

The proposed rule identified two factors relevant to the consideration of which health care occupations fall under the ambit of section 212(a)(5)(C) of the Act. The first factor is whether the health care occupation generally requires a license in a majority of the states. This factor reflects the states' historical and practical experience in distinguishing between those health care occupations requiring extensive regulation and those occupations that do not. At the advice of HHS, DHS has included the District of Columbia. While not a state, Washington, DC, has its own licensing authorities and should be included when determining whether a majority of states recognize a licensure or certification predictor exam.

The second factor is whether the health care worker has a direct effect on patient care, or, in other words, whether a health care worker in that occupation could reasonably pose a risk to patient health.

In response to this proposal, CGFNS suggested that a third factor should be considered in determining whether an occupation should be included in the certification process. The CGFNS suggested that an additional factor that should be considered is whether a significant number of foreign nationals enter the United States workforce for the purpose of performing labor in a particular health care occupation. The CGFNS noted that it would not be prudent to spend the time and resources required to establish a certification process for a particular occupation in which very few foreign workers are seeking employment.

The DHS has considered using the factor suggested by CGFNS. It would be difficult to accurately measure the number of "foreign" workers in a given occupation at a particular point in time, and the labor market for any occupation is subject to fluctuations. As the DHS is not currently adding any other occupations to the list of seven occupations requiring certification or certified statements, the DHS will not adopt the suggestion to evaluate inclusion of an occupation based on the number of foreign nationals seeking to enter the United States workforce in that occupation.

Under the proposed rule, health care workers such as, but not limited to, medical teachers, medical researchers, managers of health care facilities, and medical consultants to the insurance industry would not be required to comply with the certification requirement. In contrast, health care workers, such as supervisory physical therapists, who may not typically be involved in hands-on patient care but

do have a direct effect on patient care, would be subject to the certification requirements. In the proposed rule, the DHS acknowledged that the job descriptions of certain occupations that could be added to the list may differ in other countries from the United States definition of the occupation. The differences may create confusion about which occupation is subject to certification. The DHS suggested that a possible solution would be to define each health care occupation subject to certification in this final rule. The DHS again invited comments regarding the need to define a health care occupation that is subject to certification.

In response to this provision, the DHS received nine comments. Three commenters suggested that the list of occupations be expanded to include additional occupations including Radiation Therapists and Radiological Technologists. Two commenters suggested that the current list of occupations be retained. Three commenters suggested that the DHS should define a health care occupation as any occupation that requires a license to provide direct and indirect patient care. Another commenter suggested that a health care occupation is any occupation that involves patient care. Finally, one commenter suggested that job descriptions should be used to define a health care occupation.

After reviewing the comments, the DHS will not include a specific definition of each health care occupation subject to certification in the regulation at this time. The definitions offered by the commenters were not sufficiently specific and could cover a range of occupations not contemplated by the legislative history. Further, the suggestions have not addressed concerns that the job descriptions of occupations may differ between the United States and other countries. The DHS will continue the past practice of examining the duties of the position offered to the foreign worker to determine if the position falls into one of the listed health care occupations. The practice of continuing to review the duties of the prospective position on a case by case basis will allow for a thorough evaluation of each application and a determination based on the merits of the case rather than the petitioner's or applicant's ability to make the duties of the position conform to a narrow definition.

When To Submit the Certification to the DHS

The statutory language at section 212(a)(5)(C) of the Act requires certain aliens seeking to enter the United States

for the purpose of performing labor as a health care worker to present a certificate from CGFNS or an equivalent credentialing organization to the consular officer or, in the case of an adjustment of status, the Attorney General. In the proposed rule, the DHS also provided that the certification must be used for initial admission into the United States or for a change of status within 5 years of the date that it was issued.

Two comments were received in response to this proposal. One commenter suggested that the organization that issues the certification send it directly to either the DHS or, if the alien is outside the United States, to the consular post. Since the adoption of this suggestion would be contrary to statute, the requirement that the certificate be presented to a consular officer at the time of visa issuance and to the DHS at the time of admission or adjustment of status will continue in this final rule.

The other commenter suggested that the certification should be valid indefinitely. While the proposed regulation did not establish a validity date for the certification, it did require that it be submitted to the appropriate entity within 5 years of its issuance. The purpose of this proposal is to ensure that when the certification is submitted, the holder still has the appropriate language and technical skills to perform the duties of the occupation in the United States. Foreign licenses may be encumbered and therefore invalid after a prolonged period of time. Additionally, it is quite possible that over the course of time that the alien may lose certain skills necessary to safely perform the duties of the occupation in the United States. The 5-year submission period provides a basis to ensure that the holder of the certificate continues to meet the regulatory requirements for issuance of the certificate. The proposed rule also provided that if an alien seeking entry to the United States to perform labor in a particular health care occupation has already presented the certification and been admitted as a nonimmigrant, an immigrant, or has adjusted to permanent resident status, he or she will not be required to present the certificate again when he or she makes future applications for admission to the United States to perform labor in that particular health care occupation. The presentation of a Form I-94 issued to the alien at the initial admission to the United States, or a fee receipt showing that the alien was processed for admission under NAFTA would be used, if required, as evidence that the