American Immigration Lawyers Association

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December 10, 2002

Via email: insregs@usdoj.gov

Director, Regulations & Forms Services Division
Immigration and Naturalization Service
425 I Street, N.W., Room 4034
Washington, D.C. 20536

Re: Comments to Proposed Rule "Certificates for Certain Health Care Workers" INS No. 2080-00; RIN 1115-AE73 (67 Fed. Reg. 63313 (Oct. 11, 2002))

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on proposed regulations published in the Federal Register on October 11, 2002, that would expand upon current interim regulations to implement a process for the certification of foreign health care workers. AILA is a voluntary bar association of more than 7,800 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a very broad view on immigration matters because our member attorneys represent hundreds of thousands of families, businesses, educational institutions, students, workers and visitors, in navigating the complex minefield that comprises today's immigration rules.

Introduction

The Service is to be commended for promulgating this proposed rule expanding upon the current three interim regulations governing certificates for certain health care workers. It is now over 6 years since the underlying statute was enacted, and a final rule designed to ensure more uniformity in the determination of admissibility of health care workers is certainly very welcome.

These comments will address the following issues raised in the Proposed Rule –

- The designation of approved English testing services;
- Phasing in the application of the certification requirement for nonimmigrant health care workers;
- The determination of which other health care occupations should be subject to the INA 212(a)(5)(C) certificate requirement;
- Coverage of health care workers who received their training and education in the field in the United States; and
- Monitoring organizations authorized to issue Certificates or Certified Statements

The designation of approved English testing services

The inherent delay between promulgation of a rule and its effective implementation in the private sector mandates that, in the period between now and the promulgation of a final rule, the Service should immediately promulgate an official announcement designating **all** of the currently nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write English that are now contained in the Proposed Rule. INS adjudicators should be instructed immediately to accept certificates issued by approved credentialing organizations based upon successful completion of any tests already approved by HHS in consultation with DoEd.

> Promulgation of an official announcement designating all currently approved English language testing services should be accomplished immediately!

Sequential interim rules, coupled with heavily documented shortages in such occupations as nursing, have greatly hampered the ability of U.S. hospitals and health care facilities to obtain adequate staffing to meet their service obligations to their health care consuming communities. Initially, the lack of any officially identified English language competence assessors virtually precluded admission of any health care workers. Fortunately, with each promulgation of an interim rule, the problem has been somewhat alleviated. The addition of newly identified approved testing services in the Proposed Rule will provide flexibility to petitioners in both scheduling beneficiaries for examination and in arranging for review courses.

However, mere promulgation of a rule, in and of itself, does not result in immediate relief. Designated assessors need to implement international infrastructures to be able to provide testing to candidates for immigration. Setting up these infrastructures often takes considerable time.
It is apparent from the proposed rule that Test of English in International Communication (TOEIC) Service International and International English Language Testing Systems (IELTS) have already been identified as appropriate by the Secretary of HHS. Yet they *are not available to applicants today*! In this regard, the Service's request for comments on whether it should adopt an alternative method of disseminating a list of identified English testing services reflects an understanding of the problems inherent in waiting for rule-making to identify recognized testing services.

Consequently, it is recommended that the Service immediately implement its own suggestions as contained in the preamble to the proposed rule – to wit, designate by public notice the list of identified tests and appropriate scores as well as posting this list on the INS official website. *Indeed, it would seem that this list could be promulgated with a somewhat less formal process than a public notice in the Federal Register by the INS.* After all, the statute only requires that the Secretary of HHS, in consultation with the Secretary of the DoEd, consider the level of competence in oral and written English required as shown by an appropriate score on one or more nationally recognized commercially available, standardized assessments. The NPRM clearly shows that this has already been done. As such, all that is needed to implement the other departments' decisions is dissemination of this information to INS adjudicators, approved credentialing organizations and to the general public. The first two notifications can be done by

policy memorandum and the general public notice can be done by a press release immediately with Federal Register publication to follow.

This recommendation for immediate action has become more urgent during the comment period with the release of new information that the MELAB program has officially requested that the MELAB no longer be recognized for the purpose of certifying healthcare workers. According to the notice posted on the ELI website (www.lsa.umich.edu/eli/melab.htm), "Those [applicants] considering registering for the test after November 27, 2002, should be aware that the ELI will not send their scores to government agencies involved with visa screening for healthcare professionals. . . ." As of the date these comments are submitted, absent immediate action by the Service, there is in essence only one English language assessment vendor (Educational Testing Service) available world-wide to all healthcare employers!

Phasing in the application of the certification requirement for nonimmigrant health care workers

Since 1996, the immigration laws have required certain foreign-born health care professionals (nurses, occupational therapists, physical therapists, physicians' assistants, medical technicians/technologists, and speech language pathologists and audiologists) to obtain certificates (commonly known as a "VisaScreen Certificate") to demonstrate that their education, experience, licensure and English-language ability are equivalent to their U.S. counterparts before they are permitted to obtain permanent residence.

