

Siskind's Immigration Bulletin  
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Siskind Susser serves immigration clients throughout the world from its offices in the  
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1. Openers

Dear Readers:

A major final regulation was released Friday for foreign health care workers seeking  
to work in the US. The rule implements legislation passed seven years ago as part of

the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. That rule made health care workers inadmissible unless they are in possession of a valid credentialing document issued by an organization approved by the US government. That law has only been applied in immigrant visa applications. But it will begin to apply to non-immigrant visa applicants when the law takes final effect. The regulation is fairly comprehensive and will take a while for many to digest. However, we have provided a detailed summary in this week's issue that we hope readers find useful.

We also include an article on a topic about which most immigration lawyers and most of the public knows very little. This week in our ABCs of Immigration feature we discuss Western Hemisphere Priority Dates. This is a potential back channel for many people to get green cards much more quickly than through the better known means. We hope you find it useful.

We also include all of our regular weekly features this week and cover the rest of the news.

Finally, as always, we remind readers that we're lawyers who make our living representing immigration clients. We would love to discuss becoming your law firm. Just go to <http://www.visalaw.com/intake.html> to request an appointment or call us at 800-748-3819 or 901-682-6455.

Regards,

Greg Siskind

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## 2. The ABC's Of Immigration - Western Hemisphere Priority Dates

Many visa applicants may have access to a way to expedite the immigration process without even knowing that the shortcut exists. If an applicant has a Western Hemisphere Priority Date, that applicant may be able to jump ahead in line and immigrate to the United States sooner. This article details who may have Western Hemisphere Priority Dates available and how those individuals might be able to use the priority dates to move to the front of the line.

### 1. What is a priority date?

As part of the immigration paperwork process, individual applicants receive priority dates. These dates indicate the applicant's place in line, which determines when they are eligible to enter the United States. In most circumstances, the priority date is the filing date of the petition or labor certification application.

### 2. What is a Western Hemisphere Priority Date (WHPD)?

A Western Hemisphere Priority Date is a type of priority date that was part of a savings clause in a 1976 law that preserved the old priority dates for aliens who qualified and registered for immigration before January 1, 1977. As part of this savings clause, certain Western Hemisphere aliens are allowed early immigration.

### 3. How can I use it now?

The old priority date can be used with any properly approved visa petition filed for the alien. The new petition filed is deemed to have been filed on the previously obtained Western Hemisphere date, thus moving the applicant to the front of the line.

#### **4. Who is included in WHPD?**

Western Hemisphere Priority Dates apply to those immigration applicants who are natives of a Western Hemisphere country. The included countries include those in North and South America, as well as the Caribbean Islands.

Also, the applicant must have been eligible to immigrate before January 1, 1977. This means that you have a WHPD if you were a principal applicant of a petition before 1977. However, this also includes children and spouses of that principal applicant, regardless of divorce or aging-out. So if your parent or spouse immigrated or was eligible to immigrate before 1977, you may benefit.

The spouse automatically received the same priority date as the immigrant visa petition if the couple was married at the time the priority date was established. Two situations arise if a person marries after receiving a WHPD. First, if the person marries a non-citizen in the United States, the immigrating spouse is not eligible for a WHPD. Secondly, if the person temporarily went to another country to get married, the date of marriage may be the WHPD for the immigrating spouse.

Whenever the principal applicant applied, his children already in existence are entitled to the parent's original priority date as long as the children are under 21 and unmarried at the time the principal applicant established a priority date. Also, if at the time the priority date was established, there was already a marriage in existence and a child was born of that marriage afterward, that later-born child can still use the priority date.

#### **5. How do I know if I might have a WHPD?**

There are three questions that an applicant can ask to determine if they hold a WHPD.

1. Did you ever register to immigrate or apply to immigrate before 1977?
2. Did your parents ever register to immigrate or apply to immigrate before 1977?
3. If you are married, do any of these questions apply to your spouse?

If the answer to ANY of these questions is YES, the applicant likely has a WHPD. However, if the answer to ALL of these questions is NO, then the applicant likely does not have a WHPD and the attorney must begin to look at alternative avenues for immigration.

#### **5. When does a WHPD expire?**

A priority date remains effective until it is used. Any unused priority date can still be used by an applicant and does not expire until the applicant has done so. For example, if a person immigrates before 1977, but then changes their mind and returns to their native country, they cannot now reapply using the same priority

date. However, if a person receives a priority date before 1977, but never immigrated, that priority date is still effective.

#### **6. How will this help speed up the immigration process?**

If the applicant has a WHPD, the applicant can likely immediately immigrate to the United States. An attorney can take the priority date and use it for any visa petition in any category that is being filed presently. Any backlog category applicant will be allowed to jump forward in line by using the early priority date.

#### **7. Are there still WHPDs that have not been used?**

There are still many people who have not yet used their WHPD. Many may have decided not to immigrate because of different reasons, such as delays in processing.

