immigrant workers have been granted one-year periods of admission to the US.

The second interim rule temporarily authorized CGFNS to issue certificates to physical therapists and occupational therapists seeking immigrant visas. It also authorized the Foreign Credentialing Commission on Physical Therapists (FCCPT) to issue certificates to immigrant physical therapists. Appropriate English test scores were also determined for PTs.

The third interim rule finally included the rest of the designated health care professions and listed English scores for them.

In October of 2002, the USCIS proposed a final rule for certifying health care workers. The rule had the following major proposals:

1. A list of organizations authorized to issue certificates

2. A description of a certificate
3. The English language requirements
4. Alternative certification rules for nurses
5. A streamlined process for nurses, PTs, OTs and speech language pathologists and audiologists
6. The procedures for qualifying as a certifying organization
7. A list of standards that an organization must meet to certify health care workers and
8. A requirement to review periodically the performance of certifying organizations.

The proposed rule would also for the first time cover non-immigrants.

What will happen to the approvals for previously authorized certifying organizations?

The organizations previously authorized under the prior interim rules to certify health care workers (except CGFNS) shall be required to be re-certified. However, those organizations will retain interim authority to continue issuing certifications. These organizations had until January 28, 2004 to submit an I-905 Application for Authorization to Issue Health Care Worker Certificates. CGFNS will still have to submit an application (without paying a fee) by that date as well and CGFNS will still have to be subject to ongoing review by USCIS.

Are Non-Immigrants Covered by the New Law?

Yes. Beginning on July 25, 2004, non-immigrants are covered by the VisaScreen rules (see below for more information on this). Also, the vast majority of certifications are currently being issued by CGFNS. However, spouses and dependants of immigrants or non-immigrants who are the primary applicants are not covered even if the spouse intends to work in health care. But all people applying for H, J and O visas are covered. Also, TN visa holders are covered despite protests that the NAFTA Treaty prohibits this. Non-immigrants coming in for training under F, H-3 and J visas are NOT covered either.

Note that VisaScreen is a trademarked name of CGFNS' exam and other services call their certifications by other names. VisaScreen has, however, become the common name used to refer to the certification requirement and we will use that term in this article even when the actual certificate may go by a different name with other authorized certification agencies.

On July 19, 2004, the USCIS issued an extension of this deadline for SOME non-immigrants. The following workers have until July 25, 2005 to meet the VisaScreen rules:

Mexican and Canadian health care workers who held TN or TC status prior to September 23, 2003

The applicant held a US license as of September 23, 2003

Which Kinds of Health Care Workers are Covered by the Certification Requirements?

As in the proposed rule and the interim rules, seven occupations are covered. They are

1. Registered Nurses
2. Physical therapists
3. Occupational therapists
4. Speech-language pathologists
5. Medical technologists (also known as clinical laboratory scientists)
6. Medical technicians (also known as clinical laboratory scientists) and
7. Physician Assistants

The USCIS considered and has chosen not to expand this list and has also decided not to define these health care occupations. Instead, they will continue with the practice of reviewing the duties of a worker on a case-by-case basis.

How Will Health Care Workers Trained in the US be Treated?

The USCIS has retained the controversial requirement from the proposed rule that health care workers who possess state licenses or who were trained in the US must still be certified. According to USCIS, they are strictly interpreting the law and Congress expressed no intention to exempt these workers.

Also, the USCIS argues that the state screening processes alone would not demonstrate applicants' English skills and comparable training and unencumbered licensing.

The USCIS did, however, accept the suggestion of CGFNS in the final rule to allow for a more streamlined certification process for those nurses who trained in the US or who already are licensed here. Under the CGFNS proposal, a nurse who graduated from an entry-level program accredited by the National League for Nursing Accreditation Commission (NLNAC) or the Commission Collegiate Nursing Education (CCNE) would be exempt from the educational comparability review and English language proficiency testing. Also, nurses educated in the US in any other named discipline and who have graduated from a program accredited by the discipline would be evaluated under this same process. The USCIS believes that this will substantially shorten the certification process and ease the paperwork burdens on nurses.

The USCIS and the Department of Health and Human Services have also agreed to use the same kind of streamlining for the following groups:

1. For occupational therapists, graduation from a program accredited by the Accreditation Council for Occupational Therapy Education (ACOTE) or the American Occupational Therapy Association (AOTA).
2. For physical therapists, graduation from a program accredited by the Commission on Accreditation in Physical Therapy Education (CAPTE) of the American Physical Therapy Association (APTA); and
3. For speech language pathologists and audiologists, graduation from a program accredited by the Council on Academic Accreditation in Audiology and Speech Language Pathology (CAA) of the American Speech-Language-Hearing Association (ASHA).

For now, other health care workers not listed above need to go through a normal

certification.

When and How will the Certification be Presented to the USCIS?

First, certifications will only be valid for a five-year period. So it is possible that some nurses may have to go through the process more than once if they are in the US for an extended period on a non-immigrant visa or they simply wait several years before applying for admission to the US.

In the proposed regulation, the USCIS said that it would NOT be necessary to present the credentialing certification each time a worker enters the US. The presentation of an I-94 or a fee receipt showing that the worker was processed for admission under NAFTA can be used as evidence that the worker previously presented a certificate. **NOTE, HOWEVER, that the USCIS has changed its mind.** It will now only accept a valid health care worker certificate or certified statement as evidence that the worker is admissible. According to the USCIS, the proposal would not work because I-94s are supposed to be surrendered for many travelers and I-94s don't always contain information on a worker's occupation. Green card holders, however, do not need to show the certificate to be admitted each time.

How Will Certificates Be Presented When Applying for a Change of Non-Immigrant Status in the US?

The new rule adds a section that outlines the procedure for submitting a certificate when a change of nonimmigrant status is requested in the US.

Due to concerns that requiring workers already in the US in nonimmigrant visas to immediately get certifications could disrupt the delivery of health care, the USCIS has decided that they will continue waiving the certification requirement for ONE year for health care workers already in the US. The USCIS believes this will allow plenty of time for workers to meet the requirements for certification and for the credentialing organizations to get ready for a much bigger workload.

Therefore, any nonimmigrant health care worker admitted on or before July 26, 2004 will have the certification requirement waived. Furthermore, any petition or application to extend a worker's authorized stay or change his or her status will be denied unless the alien obtains the required certification no later than one year after the date of the worker's admission.

How Will Certificates Be Presented When Applying for an Immigrant Status in the US?

Any applicant coming to the US as an immigrant or is applying for adjustment of status to perform labor in a health care occupation must submit a certification at the time of visa issuance or adjustment of status. So it should not be necessary to have VisaScreen completed at the time of filing the I-140.

How Will Organizations Qualify to Issue Health Care Worker Certificates?

CGFNS is the only organization that can - at least initially - certify workers in any of the seven covered professions. They will still be subject to oversight and could lose their accreditation if the USCIS finds problem with their credentialing process.

All organizations must submit an I-905 Application for Authorization Workers (though CGFNS does not need to pay the \$230 fee). All applications are going to be handled by the USCIS Nebraska Service Center.

The USCIS will notify the public of new organizations approved for certifying by publishing a public notice in the Federal Register and on its web site at www.immigration.gov. The list will also identify organizations whose authorization has been terminated.

More than one organization can be approved to issue certificates for the same occupation and such approvals shall be valid for five years at a time.

The USCIS has laid out in the final rule the specific standards that must be met in order to qualify to issue certificates.

There are four guiding principles to the standards:

1. The USCIS will not approve an organization unless the organization is independent and free of material conflicts of interest regarding whether an alien receives a visa.
2. The organization should demonstrate an ability to evaluate both the foreign credentials appropriate for the profession and the results of examinations for proficiency in the English language appropriate for the health care field in which the alien works.
3. The organization should also maintain comprehensive and current information on foreign educational institutions, ministries of health and foreign health care licensing jurisdictions.
4. If the health care field is one for which a majority of states require a predictor examination (such as nursing), the organization should demonstrate an ability to conduct the examination outside the US.

A change from the proposed regulations is the addition of language clarifying that a not-for-profit corporation that has a self-perpetuating board of directors may still demonstrate that it is independent and free of material conflicts of interest regarding whether the alien receives a visa.

Another addition to the proposed rules is that credentialing organizations will be required to request evidence of a worker's degree and transcript from the issuing educational and licensing authorities rather than from the applicants. This new rule is designed to reduce fraud.

The regulations also have a number of specific requirements that must be met by certifying organizations including the following:

- o the organization must be independent of any other group that functions as a representative of the occupation or profession or serves as or is related to a recruitment/placement organization
- o the organization must be able to render impartial advice regarding an individual's qualifications regarding training, experience and licensure.
- o the organization must be completely independent in all of its day-to-day activities.
- o the organization should provide applicants with their results as quickly as possible and if an applicant fails, the applicant should be quickly provided with information on his or her areas of deficiency
- o the organization should take steps to ensure applicants' information is kept

confidential

- o the certifying organization must have a formal policy for renewing the certification if an applicant's original certification has expired before the individual first seeks admission to the US or applies for adjustment of status
- o the organization shall provide all qualified applicants with a certificate in a timely manner
- o the organization shall examine, evaluate and validate the academic and clinical requirements applied to each country's accrediting bodies or the educational institution
- o the organization should evaluate the licensing and credentialing systems of each country or licensing jurisdiction to see which systems are equivalent to that of the majority of licensing jurisdictions in the US
- o the organization shall be prepared to submit information requested by USCIS for use in investigating allegations of non-compliance with standards
- o the organization shall establish procedures to track the ability of certificate holders to pass US licensing or certification exams. Information on passage rates shall be supplied to HHS on an annual basis or the USCIS as part of the five-year reauthorization application.