The statute also applies to persons present in the U.S. in temporary working status ("H-1B", "H-1C", "TN", etc.), but for the past six years, both the INS and the State Department have issued a blanket waiver of this requirement under INA §212(d)(3), 8 U.S.C. §1182(d)(3). However, under the proposed rule, such waivers would no longer be available.

In practical terms, this means that all covered health care workers employed in the U.S. in temporary status on the final rule's effective date would be required to present a VisaScreen Certificate whenever they –

1. Apply for a temporary visa abroad;
2. Apply to change to working status within the U.S.;
3. Apply to extend their stay in the U.S.; or
4. Exit the U.S. and attempt to reenter the country.

If the proposed rule is implemented in its present form, a Canadian registered nurse who is presently working in the U.S. in TN status who leaves the U.S. for a weekend to visit her family in Canada will not be able to reenter the U.S. to resume previously covered employment without obtaining a VisaScreen Certificate. Based upon past experience, it is estimated it will take a minimum of 3-4 months to obtain such a certificate from the date of application.

The United States is currently undergoing a severe national nursing shortage (the American Hospital Association estimates that there are over 128,000 vacancies in U.S. hospitals for registered nurses). The sudden withdrawal of the blanket waiver provision for nonimmigrants

present in the U.S under waiver who take a brief trip abroad intending to return to resume employment, nonimmigrants with petitions pending on the effective date of the new final rule, or nonimmigrants abroad with petitions approved before the effective date of the rule who have not yet obtained visas, would result in U.S. health care employers unexpectedly losing RNs and other health care workers during this time of crisis, further exacerbating the existing shortage. After all, U.S. healthcare employers have no way of knowing in advance when the Service will issue its final rule. Needless to say, sudden withdrawal of the blanket waiver authority would also create an administrative nightmare for the Service as it deals with devastated employers who had pending and recently approved petitions on the date of promulgation of the final rule and find their staffing plans newly in disorder.

Sudden withdrawal of the authority to grant blanket waivers for nonimmigrant health care workers, aside from creating an administrative nightmare for the Service, would seriously disrupt U.S. employers' healthcare worker staffing programs.

As an interim measure, to avoid a severe disturbance in the provision of health care services, as well as to avoid creating an additional administrative burden for the Service, AILA recommends that the Service modify the final rule. ***The final rule should provide for a transitional period for nonimmigrant healthcare workers who were already working on the date of promulgation or were already in the petitioner's employment pipeline.*** During this transitional period, the Service should continue to issue blanket waivers to the following categories of nonimmigrant health care workers:

A transitional period during which temporary authority to grant blanket waivers continues is needed to avoid employer staffing disruption and burden on the Service.

1. Nonimmigrant health care workers who seek to re-enter the United States to resume employment previously covered under the blanket waiver on the date of promulgation of the final rule;

2. Nonimmigrants in the United States who had petitions to change to or extend their status as healthcare workers pending on the date of promulgation of the final rule;

3. Nonimmigrants abroad who had petitions seeking classification as a nonimmigrant to work as a healthcare worker that were either pending on the date of promulgation of the final rule or approved before or on the date of promulgation of the final rule.

AILA suggests that the transitional period be determined by the nonimmigrant's petition and that it extend over a period not less than one year from the issuance of the final rule, or the expiration date on the nonimmigrant's form I-797 approval, whichever period is longer.

The determination of which other health-care occupations should be subject to the INA 212(a)(5)(C) certification requirement

The preamble to the Proposed Rule raises the question of whether aliens in additional

occupations should be required to comply with INA Section 212(a)(5)(C). The Service is seeking comments on whether the list of occupations subject to the certification requirement should be expanded and on the factors that the Service proposes to use in making its determinations; and whether particular occupations should be added to the list.

- *Whether the list of occupations subject to the certification requirement should be expanded*

Since the conference report provides that the Service can designate additional health care occupations subject to certification, it is apparent that the statute does contemplate expansion of the list. The problem, succinctly illustrated in the preamble to the Proposed Rule, is how to make the determination as to which additional health care occupations should be included in the list of covered occupations.

- *The factors that the Service proposes to use in making its determinations*

Factors that the Service states it is considering to use in making this determination include: (1) whether a majority of states require licensing for a particular health care occupation (an objective and clearly defined standard); and (2) whether the health care worker has a direct effect on patient care (a somewhat subjective, vague and ambiguous standard).