#### **8. How can I find out if I have a WHPD?**

Appropriate documentation will determine if an applicant has a WHPD. Applicants should look for any consular or immigration documents that they or their parents might have. Some items to look for include: old consular registration documents, Forms I-151 or other types of "green cards," national passports with stamps showing admission for permanent residence, or any other document that might show immigration-type activity, such as I-130 refusals.

However, one of the problems with the WHPD is getting the proper documentation to demonstrate that the applicant has an available WHPD. If the applicant does not have the documentation on hand, the attorney can do a Freedom of Information Act (FOIA) request to determine if they have a WHPD. A FOIA request to the Bureau of Citizenship and Immigration Services (BCIS) for the immigrant's file could reveal an old Form I-550 showing an attempt to immigrate family members. The alien's file might also contain the old immigrant visa showing the date of application for the visa and date of admission to the U.S. In addition to requesting information from the BCIS, it is also helpful to make a FOIA request to the Department of State. The State Department or U.S. consular officers may have old records. In these requests, include all the information that the client knows concerning a possible WHPD. The more information that is available for the services, the more likely it is that the service will find the necessary records.

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#### **3. Ask Visalaw.com**

*If you have a question on immigration matters, write [Ask-visalaw@visalaw.com](mailto:Ask-visalaw@visalaw.com). We can't answer every question, but if you ask a short question that can be answered concisely, we'll consider it for publication. Remember, these questions are only intended to provide general information. You should consult with your own attorney before acting on information you see here.*

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Q - I am a J1 visa holder currently on my second year of a three-year program subject to two year home country residence rule. Country A is my country of citizenship when I got my US J1 visa. Recently, I got my immigrant visa approved for

country B (not USA) and it is a state sponsored visa requiring me to fulfill residence requirements before I become a citizen. Would I still need to fulfill the two year rule in country A or get a waiver so I can enter the US again in the future even if I am already a citizen of country B? Are there existing policies about cases like this? Thank you very much for any help and/ or answers you can give me. Please advise me on what steps to follow and how your firm can help me in this regard.

A - You would need to fulfill the requirement in Country A or any other country of which you had citizenship or resided permanently BEFORE coming on the J-1 visa. You can't do the two years in countries that come into the picture after you start on J-1 status.

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Q - Hi, my Grandmother (US CITIZEN) filled in a petition for my mother (Divorced, over 21) in the end of 2000. At this time I was 16, so far we haven't heard anything from the INS whatsoever. The INS received our I-130 before April 2001. Do we qualify for the benefits of the law or amendment 245(i)? And how long (average) will this process take? Also will I be eligible for the green card if I am over 21 when we get their response?

A - If your mother was in the US on December 20, 2000, you can all benefit from 245(i). According to the Visa Bulletin ([http://travel.state.gov/visa\\_bulletin.html](http://travel.state.gov/visa_bulletin.html)), the 1st Preference, adult children of US citizens, is currently on February 2000. If your Mom's petition was filed in December 2000, it should be current in approximately 1 year. If at the time it is approved you are under the age of 21, you will be fine. If you are over 21, your situation will have to be analyzed using the formula in the Child Status Protection Act to determine if you will benefit.

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Q - My husband and I are GC holder, and are fighting for the divorce. In my situation, will the divorce and family abuse affect my naturalization processing, my husband don't agree to separate, I have to stay alone (in past one year), we can not file together, will it be any trouble for the interview?

A - The main effect on naturalization will be in terms of timing. Spouses of US citizens typically can file for naturalization two years and nine months after becoming a permanent resident. Others usually must wait until four years and nine months have passed. So if you are separated or divorced, that may delay your filing. But it should not affect whether you qualified for naturalization.

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Q - A friend has an approved F3 family based petition with priority date May 1990. NVC already sent her Packet 3 and she has paid the Visa Fee and Affidavit of Support review fee. Right now there has been a retrogression. They are processing Mar 1988 priority date. Presently she is vacationing in the US on a B1B2 visa valid until 2008. Can she adjust status while there or can she continue with the process there? Can she get a work permit? What happens to her spouse and minor children left in her home country?

A - The only way to file an adjustment application is with a current priority date. If it has retrogressed, your friend will have to continue waiting. In cases where someone has filed an adjustment application in the US and then the date retrogresses, the BCIS will normally allow one to continue remaining in the US with a pending application and will simply hold off on making a decision in the case until the priority date is again current. It sounds like your friend is going to have to continue waiting outside the US.

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Q - I have a question regarding my sister. She is abroad and was admitted to University A for a MS program. She was issued I-20 form and obtained a F-1 visa. Meanwhile, she was accepted to University B on the Ph.D. program. She would rather go to University B. The question is: can she go to University B using her F-1 visa or does she have to study for one semester at University A and then transfer?

