

performing labor as a health care worker * * * with respect to immigrants, to limit the scope of this provision to aliens with an approved employment-based (EB) preference petition under section 203(b) of the Act, 8 U.S.C. 1153(b), to perform labor in a covered health care occupation. Therefore, an alien is not subject to section 212(a)(5)(C) of the Act if he or she is seeking an immigrant visa or adjustment of status on any other basis pursuant to a family-sponsored petition under section 203(a) of the Act, 8 U.S.C. 1153(a), an EB preference petition for a non-health care occupation; under section 209 of the Act, 8 U.S.C. 1159 (adjustment of status of refugees); under section 210 of the Act, 8 U.S.C. 1160 (special agricultural workers), or pursuant to section 240A of the Act, 8 U.S.C. 1229b (cancellation of removal); under section 249 of the Act, 8 U.S.C. 1259 (record of admission for permanent residence); or under any other statutory provision relating to admission as an immigrant.

With respect to nonimmigrant aliens, the proposed rule applied the certification requirement to all aliens who have obtained nonimmigrant status for the purpose of performing labor as a health care worker, including, but not limited to, those aliens described in sections 101(a)(15)(H), (J), and (O) of the Act, 8 U.S.C. 1101(a)(15), and aliens entering pursuant to section 214(e) of the Act, 8 U.S.C. 1184(e), as TN professionals.

The DHS also proposed that a nonimmigrant entering the United States to receive training in an occupation listed at 8 CFR 212.15(c) will not be required to obtain a health care certification. This includes, but is not limited to, F-1 nonimmigrants receiving practical training and J-1 nonimmigrants coming to the United States to undertake a training program in a medical field. Nonimmigrant aliens entering the United States to receive training in a health care occupation fall outside the ambit of section 212(a)(5)(C) of the Act because they are not independently performing the full range of duties of their occupation and, therefore, are not entering for the purpose of performing labor as a health care worker. Their primary purpose in the U.S. is not to perform health care but is rather to receive training.

Finally, the DHS concluded in the proposed rule that the alien health care certification requirement should not be applied to the spouse and dependent children of an immigrant or nonimmigrant. Dependent aliens enter the United States for the primary purpose of accompanying the principal

alien, not to perform labor as a health care worker, or in any other field. A dependent alien derives his or her nonimmigrant status from his or her familial relationship with the principal alien and is not required to work in a particular occupational field or for a specific employer to maintain his or her status. Accordingly, regardless of whether or not a dependent alien may intend to work in a health care occupation listed at 8 CFR 212.15(c), he or she would not be subject to the health care worker certification requirement.

Eighteen comments were received in response to this portion of the proposed rule. Four commenters stated that all nonimmigrant aliens should be covered by section 212(a)(5)(C) of the Act. Six commenters suggested that section 212(a)(5)(C) of the Act should not apply to TN nonimmigrants because it conflicts with the terms of the North American Free Trade Agreement (NAFTA).

The DHS carefully considered these comments. However, as noted in the proposed rulemaking, based on our consideration of the relevant statutory provisions, legislative history, judicial precedent, and our prior rulemakings, the DHS has concluded that the health care certification requirement is intended to apply to all nonimmigrant health care workers. The legislative history of IIRIRA confirms that, in this instance, the DHS may not rely on the commenters' assertions regarding an alleged conflict with NAFTA to reach a different result. *See* H.R. CONF. REP. NO. 104-828 at 226-27 (1996).

Four commenters also stated that the certification requirement should be applied to the spouse and dependent children of an immigrant or nonimmigrant alien. One commenter stated that nonimmigrant aliens coming to the United States to obtain training, such as F-1 and J-1 nonimmigrants, should not be required to obtain a certificate while two commenters suggested that they should. Likewise, two commenters suggested that an H-3 alien should also be exempt from the provision because an H-3 alien is also coming to the United States to obtain training. Finally, one commenter suggested that the DHS specifically list the nonimmigrant aliens exempted from the certification requirements in the final regulation.

The DHS will not require dependent aliens to obtain a certificate even if they will eventually be employed in a covered health care occupation. Sections 212(a)(5)(C) and 212(r) of the Act relate to grounds of inadmissibility. Since dependent aliens enter the United States for the primary purpose of

accompanying the principal alien, they are not coming to the United States to perform labor as a health care worker, or in any other field, and they will not be required to obtain a certification.

Further, the DHS will not list the specific aliens exempted from the requirement to obtain health care certificates. The language contained in the proposed rule at 8 CFR 212.15(a)(1) provides that the provision applies only to those aliens coming to the United States for the primary purpose of performing labor in a health care occupation. This language clearly does not apply to a nonimmigrant alien coming to the United States for training, including an H-3 nonimmigrant alien. Further, the listing of specific nonimmigrant classifications in the regulation may be erroneously interpreted by some to limit the exemption to those nonimmigrants specifically listed in the regulation.

Health Care Workers Who Were Trained in the United States, or Who Are in Possession of a Valid State License

The proposed rule provided that possession of a state license does not exempt a foreign health care worker from compliance with the certification requirement.

As stated in the proposed rule, this conclusion was reached after considering the language of the statute, and after consultation with HHS. Nothing in the text of section 212(a)(5)(C) of the Act relieves alien health care workers of this requirement, on the ground that they were trained in the United States or are already licensed here. Moreover, the certification requires that any state license the alien may already have is unencumbered. Indeed, had Congress intended to exempt such aliens from the certification requirement, it would not have explicitly provided that the certification must document the fact of an alien's successful passage of any test or examination that is accepted as evidence of an applicant's likely success on a state licensing examination, if a majority of States recognize such a pre-licensing test or examination. In addition, in NRDA, Congress explicitly addressed whether a foreign nurse, in possession of a full and unrestricted license issued by the state of intended employment, should be subject to the certification requirement. The NRDA created a less onerous, alternative method of certification for foreign nurses who have unrestricted state licenses and meet certain other conditions, as provided in section 212(r) of the Act. The fact that Congress has chosen not to provide a less rigorous