What Kinds of Organizations Can Qualify to Be a Credentialing Organization?

According to the USCIS, any organization, including a state agency, can be found eligible for authorization to issue certificates as long as it meets the majority of the standards noted above.

How Will the USCIS Monitor Credentialing Organizations?

The USCIS has stated that it intends to develop a process to monitor credentialing organizations to ensure that the organization continues to follow the standards in the new rule. As part of this process, the USCIS will review and reauthorize programs every five years. If the USCIS makes adverse findings, it can initiate termination proceedings. It also may conduct additional reviews at any time in the five-year period. CGFNS sought to be exempt from this requirement, but were rebuffed by USCIS.

How Much Time Will Credentialing Organizations Have to Issue Certificates?

The USCIS considered requiring organizations to issue certificates in a specified period of time. But instead they decided to simply state in the regulations that organizations must issue certificates in a timely manner to as to minimize any delays that may affect a worker's ability to proceed with his or her application for an immigration benefit. It did, however, state in the regulation's preamble that it reserves the right to initiate termination proceedings against organizations that are unduly slow in issuing certificates. It also can waive the certification requirement in individual cases upon request.

How Much Can a Credentialing Organization Charge for a Certificate?

The USCIS does not specify how much an organization can charge, but the regulation does state that the fee charged should not unduly impair a worker's ability to seek an immigration benefit.

How Can a Certificate Be Revoked from a Worker?

A credentialing organization must develop policies and procedures for revoking certificates if it finds that a worker was not eligible to receive the certificate at the time it was issued. Also, for workers whose certificates are revoked, credentialing organizations are responsible for notifying the Nebraska Service Center, which may revoke the visa petition and initiate removal proceedings.

The USCIS has added a requirement since the proposed regulation that requires an organization issuing certificates include in its revocation process a mechanism to revoke a certificate when it learns that a holder is no longer eligible to hold a certificate.

What Does the Certificate Need to Include?

The certification needs to include the following information:

1. The name, designated point of contact to verify the validity of the certificate, address and telephone number of the certifying organization;
2. The date the certificate was issued?
3. The health care occupation for which the certificate was issued; and
4. The alien's name and date and place of birth.

What are the Testing Organizations and Scores Approved for the English Language Certification Requirement?

The tests and scores will be published periodically in the Federal Register and on the USCIS web site at www.immigration.gov.

Score requirements are currently as follows:

1. Physical and Occupational Therapists -

ETS: TOEFL: Paper-based 560, Computer-based 220; TWE: 4.5; TSE: 50;

2. Nurses and other health care workers requiring a bachelors degree -

ETS: TOEFL: Paper-based 540, Computer-based 207; TWE: 4.0; TSE: 50;

TOEIC Service International: TOEIC: 725; plus TWE: 4.0 and TSE: 50; or

IELTS: 6.5 overall with spoken band score of 7.0 (this would require the Academic module).

3. Occupations requiring less than a bachelor's degree -

ETS: TOEFL: Paper-based 530, Computer-based 197; TWE: 4.0; TSE: 50;

TOEIC Service International: TOEIC: 700; plus TWE: 4.0 and TSE: 50; or

IELTS: 6.0 overall with spoken band score of 7.0 (this would require the Academic or the General module).

Note that graduates of health profession programs in Australia, Canada (except Quebec),

Ireland, New Zealand, the United Kingdom and the United States are deemed to have met the English language requirements.

Gregory Siskind (gsiskind@visalaw.com) is a partner in the law firm of Siskind, Susser, Haas and Devine (www.visalaw.com), which has offices in the United States and around the world. He is an active member of the American Immigration Lawyers Association (AILA). He is a member of the American Bar Association (ABA), where he currently serves as Chairman of the Law Practice Management Publishing Board and on the Governing Council of the Law Practice Management Section. He was one of the first lawyers in the country (and the very first immigration lawyer) to set up a website for his practice and he was the first attorney in the world to distribute a firm newsletter via e-mail listserv. He is a co-author of *The J Visa Guidebook* published by LexisNexis Matthew Bender, and the author of *The Lawyer's Guide to Marketing on the Internet*, published by the ABA. He graduated magna cum laude from Vanderbilt University and received his law degree from the University of Chicago.