A - If your sister entered the US before with the University A I-20 and visa and attended University A for a semester and now wishes to return to the US to study at University B, then it is okay, she can do it. However, if she has not used her University A visa before, and has not attended University A, then there is trouble: At your first entry to the US in the F-1 status, the school listed on your visa must match your I-20. Sometimes immigration officers waive that requirement and agree to stamp the student's new I-20 rather than the one that she got the visa for, but after SEVIS, that is a big risk to take.

If a student's visa and I-20 at entry state "School A," but the student after entry reports immediately to "School B," then that student is out-of-status and must apply for a reinstatement because a student is not eligible to transfer if he or she was not pursuing a full-course of study at the school that she was authorized by the immigration to attend (that will be School A). So, if your sister really wishes to attend University B, she should contact them to see if they can assist her in obtaining a visa.

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#### 4. Border News

The Bureau of Immigration and Customs Enforcement (ICE) announced this week that it has deported John Edward Anthony McNicholl, a suspected member of the Irish National Liberation Army (INLA), a terrorist organization in Northern Ireland. McNicholl was delivered to Irish authorities last Friday. According to ICE, McNicholl is wanted on murder charges for his alleged role in a 1975 ambush of police officers in Northern Ireland; officials said he escaped from prison while awaiting trial in 1976, and later entered the United States illegally after his visa application was denied.

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Australian Broadcasting Corporation reported that two high-ranking Russian space officials involved in the International Space Station project were denied U.S. entry visas to attend a conference in Monterey, California. Russia Space Agency spokesman Sergei Gorbunov said the two men had completed all the necessary paperwork on time but were refused the visas on the eve of their departure. The U.S. embassy did not explain the decision and could not be reached for comment.

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According to a Thai official quoted by Reuters, the US has accepted 8,000 refugees from an ethnic Hmong group that fled Laos to Thailand after a communist takeover in 1975. The refugees will be resettled with relatives in the United States. The US embassy in Bangkok declined to comment.

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The Sixth U.S. Circuit Court of Appeals has found that Rabih Sami Haddad, a co-founder and former president of the Global Relief Foundation, is removable from the country, clearing the way for his deportation by ICE officials. The Global Relief Foundation has been categorized by the Treasury Department as a Specially Designated Global Terrorist organization. Haddad is a Lebanese citizen who resided in the Detroit area before being apprehended on December 14, 2001, for being in the United States illegally. The Immigration Judge found that Haddad was not eligible for asylum because he was "a danger to the security of the United States."

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The AP reported this week that five Ecuadorians have pleaded guilty to conspiracy to encourage and induce aliens to illegally enter the United States. The Justice Department said the defendants were trying to smuggle 270 illegal immigrants into the United States and that they will probably be sentenced to about three years in federal prison and deported upon release.

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A U.S. District Court in Tucson, Arizona, sentenced two men to 27 months in federal prison for smuggling 44 undocumented immigrants in moving van across the Tohono O'odham Nation. According to the Arizona Daily Star, the two men admitted they charged \$50 for each immigrant to be delivered to Phoenix.

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Austin police are holding three men on charges of transporting and harboring undocumented aliens, after officials found 29 illegal migrants living together in a North Austin house. The immigrants said they had been smuggled into the country. ICE identified Erik Angeles-Mendoza, Daniel Angeles-Mendoza, and Felipe Ceron-Espinoza, as belonging to a smuggling ring holding the aliens "until friends or relatives pay off the price of bringing them across the border."

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## 5. News From The Courts

### **Benitez v. Wallis**

Daniel Benitez, a native and citizen of Cuba, is an inadmissible alien who brought a petition challenging his indefinite detention. The U.S. District Court for the Northern District of Florida denied Benitez's petition and decided that the INS's conclusions

that Benitez posed a danger to the community and was likely to display further violent behavior were legitimate and valid reasons to detain Benitez until he could be removed to Cuba. The Eleventh Circuit affirmed the decision of the district court.

In 1980, Benitez attempted entry into the U.S. from the port of Mariel, Cuba and was stopped at the border. He was paroled into the U.S. according to INA § 212(d)(5) which allows the Attorney General to temporarily parole aliens "on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." In 1983, Benitez was convicted of second-degree grand theft and sentenced to three years probation. Sometime later, Benitez applied to become a lawful permanent resident (LPR). In 1985, Benitez's application was denied because his criminal conviction for grand theft was a crime involving moral turpitude.

In 1993, Benitez pled guilty to a multi-count criminal indictment: armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery and unlawful possession, and sale or delivery of a firearm with an altered or removed serial number. He was sentenced to twenty years in jail. Based on these criminal convictions in 1993, INS revoked Benitez's immigration parole. Benitez was ordered to appear before an immigration judge to determine if he should be excluded and deported. In 1994, he was found excludable and deportable to Cuba for his criminal convictions.