Yet a look at the illustrative examples noted in the preamble reveals that only the first listed factor is relevant under this analysis. For example, medical teachers, medical researchers, managers of health care facilities, and medical consultants to the insurance industry are not generally required to have licenses in the occupations listed in a majority of the states while a supervisory physical therapist is required to have a license as a physical therapist in a majority of states. Yet these same medical teachers who impart outdated knowledge and science, medical researchers who violate research protocol or mismanage data, managers of health care facilities who tolerate inadequate staffing or ineffective supply and maintenance systems, and medical consultants who improperly deny coverage benefits though not required to hold state licenses generally, reasonably pose a risk to patient health (the Service's definition of direct effect on patient care). As such, the connection between "direct effect" and the need for certification is extremely vague and tenuous.

- *A more appropriate factor, in addition to the state license requirement, would be whether the worker is employed by an employer engaged in providing direct care to patients.*

If anything distinguishes the Service's examples of occupations from each other, it is the fact that on the one hand, in the case of the supervisory physical therapist *the employer is a direct provider of patient services*, while on the other hand, the other occupations' employers are not and effect patient care only indirectly. As such, it would appear that a more workable second-prong of the test would be whether the health care worker would be working for an employer that is engaged in providing direct patient care

A more objective factor would be whether the employer is involved in providing direct patient care as defined under federal health care financing law.

services. Such employers are easily identifiable under existing federal Health Care Financing Administration criteria.

Similarly, the fact that the job description of a "clinical social worker" may be different in other countries is irrelevant. The statute clearly applies only to the occupation as defined within the United States since it only applies to an alien "who seeks to enter for the purpose of performing work as a health care worker." In other words, the work to be performed will be in the United States. Regardless of what the job description may be outside of the United States, the certification requirement only attaches if the job description within the Unites States requires labor as a health care worker. Any difference between a United States job description and a foreign one only goes to the issue of whether the beneficiary of an employment-based petition is qualified for the position offered.

> Only the job description in the United States is relevant in determining whether a health care occupation should be subject to the certification requirement.

Coverage of health care workers who received their training and education in the United States

As the preamble notes, where a health care worker has received his or her training and education in the United States, the only item lacking from complete compliance with the statutory criteria is verification of the health care worker's license (if any is needed). Yet, such verification is easily obtainable from state regulatory bodies at nominal cost. Despite this ease of availability, and based solely on silence in the statute, the Service is opting to require certification for U.S. trained health care workers by a third party credentialing organization. It invites approved credentialing organizations to initiate “streamlined processing,” thus inserting a third party into the process to rubber stamp state agency verification. Even under a streamlined process, the applicant will be subjected to additional expense and delay. Recognizing that the only lacking item is verification of a state license, a truly “streamlined process” would exempt U.S trained and educated applicants from the certification requirement.

> Health care workers who received their training and education in the United States should be exempt from certification.

Monitoring organizations authorized to issue Certificates or Certified Statements

The Service indicates that it will develop a regulatory process to monitor credentialing organizations. The proposed review would take place in tandem with the reauthorization process every five years. Performance reviews should include the views of the stakeholders, including, but not limited to, employers, healthcare workers, and their counsel. The Service should provide a procedure for the stakeholders to provide information and file complaints about the service provided by the credentialing organization. These information and complaints must be taken into consideration in the performance reviews.

Performance reviews should be conducted each year during the initial authorization period. Assuming that satisfactory annual performance reviews are necessary to reauthorization, if the credentialing organization is reauthorized, the performance reviews could then be conducted on a less frequent basis or upon the basis of complaints from the shareholders. The Service should provide the public with notice when any credentialing organization seeks reauthorization and accept comments for a specified period of time regarding the customer service performance of that organization. In this regard, reasonable time frames for issuance of the certificates or certified statements must be established and adhered to, and a reliable, cost-effective, and efficient method of communication between stakeholders and the certifying organization must be implemented. Upon receipt of all of the required documentation, the review and issuance of the certificate or certified statement, or a communication delineating any deficiencies should be accomplished within 30 days.

> Monitoring of credentialing organizations must include a performance evaluation of the organization's customer service performance. Approved organizations must provide service in a reasonable time and provide a mechanism for prompt, effective, cost-effective communication to stakeholders. Initial and continued approval should be conditioned upon meeting these standards.

To be authorized to issue certificates, the organization must demonstrate that it has an effective system of communication available to the stakeholders. At a minimum the system should notify applicants of the receipt of required documents or any deficiencies in the file on an ongoing basis. As most of the applicants are outside of the U.S., the most effective manner of communication is via the Internet. The organization should be required to provide a system that would allow an applicant to ensure, via the Internet, that all of the necessary documents have been received by the credentialing organization as well as notify the applicant of any deficiencies that need corrective action. This would allow the applicants to follow up with the organizations that must send in the documentation.

AILA strongly recommends that the Service include customer service standards in its initial approval criteria and perform ongoing monitoring of the customer service performances of credentialing organizations.

In conclusion, we urge the Department of Justice to revisit the proposed rule in light of these comments.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION