

9 FAM 40.53 NOTES

(CT:VISA-1320; 09-24-2009)
(Office of Origin: CA/VO/L/R)

9 FAM 40.53 N1 BACKGROUND

(CT:VISA-1320; 09-24-2009)

- a. Section 343 of Public Law 104-208 of the Immigration Reform and Immigrant Responsibility Act (IIRIRA) created a new ground of inadmissibility now codified at Section 212(a)(5)(C) of the *INA*. It provides that, subject to section 212(r) of the Act, *any* alien seeking to enter the United States, *as an immigrant or a nonimmigrant*, for the purpose of performing health-care occupations (other than physicians), is inadmissible unless he or she presents a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or an equivalent independent credentialing organization approved by the Attorney General, *who* transferred *exercise of this* authority from the Department of Justice to the Department of Homeland Security (DHS) in consultation with the Secretary of the Department of Health and Human Services (HHS), verifying that:
- (1) The alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States specified in the application; are comparable with that of an American health care worker;
 - (2) The alien has the level of competence in oral and written English language proficiency considered by the Secretary of HHS, in consultation with the Secretary of Education, to be appropriate for the health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicants ability to speak and write English; and
 - (3) The majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, that the alien has passed such examination.

- b. The requirement of 212(a)(5)(C) have been interpreted to apply only to the following seven health care occupations:
- (1) Licensed Practical Nurses, Licensed Vocational Nurses, and Registered Nurses;
 - (2) Physical Therapists;
 - (3) Occupational Therapists;
 - (4) Speech-language Pathologists and Audiologists;
 - (5) Medical Technologists (also known as clinical laboratory scientists);
 - (6) Medical Technicians (also known as clinical laboratory technicians; and
 - (7) Physician Assistants.

9 FAM 40.53 N1.1 Section 4(a) of the Nursing Relief for Disadvantaged Areas Act (NRDAA) of 1999

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- a. Public Law 106-95, is amended by adding new *INA section* 212(r), which provides an alternative certification process for aliens seeking to enter the United States for the purpose of performing labor as a nurse. In lieu of a certification under the standards of *INA* Section 212(a)(5)(C), an alien nurse can present to *you* (or in the case of an adjustment of status, the Department of Homeland Security (DHS)) a certified statement from the CGFNS (or equivalent, independent credentialing organization approved for the certification of nurses) that:
- (1) The alien has a valid and unrestricted license as a nurse in a State where the alien intends to be employed and that such State verifies that the foreign licenses of the alien nurses are authentic and unencumbered;
 - (2) The alien has passed the National Council Licensure Examination (NCLEX); and
 - (3) The alien is a graduate of a nursing program that meets the following requirements:
 - (a) The language of instruction was English;

- (b) The nursing program was located in a country which:
- (i) Was designated by CGFNS no later than 30 days after the enactment of the NRDAA, based on CGFNS' assessment that designation of such country is justified by the quality of nursing education and English language proficiency;
 - (ii) Was designated on the basis of such assessment by unanimous agreement of CGFNS and any equivalent credentialing organizations which the DHS has approved for the certification of nurses; and
 - (iii) The nursing program was in operation on or before November 12, 1999; or has been approved by unanimous agreement of CGFNS or any equivalent credentialing organizations, which the DHS has approved for certification of nurses.

9 FAM 40.53 N1.2 Definition of Terms (Seven Health Care Occupations) from the Department of Labor, Dictionary of Occupational Titles

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- a. **Nurse, Professional (Medical Service) [Alternate Titles: Nurse, Certified Nurse, Licensed, Registered]**—a term applied to persons meeting the educational, legal, and training requirements to practice as professional nurses, as required by a State Board of Nursing. This individual performs acts requiring substantial specialized judgment and skill, care and counsel of ill, injured, or infirm persons and in promotion of health and prevention of illness. Classifications are made according to types of nursing activity such as:
- (1) Director;
 - (2) Nursing Service (Medical Service); *or*
 - (3) Nurse, General Duty (Medical Service).
- b. **Physical Therapist (Medical Service) [Alternate Titles Physiotherapist]**:
- (1) Plans and administers medically prescribed physical therapy treatment for patients suffering from injuries, or muscle, nerve, joint, and bone disease, *in order to* restore function, relieve pain,

- and prevent disability; reviews physicians' referrals (prescription) and patients' conditions and medical records to determine physical therapy treatment required;
- (2) Tests and measures patients' strength, motor development, sensory perception, respiratory and circulatory efficiency, and records and *develops* treatment programs;
 - (3) Plans and prepares written treatment program;
 - (4) Administers manual exercises; instructs, motivates, and assists patient to perform various physical activities, *including use of* crutches, canes and prosthesis;
 - (5) Administers treatments involving application of physical agents, using equipment such as hydrotherapy tanks and whirlpool baths, moist packs, ultraviolet and infrared lamps, ultrasound machines, massage techniques, and body physiology;
 - (6) Records and evaluates the effects of treatment at various stages and adjusts treatments to achieve maximum benefit, and may *instruct* patient and family in treatment procedures to be continued at home;
 - (7) Confers with physician and other practitioners to obtain additional patient information, suggests revisions in treatment program, and *integrates* physical treatment with other aspect of patient's health care;
 - (8) Instructs and directs work activities of assistants, aides, and students;
 - (9) Plans and conducts lectures and training programs on physical therapy and related topics for medical staff, students, and community groups;
 - (10) May teach physical therapy techniques and procedures in educational institutions; and
 - (11) May write technical articles and reports for publications; may plan, direct, and coordinate physical therapy program and be the designated director.
 - (12) Physical therapist must comply with State requirement for licensure.

c. **Occupational Therapist (Medical Service):**

- (1) Plans, organizes, and conducts occupational therapy programs in hospital, institution, or community settings to facilitate development and rehabilitation of mentally, physically, or emotionally handicapped individuals;
- (2) Plans activities such as manual arts and crafts, practice in functional, prevocational, vocational and homemaking skills, and activities of daily living, and participation in sensorimotor, educational, recreational, and social activities to help patient or handicapped persons develop or regain physical and mental functioning;
- (3) Consults and coordinates with other members of the rehabilitation team to select activity program consistent with needs and capabilities of the individual;
- (4) Selects constructive activities suited to the individual's physical capacity, intelligence level, and interest;
- (5) *Prepares* the individual for return to employment, assists in restoration of functions, and aids in adjustment to disability;
- (6) Teaches individual skills and techniques required for participation in activities and evaluates individual progress; and
- (7) May conduct, plan, direct, and coordinate training program and occupational therapy programs and be designated director, occupational therapy (Medical Service).

d. **Speech-Language Pathologists and Audiologists (Profess. & Kin)**
[Alternate Titles: Speech Clinician; Speech Therapist]:

- (1) Specialize in diagnosis and treatment of speech and language problems, and *engage* in scientific study of human communication: diagnose and evaluate speech and language skills as related to educational, medical, social, and psychological factors;
- (2) Plan, direct, or conduct habilitative and rehabilitative treatment programs to restore communicative efficiency of individuals with communication problems of organic and nonorganic etiology;
- (3) Provide counseling and guidance and language development therapy to handicapped individuals;
- (4) Administer, score, and interpret specialized hearing and speech tests;

- (5) Develop, implement, and monitor individualized plans for assigned clients to meet individual needs, interests, and abilities, using audio-visual equipment, such as tape recorders, overhead projectors, filmstrips, and other demonstrative materials;
- (6) Review treatment plans and assess individual performance to modify and change, or write new programs;
- (7) Maintain records, establishment's policy, and administrative regulations as required by law;
- (8) May act as consultant to educational, medical, and other professional groups, and serve as consultant to classroom teachers to incorporate speech and language activities into daily schedule;
- (9) May teach manual sign language to students incapable of speaking, and instruct staff in use of special equipment designed to serve handicapped. See audiologist (Medical Service) 076.101-010 for one who specializes in diagnosis of rehabilitative services for auditory problems; *and*
- (10) Attend meetings and conferences and participate in other activities to promote professional growth.

e. **Medical Technologist, (also known as Clinical Laboratory Scientists Service):**

- (1) Perform medical laboratory tests, procedures, experiments, and analyses to provide data for diagnosis, treatment, and preventive of disease and conduct chemical analyses of body fluids, such as blood, urine, and spinal fluid to determine presence of normal and abnormal components;
- (2) Studies blood cells, their numbers, and morphology, using microscopic technique;
- (3) Perform blood group, type, and compatibility test for transfusion purposes;
- (4) Analyze test results and enter findings in computer;
- (5) Engage in medical research under direction of the Medical Technologist, Chief (medical service) 078.161-010;
- (6) May train and supervise students; *and*
- (7) May specialize in area such as hematology, blood-bank, serology,

immunohematology, bacteriology, histology, or chemistry.

f. **Medical-Laboratory Technician (Medical Ser.) [Alternate Titles: Clinical Laboratory Technicians]**

- (1) Performs routine tests in medical laboratory to provide data for use in diagnosis and treatment of disease;
- (2) Conducts quantitative and qualitative chemical analyses of body fluid, such as blood, urine, and spinal fluid, under the supervision of medical technologist (Medical Service) 078.261-038;
- (3) Incubates bacteria for specified period and prepares vaccines and serums by standard laboratory methods;
- (4) Inoculates fertilized eggs, broths, or other bacteriological media with organism;
- (5) Performs blood counts, using microscope, conducts blood tests for transfusion purposes;
- (6) Prepares standard volumetric solutions and reagents used in testing;
- (7) Tests vaccines for sterility and virus inactivity;
- (8) May draw blood from patient's finger, ear lobe, or vein, observing principles of asepsis to obtain blood samples; *and*
- (9) May specialize in hematology, blood bank, cytology, histology, or chemistry.

g. **Physician Assistant (Medical Service):**

- (1) Provides health care services to patients under the direction and responsibility of physician: examines patient, performs comprehensive physical examination, and compiles patient medical data, including health history and results of physical examination;
- (2) Administers or orders diagnostic tests, such as x-ray, electrocardiogram, and laboratory tests, and interprets test results for deviation from normal;
- (3) Performs therapeutic procedures, such as injections, immunizations, suturing, wound care, and managing infections;
- (4) Develops, implements, records patient management plans, and assist provision of continuity of care; and

- (5) Instructs and counsels patients regarding compliance with prescribed therapeutic regimens, normal growth and development, family planning, emotional problems of daily living, and health maintenance.

9 FAM 40.53 N2 HEALTH-CARE WORKERS NOT SUBJECT TO INA 212(A)(5)(C)

(TL:VISA-461; 09-11-2002)

Any other health-care occupations that are not mentioned in note 9 FAM 40.53 N1 such as chiropractors, dentists, dental technicians, dental assistants, acupuncturists, psychologists, nutritionists, medical teachers, medical researchers, managers of health-care facilities, medical consultants to the insurance industry, etc., will not be required to obtain certification requirements under INA 212(a)(5)(C) and their visa cases should, therefore, be processed to conclusion.

9 FAM 40.53 N2.1 Spouse or Dependent of Immigrant Alien

(TL:VISA-461; 09-11-2002)

The INA statute specifically refers to aliens who are seeking to enter the United States under INA 203(b). A dependent alien admitted for the primary purpose of family unity whose occupation may be that of health-care worker, nevertheless, is not subject to the provisions of INA 212(a)(5)(C).

9 FAM 40.53 N2.2 Family-Sponsored Immigrant or Employment-Based Immigrant in Non-Health-Care Occupation

(TL:VISA-461; 09-11-2002)

An alien whose usual occupation is that of health care worker who is seeking permanent status as a family-sponsored immigrant or as an employment-based immigrant who will not be providing health-care services is not subject to INA 212(a)(5)(C).

9 FAM 40.53 N3 TEMPORARY WAIVER FOR NONIMMIGRANT HEALTH-CARE WORKERS

(TL:VISA-641; 08-17-2004)

To ensure that health-care facilities remain fully staffed, the Department of Homeland Security (DHS) and the Department of State have agreed to exercise blanket waiver authority under INA 212(d)(3)(A) for nonimmigrants and temporarily waive the certification requirement until July 26, 2004. On and after July 26, 2004 discretion shall be applied on a case-by-case basis. This waiver also applies to Canadians seeking admission in Trade NAFTA (TN) status. Health-care workers who receive waivers for INA 212(a)(5)(C) ineligibilities should be issued visas limited to a single entry with six-month validity.

9 FAM 40.53 N4 CERTIFICATION AUTHORITY GRANTED TO CERTAIN ORGANIZATIONS

(CT:VISA-1320; 09-24-2009)

The DHS has published the final regulations relating to *the* credentialing of immigrants coming to the United States in all health-care occupations. Nurses, occupational therapists, physical therapists, speech language pathologists and audiologist, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians), and physician assistants, who have been certified by the Commission on Graduates of Foreign Nursing Schools (CGFNS), as well as occupational therapists certified by the National Board for Certification in Occupational Therapy (NBCOT), and physical therapists certified by the Foreign Credentialing Commission on Physical Therapy (FCCPT) may obtain immigrant visas, if otherwise qualified.