Benitez was released into INS custody in October 2001. In November 2001, he was ordered to appear before the Cuban Review Panel to determine if it was in the public interest to release him from INS custody. In January 2002, Benitez filed a petition challenging his indefinite detention by INS. Later that January, he received a Notice of Releasability from the Cuban Review Panel. In March 2003, his Notice of Releasability was revoked when the INS concluded that Benitez was involved in a planned jail escape.

The Eleventh Circuit affirmed the district court's decision to deny Benitez's petition for several reasons. The Eleventh Circuit concluded that while Benitez was physically present in the U.S. for over twenty years, he was never admitted to the U.S. and remained an inadmissible alien. Benitez argued that his indefinite detention violated Constitutional and federal law. The Eleventh Circuit decided that as an inadmissible alien, Benitez does not have a constitutional right preventing indefinite detention. The Eleventh Circuit also concluded that Benitez posed a danger to the community and was likely to continue in his criminal behavior. Benitez cannot be returned to Cuba because the Cuban government will not allow it. The Attorney General has the discretion to detain or parole aliens who are not admitted into the U.S. and whose home country will not take them back.

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### **Ghashghaee v. INS**

Abbas Ghashghaee, a native of Iran, appealed to the Ninth Circuit Court of Appeals for review of the Board of Immigration Appeals' (BIA) denial of his asylum application. The Ninth Circuit found that the BIA erred in finding that Ghashghaee was ineligible for asylum because of his assistance in the persecution of others. The court held that the INS did not introduce evidence to demonstrate this persecution.

In addition, previous decisions stated that harm that was the result of another goal, such as the defense of the government against an opponent, was not persecution. Therefore, although Ghashghaee worked for SAVAK before the Iranian Revolution, there was no evidence that he assisted in the persecution of others. Since the BIA found that Ghashghaee had otherwise satisfied the requirements for asylum, the Ninth Circuit granted the petition for review.

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## 6. Government Processing Times

Please click on the links below to view new processing times charts:

California - <http://www.visalaw.com/california.html>

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## 7. News Bytes

The Attorney General has granted an extension of Temporary Protected Status (TPS) for Somali nationals due to the ongoing armed conflict within Somalia that would be a serious threat to the physical safety of returning Somali nationals. The extension is effective September 17, 2003 until September 17, 2004. Nationals of Somalia who have been granted TPS must re-register for the 12-month extension during the re-registration period, which begins July 21, 2003 and ends September 19, 2003.

To re-register for extension, TPS applicants must submit Form I-821 (Application for TPS), Form I-765 (Application for Employment Authorization) and two identification photographs to the local BCIS district office. Applicants who are seeking to reregister for TPS only, and not seeking an extension of employment authorization, must still submit Form I-765, but do not have to pay the application fee. All applicants seeking an extension of employment authorization until September 17, 2004 must pay the \$120 filing fee.

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Mohammad Hussein, a Pacific Islander and native of Fiji, worked as a pilot for Trans States Airlines, Inc., until he was fired on September 18, 2001, despite his claim that he had an excellent work record. Mr. Hussein alleges that he was discharged because of his Islamic religious beliefs and Arabic appearance. He filed a charge of religious, race and national origin discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) after Trans States refused to provide a reason or justification for his discharge.

Since September 11, 2001, the EEOC has received over 800 charge filings alleging post-9/11 discrimination against individuals who are perceived to be Muslim, Arabic, Middle Eastern, South Asian or Sikh. Mr. Hussein's case is the sixth post-9/11 backlash discrimination lawsuit filed by the EEOC.

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The U.S. Equal Employment Opportunity Commission (EEOC) has won its national origin discrimination suit against Colorado Central Station Casino on behalf of a

group of Hispanic employees of the housekeeping department who were verbally harassed and subjected to unlawful English-only rules. Employees had been told that English was the official language of the casino and that Spanish could not be spoken. Thirty-six workers will split the \$1.5 million settlement.

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By October 1, 2003, people entering the United States under the Visa Waiver Program (VWP) must have Machine Readable Passports (MRPs). VWP travelers who do not have MRPs will be required to obtain a non-immigrant B-1, B-2 or B-1/B-2 visa before entering the U.S., as these visas contain machine-readable biographical data. This requirement applies to all categories of passports: regular, official or diplomatic. A MRP can generally be identified by the two typeface lines printed at the bottom of the biographical page.

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The U.S. government is testing a nationwide plan to ease overcrowded jails and ensure appearances at court hearings or deportation proceedings by freeing some illegal immigrants on electronic ankle bracelets. Eleven illegal immigrants in Michigan were given the bracelets in July and the Bureau of Immigration and Customs Enforcement plans to expand the program to other field offices. The program is offered mainly to immigrants with no violent criminal past.

