

temporarily authorize organizations to issue certificates to immigrant health care workers. CGFNS was found to have an established track record in issuing certificates for the additional occupations.

What Were the Provisions of the H-1C Interim Rule Published on June 11, 2001?

A related interim rule was published in response to the passage of the NRDA, Petitioning Requirements for the H-1C Nonimmigrant Classification under Public Law 106-95, 66 FR 31107 (June 11, 2001) (amending 8 CFR 214.2(h)). Among other things, the NRDA created an alternative certification process for foreign nurses only, as provided in section 212(r) of the Act. In the H-1C rule, the DHS announced that it would continue to waive the certification requirements for nonimmigrant nurses, pending the promulgation of new regulations implementing both certification processes.

What Provisions Were Contained in the Proposed Rule Published on October 11, 2002?

In the October 11, 2002, rule, the DHS proposed to implement a comprehensive process for the certification of foreign health care workers under sections 212(a)(5)(C) and (r) of the Act. It addresses foreign health care workers coming to the United States on a temporary basis (nonimmigrant aliens) as well as on a permanent basis (immigrants).

This rule proposed to amend 8 CFR 212.15 by:

- (1) Specifying which organizations are authorized to issue certificates (8 CFR 212.15(e));
- (2) Describing the required content of the certificate itself (8 CFR 212.15(f));
- (3) Specifying the English language requirements for certification (8 CFR 212.15(g));
- (4) Implementing the alternative certification process for foreign nurses and the required content of the certified statement (8 CFR 212.15(h));
- (5) Establishing a streamlined certification process for certain nurses, occupational therapists, physical therapists, and speech language pathologists and audiologists (8 CFR 212.15(i));
- (6) Describing the procedure to qualify as a certifying organization (8 CFR 212.15(j));
- (7) Listing the standards that an organization must meet in order to obtain and retain authorization to issue foreign health care worker certifications (8 CFR 212.15(k)); and

(8) Providing for periodic review of the performance of certifying organizations (8 CFR 212.15(l)) and the termination of their authority (8 CFR 212.15(m)).

The rule also proposed to amend 8 CFR 103.1 by specifying at new paragraphs (f)(3)(iii)(QQ) and (RR) that the Associate Commissioner for Examinations exercises appellate jurisdiction over applications for authorization to issue foreign health care worker certifications, and the termination of authorization to issue foreign health care worker certifications.

The rule proposed to amend 8 CFR 103.7(b)(1) by adding a fee for filing Form I-905, Application for Authorization to Issue Certification for Health Care Workers. This form was previously approved for use in order to ensure that organizations formally seeking authorization to issue health care worker certificates or certified statements will be able to submit complete and uniform applications. However, because the authorization process was never implemented through a final regulation, the Form I-905 has not yet been distributed for public use.

The rule also proposed to amend 8 CFR 214.1(h) by adding a requirement that an alien who seeks to enter the United States for the purpose of performing labor in a health care occupation must present a foreign health care worker certification to the DHS in accordance with 8 CFR 212.15(d).

The rule further proposed to amend 8 CFR 248.3 by adding paragraph (i) to mandate that a nonimmigrant seeking a change of status to perform labor in a health care occupation must submit a foreign health care worker certification.

Discussion of Comments

What Comments Were Received in Response to the Proposed Rule?

Thirty-three comments were received from a variety of individuals and organizations including health care workers, attorneys, professional organizations, U.S. Government organizations, foreign government officials, and organizations granted authority to issue certifications to health care workers. The comments addressed many aspects of the proposed rule. For the sake of clarity, this section will summarize the justification for the regulatory amendments contained in the proposed rule and then discuss the comments that relate to the specific amendment.

It must be noted that the proposed rule generated a number of comments that were not related to the issue of

certifications for health care workers. For example, two commenters discussed the general issue of the DHS' role in the importation of nurses to the United States while another commented on the issue of Social Security cards and licenses for nurses. One commenter discussed an alleged contradiction in the statutory language. These comments will not be discussed because they are not germane to the proposed rule.

Ten commenters made general observations on the impact of the rule on health care in the United States. Nine of the commenters provided that the rule will have an adverse affect on health care in the United States because it will make it harder for facilities to recruit, hire, and retain foreign health care workers. The commenters stated that the implementation of the regulation will result in increased backlogs and create difficulties for aliens attempting to enter the United States. The other commenter stated that CGFNS will have a difficult time processing the number of requests it will receive for certifications. One commenter stated that the regulation takes away the authority of hospital administrators to make decisions with respect to health care issues. Finally, one commenter stated that the regulation was not flexible and would create operational difficulties for health care facilities.

The statutory provisions relating to the certification process are complex. In drafting the previous interim rules, the proposed rule, and this final rule, every attempt has been made to minimize the adverse affects that they would have on health care facilities and health care workers and, at the same, ensure that they reflect the intent of Congress.

Aliens Who are Subject to the Health Care Certification Requirements

The DHS took the position in the proposed rule that the requirements of section 212(a)(5)(C) of the Act apply to both immigrants and nonimmigrants who seek to enter the United States for the purpose of performing labor as a health care worker. Physicians are explicitly exempted from the certification requirement by the statute and, therefore, are not covered by this rule.

Further, the DHS held that with respect to immigrants, the certification requirement applies to both aliens overseas who are seeking an immigrant visa, and aliens in the United States who are applying for adjustment of status to that of a permanent resident. The DHS interprets the statutory language, "any alien who seeks to enter the United States for the purpose of