9 FAM 40.53 N5 QUALIFYING AS AN IMMIGRANT HEALTH-CARE WORKER

(CT:VISA-1320; 09-24-2009)

An alien who wishes to immigrate to the United States to perform in a health-care occupation must be the beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker, and must be certified by the CGFNS, the NBCOT, or the FCCPT. Certification by these organizations is evidence that the applicants have satisfied the requirements of section 343 of Public

Law 104-208, including a passing score on the appropriate English language examination. If, however, the personal interview reveals an obvious lack of appropriate English language proficiency or appropriate knowledge of the certified health care field, *you* should submit the case to the Department (CA/VO/L/A) for an advisory opinion. An approved certificate does not excuse the applicant from all the other relevant statutory and regulatory requirements for visa issuance.

9 FAM 40.53 N6 VALIDITY OF CERTIFICATES ISSUED BY COMMISSION ON GRADUATES OF FOREIGN NURSING SCHOOLS (CGFNS), NATIONAL BOARD FOR CERTIFICATION IN OCCUPATIONAL THERAPY (NBCOT), AND FOREIGN CREDENTIALING COMMISSION ON PHYSICAL THERAPY (FCCPT)

(CT:VISA-1320; 09-24-2009)

Certificates issued by CGFNS, NBCOT, and FCCPT must be valid at the time of visa issuance and at the time for any admission into the United States, or change of status within the United States. Individual's certification or certified statement must be used within five years of the date that it was issued.

9 FAM 40.53 N7 ALIENS EXEMPT FROM ENGLISH TESTS

(CT:VISA-1320; 09-24-2009)

Section 212(a)(5)(C(ii) of the INA gives the Secretary of Health and Human Services, in consultation with the Secretary of Education, the sole authority to set the level of competence in oral and written English appropriate for all health care fields in which the alien will be engaged. The Michigan English Language Assessment Battery (MELAB) has advised that it will no longer provide English language testing services for health care workers. Therefore, MELAB has been removed from the list of approved English tests. Individuals who seek to meet the English language requirements will be required to do one of the English language test mentioned in 9 FAM 40.53 N7.1. According to 8 CFR 212.15(g)(2), aliens who have graduated from a college *or* university of professional training school located in Australia,

Canada (except Quebec), Ireland, New Zealand, the United Kingdom, and the United States are exempt from the English language requirement.

9 FAM 40.53 N7.1 Approved English Language Tests for Certain Health Care Workers

(CT:VISA-1320; 09-24-2009)

The HHS has approved the following tests as acceptable English language testing systems for the purpose of health care workers certification in certain occupations (See 9 FAM 40.53 N1 b):

- (1) Educational Testing Service (ETS);
- (2) Test of English in International Communication (TOEIC) Service International; *and*
- (3) International English Language Testing System (IELTS).

9 FAM 40.53 N7.2 Passing English Test Scores for Certain Health Care Occupations

(CT:VISA-1320; 09-24-2009)

a. Occupational and physical therapists. An alien seeking to join the labor force in the United States as an occupational or physical therapist must obtain the following scores on the English tests administered by ETS:

- (1) Test of English as a Foreign Language (TOEFL);
- (2) Paper-Based 560;
- (3) Computer-Based 220;
- (4) Test of Written English (TWE): 4.5; and
- (5) Test of Spoken English: 50.

NOTE: The certifying organizations shall not accept the results of the TOEIC or the IELTS for the occupation of occupational therapy or physical therapy.

b. Registered nurses and other health care workers requiring the attainment of a baccalaureate degree. An alien coming to the United States to perform labor as a registered nurse (other than a nurse presenting a certified statement under section 212 (r) of the Act) or to perform labor in another health care occupation requiring a baccalaureate degree (other

than occupational or physical therapy) must obtain one of the following combinations of scores to obtain a certificate:

- (1) ETS: TOEFL: Paper-Based 540, Computer-Based 207, TWE: 4.0; TSE: 50;
- (2) TOEIC Service International: TOEIC: 725; plus TWE:4.0 and TSE: 50; or
- (3) IELTS: 6.5 overall with a spoken band score of 7.0. This would require the academic module.

c. Occupations requiring less than baccalaureate degree. An alien coming to the United States to perform labor in a health care occupation that does not require a baccalaureate degree must obtain one of the following combinations of scores to obtain a certificate:

- (1) ETS: TOEFL: Paper-based 530, computer-Based 197; TWE: 4.0; TSE; 50;
- (2) TOEIC Service International: TOEIC: 700; plus TWE 4.0 and TSE: 50; or
- (3) IELTS: 6.0 overall with a spoken band score of 7.0. This would allow either the academic or the General module.