Participants in the program have curfews and are allowed to leave their home for work, religious services or medical purposes. The ankle bracelets send an electronic signal through the telephone line that informs the government when the immigrant has entered or exited the home. The program will allow immigrants to spend their last months in the U.S. with their families instead of waiting in jail.

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Eduardo Aguirre, newly appointed Director of BCIS administered the oath of allegiance to over 150 immigrants who were sworn in as U.S. citizens on Thursday, July 24, 2003 at George Mason University in Arlington, Virginia.

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For EB-2 classification, an alien needs an advanced degree or its equivalent, and the regulations state at 8 CFR 204.5(k)(2) that the equivalent is a bachelor's degree "or a foreign equivalent degree" followed by at least five years of progressive experience. Attorneys have noticed that the Vermont Service Center is interpreting this as the foreign equivalent must be a single degree because the singular form of the word is used. Therefore, a three-year bachelor's degree, as is common in India, followed by post-graduate studies leading to a diploma from a recognized institution cannot be the foreign equivalent of a bachelor's degree because it is not a single degree, but a combination of two degrees.

According to correspondence with Efren Hernandez III, Director of the Business and Trade Services at the BCIS, the completion of a three-year foreign university course of study resulting in a bachelor's degree followed by the completion of a PONSI-recognized post-graduate diploma program may be deemed the equivalent of a four-year U.S. bachelor's degree. That equivalent U.S. bachelor's degree combined with

five years of progressive experience in the specialty may be deemed an advance degree satisfying the requirements of INA § 203(b)(2)(A) and 8 CFR § 204.5(k)(2).

However, the AAO previously stated that it would give no effect to Hernandez's letters, despite the fact that this is the policy-making department of the BCIS.

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## 8. International Roundup

The appointment of a former Pakistani national as a visa officer in the British high commission in New Delhi has turned into a diplomatic duel. The official, Haroon Suleman, is a British national who previously held dual Pakistani and British citizenship. The application for the appointment of the official was sent to the Indian High Commission in London last May. The Indian ministry of external affairs has asked the British to withdraw the appointment of the official. The request has not been made formally yet to avoid embarrassment to the UK.

Meanwhile, British officials say that it is within their sovereignty to appoint their diplomats. Indian diplomats say the British should have been aware of the sensitive nature of the job and not nominated an official of Pakistani origin. "They've withdrawn Iraqi officials from their missions," a senior official stated. "How do they expect us to take a Pakistani national?" Sources say intelligence agencies had raised objections because of Suleman's Pakistani origin and because of the nature of the job, a sensitive visa section.

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Six of Iraq's remaining 34 Jews have left the country for Israel. The operation is part of a mission led by the Hebrew Immigrant Aid Society (HIAS), in cooperation with the Jewish Agency for Israel. Their plane departed Iraq Friday evening with the six Iraqis and Rachel Zelon, HIAS vice-president for program operations.

The Jewish community has lived under a repressive regime for decades. They have lived in a community that despises Jews and Israel. Most of them have to hide their identity because they are at risk given the increase in tensions in Iraq and the open anti-Semitism. Overall, the conditions within the community are considered bleak; most of the Jewish community lives in substandard conditions and are unable to care for themselves. Most of the remaining Jews of Iraq do want to leave the country if possible. Besides Israel, the Netherlands and Great Britain are possible places for resettlement.

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Two agents had their licenses cancelled and a third one has been prevented from re-registering following the shut down of rogue immigration advisers in Australia. Several cases have been referred to the federal police for investigation as the government seeks to clean up an industry that is plagued with criminal behavior. Agents are advising people to watch out for suspicious claims and billing for large sums of money for mediocre services because of extortion of funds from clients.

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A foreign ministry spokesman for India said the country would finance travel, accommodations, and medical treatment for a group of sick Pakistani children. The Ministry stated that the decision followed the positive response in India to a Pakistani baby girl who was successfully treated in an Indian hospital. The announcement was made after the first meeting between the Indian Foreign Minister and the new Pakistani High Commissioner.

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## 9. Legislative Update

The following bills were recently introduced in Congress:

[HR 2792](#), to extend eligibility for refugee status of unmarried sons and daughters of certain Vietnamese refugees, sponsored by Rep Davis, Tom [VA-11] (introduced 7/18/2003). Latest Major Action: 7/18/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[HR 2799](#), making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 2004, and for other purposes. Sponsor: Rep Wolf, Frank R. [VA-10] (introduced 7/21/2003) Latest Major Action: 7/24/2003 Senate preparation for floor. Status: Received in the Senate.

[HR 2800](#), making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2004, and for other purposes. Sponsor: Rep Kolbe, Jim [AZ-8] (introduced 7/21/2003) Latest Major Action: 7/24/2003 Senate preparation for floor. Status: Received in the Senate. Read twice. Placed on Senate Legislative Calendar under General Orders. Calendar No. 227.

[HR 2807](#), to establish grant programs to improve the health of border area residents and for bioterrorism preparedness in the border area, and for other purposes. Sponsor: Rep Kolbe, Jim [AZ-8] (introduced 7/21/2003) Latest Major Action: 7/21/2003 Referred to House committee. Status: Referred to the Committee on Energy and Commerce, and in addition to the Committee on International Relations, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

[HR 2841](#), to amend the Immigration and Nationality Act to eliminate the waiver authority relating to the implementation of machine readable passports and to expand the definition of terrorist activities for purposes of deportation. Sponsor: Rep Weldon, Dave [FL-15] (introduced 7/23/2003) Latest Major Action: 7/23/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[HR 2848](#), to provide for Federal custody and Federal payment of costs of emergency ambulance and medical services for aliens illegally attempting to enter the United States. Sponsor: Rep Filner, Bob [CA-51] (introduced 7/24/2003) Latest Major Action: 7/24/2003 Referred to House committee. Status: Referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case

for consideration of such provisions as fall within the jurisdiction of the committee concerned.

[HR 2849](#), to amend the Immigration and Nationality Act with respect to the H-1B and L-1 visa programs to prevent unintended United States job losses, to increase the monitoring and enforcement authority of the Secretary of Labor over such programs, and for other purposes. Sponsor: Rep Johnson, Nancy L. [CT-5] (introduced 7/24/2003) Latest Major Action: 7/24/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[S. 1447](#), a bill to establish grant programs to improve the health of border area residents and for bioterrorism preparedness in the border area, and for other purposes. Sponsor: Sen Bingaman, Jeff [NM] (introduced 7/23/2003). Latest Major Action: 7/23/2003 Referred to Senate committee. Status: Read twice and referred to the Committee on Health, Education, Labor, and Pensions.

[S. 1452](#), a bill to amend the Immigration and Nationality Act with respect to the H-1B and L-1 visa programs to prevent unintended United States job losses, to increase the monitoring and enforcement authority of the Secretary of Labor over such programs, and for other purposes. Sponsor: Sen Dodd, Christopher J. [CT] (introduced 7/24/2003). Latest Major Action: 7/24/2003 Referred to Senate committee. Status: Read twice and referred to the Committee on the Judiciary.

To see what immigration-related legislation is pending in Congress, visit our legislative chart at [www.visalaw.com/advocacy.html](http://www.visalaw.com/advocacy.html).

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#### 10. State Department Visa Bulletin - August 2003

The U.S. Department of State has released the Immigrant Numbers for August 2003. To view these charts, please visit <http://www.visalaw.com/visabulletin.html>.

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#### 11. Guest Article - Chile and Singaporean Free Trade Act: An H-1B Cap That Makes Sense, by Gary Endelman

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Since everyone anticipates the H-1B cap falling back to 65,000, perhaps one may wonder what the economic rationale is for this precise level of migration. If there is one, it is America's best kept secret. If political considerations mandate the adoption of some ceiling, and since the H-1B is supposed to help the domestic economy, should this not be a cause for concern? Beyond that, the inherent difficulty of settling upon any number suggests that perhaps the focus of the debate should be elsewhere. All H-1Bs are not created equal. What is important is not how many H1B workers come, but what kind of H-1Bs come. If the economy needs certain skills in certain jobs, then it is these type of H1Bs that should be favored without any limit. Correspondingly, if the economy has a surplus of expertise in a designated area,

then, until a shortage develops, no H-1Bs of this type should be allowed. Whatever the end result, any restriction on H-1B admissions should not be a political but an economic decision arising out of what the economy needs.

Only when we have a cap that puts the economic interests of America first will such a restriction serve a useful purpose. The number of H-1Bs from Venezuela need not be the same as the H-1B influx from Canada, nor should it be since America's commercial links with each such ally are fundamentally dissimilar. To argue, as some immigration advocates have, that this would result in some nations getting a disproportionate percentage of the overall H-1B visa allotment reflects an alien-centered view of the H-1B that cannot be reconciled with the protection of the American national interest. There is no entitlement to the H1B and access to this program should be earned through the extension of reciprocal benefits that are offered to the United States by those countries whose citizens and economies benefit from, indeed depend upon, its continued existence. The recent Free Trade Agreements signed with Chile and Singapore, which will have the effect of taking away some 6,800 H-1B visas, more than 10% of the total, and count against the H cap in the 1st and 7th years, make H-1B admissions from these countries depend on how many Americans in these same occupations are allowed to work there. Now, here is an interesting model, one that makes the H1B visa a tool for American economic penetration of key foreign markets. The cap on H1Bs from Chile and Singapore was set not by Washington alone, but by Washington in concert with its trading partners who together decided how much global mobility they were willing to allow.

What works for Chile and Singapore should work for other nations with whom we do business on a regular basis, such as Mexico, India and China. Congress may decide to base the level of H-1B admissions not on statistical equality, but, rather, on the extent to which the sending countries encourage or frustrate American investment in the same commercial sectors that their H-1B beneficiaries work in. So, for example, if remittances sent back by Indian software engineers from Silicon Valley are a vital source of support for the Indian economy, then the Indian authorities should be prepared to give something back in return and allow US companies to participate in the Indian technology boom on the same footing as an Indian business would enjoy. This provides Americans the same opportunity to penetrate the Indian economy that the US affords India when Indian H-1Bs are employed in the US economy. Nationalistic expressions of outrage at such requests are entirely understandable from an historical perspective. Case in point, most recently, the Mexican Government expressed indignation to hints that privatization of the lucrative Pemex market would be the Bush Administration's price for a massive new amnesty program for the undocumented. Yet, H-1B proponents, if they are honest with themselves, must realize that these are the kind of sentiments that neither we nor our allies can afford any longer. Allowing an H1B worker from India or Mexico the freedom to work in the United States in H-1B status is a conscious decision by Congress to share the fruits of our national sovereignty with others whose citizens have the talent to help us; our allies should be prepared to reciprocate and demonstrate a willingness to level the playing field and open their markets to American capital. The extent of H-1B admissions from any particular country would, as with Chile and Singapore, be the subject of bilateral negotiations in which global mobility would become an asset to be maximized, not a problem to be controlled.

The problem with constant fluctuations in the H-1B cap is not primarily one of numbers, but of uncertainty. In this kind of institutionalized indecision, where the

rules of the game change every few years, it is impossible for American employers of H-1B workers to engage in intelligent planning that seeks to maximize the benefit of their presence. Restrictions on where they can work, how often they can travel, what kinds of jobs they can perform- all these inject rigidity and artificiality into the economy that serves no purpose other than to empower those who police such activity. This kind of micromanagement does not create wealth, does not produce jobs, does not make US employers more competitive nor increase their ability to expand here at home with good jobs going to Americans who need them. Beyond all this, it is sheer fallacy to look at the H-1B quota in isolation from the need to create a rational and simplified labor market control system. Doing so ignores the basic truth that employers do not recruit for 3 or 6 years; they are looking for permanent employees. It makes no sense to expand the H-1B quota without doing something to enable these same employers to retain the services of the very H-1B beneficiaries they have trained after their authorized stay is up. If we do nothing about labor certification, any improvements made in the H-1B arena will be wasted and frustrated employers will respond by taking the logical step of decreasing H-1B sponsorship, unwilling to waste time and money on a foreign worker who will not be around for the long haul.

Congress should set a new H-1B cap, one that is the product of consultation and negotiation. Most importantly, any H-1B cap should be set on a country-by-country basis that varies as the facts and circumstances of our economic relationships change. If such a nation-based H-1B cap is adopted, two things would happen immediately. First, the need for an overall cap would disappear. Second, almost overnight, opposition to H-1B migration would dramatically decline as even all but the most partisan critics would realize that, for the first time, H-1B policy was nation-centered, not alien-centered, and sought not to help the H-1B beneficiary, but to enrich the United States. If we make it harder for H-1B beneficiaries to come, but easier for them to stay, then, at long last, America will have an H-1B cap that makes sense.

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## 12. Report Notes Thirty-four "Credible" Allegations of Patriot Act-Related Violations

The U.S. Department of Justice (DOJ) released its Report to Congress on Implementation of Section 1001 of the USA Patriot Act on July 17, 2003. The report had acknowledged many cases in which DOJ employees have been accused of violating civil rights and civil liberties through the enforcement of the USA Patriot Act.

The report spanned a six-month period, ending June 15, 2003. During this time, the Office of the Inspector General (OIG) received 1,073 complaints that suggested Patriot Act-related civil rights or civil liberties violations. Of these complaints, 272 were complaints about DOJ employees, and therefore, fell within the jurisdiction of the OIG. Thirty-four of those were deemed "credible" complaints of civil rights and civil liberties violations committed by DOJ employees. (The OIG also received 370 complaints that were classified as being unrelated to Patriot Act civil rights and civil liberties violations.)

Many of the violation accusations were directed at the Bureau of Prisons, which oversees federal prisons and detention centers. Accusations were also made against

the FBI, the Drug Enforcement Administration and INS. Accusations of violations of civil rights and civil liberties included the beating of Muslim and Arab immigrants in federal detention centers and verbally abusing Muslim detainees.

The USA Patriot Act allows law enforcement authorities to have expanded powers in order to detect and prevent acts of terrorism in the U.S. or the U.S.'s interests abroad. Under the Patriot Act, the DOJ was granted broad new surveillance and detention powers. Section 1001 of the act requires the DOJ and the OIG to investigate accusations of violations of civil rights and civil liberties committed by DOJ employees to prevent widespread law enforcement abuse. It also requires the OIG to provide reports to Congress on the implementation of Section 1001. The report released on July 17 was the third report since the Patriot Act was passed.

The report can be viewed on the OIG's page of Special Reports:  
<http://www.usdoj.gov/oig/special/03-07/index.htm>.

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### 13. DHS Issues Final Regulations On Non-Immigrant Health Care Workers

The Department of Homeland Security has issued long-awaited final regulations governing health care workers on non-immigrant visas. The rule follows the October 2002 release of proposed regulations and represents the final implementation of health care worker provisions included in Section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("The 1996 Act"). That law created a new ground of inadmissibility for health care workers unless the workers have a certificate from an approved organization verifying the worker's credentials.

#### **The Requirements of the 1996 Act**

Section 343 of the 1996 Act provided a new ground of inadmissibility for health care workers unless the worker could present a certificate from the Commission on Graduates of Foreign Nursing Schools or an equivalent credentialing organization approved by both DHS and the Department of Health and Human Services. The credentialing must verify:

1. The alien's education, training, license, and experience meet all applicable requirements for admission into the US, are comparable with that required for a similar American health care worker, and the license is unencumbered.
2. The alien has the level of competence in oral and written English considered by HHS and the Department of Education to be appropriate for health care work of the kind in which the alien will be working.
3. If a majority of states licensing the profession recognize a test predicting an applicant's success on the profession's licensing or certification examination, the alien has passed such a test or examination.

For nurses, Section 212(r) of the Immigration and Nationality Act provides that CGFNS can alternatively certify a nurse who has a valid and unrestricted license in a US state where the nurse intends to be employed, the nurse has passed the National Council Licensure Examination (NCLEX) and the nurse meets the following

requirements:

1. The course instruction was in English; and
2. The nursing program was located in a country which was designated by CGFNS as having nursing programs of sufficient quality and English instruction; and
3. The nursing program was in operation on or before November 12, 1999 or has been approved by CGFNS if it was later established.

CGFNS has designated the following countries for purposes of the alternate certification process: Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and the United States.

### **The Gradual Enactment of the 1996 Act's Health Care Provisions**

The 1996 Act's health care provisions have been implemented in three interim rules. The first was released in 1998 following the filing of a class action law suit challenging the long delay in implementing interim regulations following passage of the 1996 Act. From the passage of the 1996 Act until that regulation was issued, no health care workers were admitted to the US. Two more regulations - one in 1999 and one in 2001 - were issued finally allowing all health care workers covered under the 1996 Act to be admitted.

The first regulation identified seven categories of health care workers subject to the 1996 Act. They are nurses, physical therapists, occupational therapists, speech-language pathologists, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians) and physician assistants. In that rule, CGFNS as well as NBCOT, the organization that credentials occupational therapists, were authorized to certify nurses and occupational therapists, respectively. The rule also established the appropriate English testing levels for RNs and OTs and specified exemptions from the English rules. The first interim rule only applied to immigrants and not non-immigrants. The law was waived for non-immigrants until issuance of a final regulation. Until now, such non-immigrant workers have been granted one year periods of admission to the US.

The second interim rule temporarily authorized CGFNS to issue certificates to physical therapists and occupational therapists seeking immigrant visas. It also authorized the Foreign Credentialing Commission on Physical Therapists (FCCPT) to issue certificates to immigrant physical therapists. Appropriate English test scores were also determined for PTs.

The third interim rule finally included the rest of the designated health care professions and listed English scores for them.

In October of 2002, the DHS proposed a final rule for certifying health care workers. The rule had the following major proposals:

1. A list of organizations authorized to issue certificates
2. A description of a certificate
3. The English language requirements
4. Alternative certification rules for nurses
5. A streamlined process for nurses, PTs, OTs and speech language pathologists and

audiologists

6. The procedures for qualifying as a certifying organization
7. A list of standards that an organization must meet to certify health care workers and
8. A requirement to review periodically the performance of certifying organizations.

The proposed rule would also for the first time cover non-immigrants.

### **What will happen to the approvals for previously authorized certifying organizations?**

The organizations previously authorized under the prior interim rules to certify health care workers (except CGFNS) shall be required to be re-certified. However, those organizations will retain interim authority to continue issuing certifications. These organizations will have until January 28, 2004 to submit an I-905 Application for Authorization to Issue Health Care Worker Certificates. CGFNS will still have to submit an application (without paying a fee) by that date as well and CGFNS will still have to be subject to ongoing review by DHS.

### **Are Non-Immigrants Covered by the New Law?**

Yes. There are few exceptions. Spouses and dependants of immigrants or non-immigrants who are the primary applicants are not covered even if the spouse intends to work in health care. But all people applying for H, J and O visas are covered. Also, TN visa holders are covered despite protests that the NAFTA Treaty prohibits this. Non-immigrants coming in for training under F, H-3 and J visas are NOT covered, however.

### **Which Kinds of Health Care Workers are Covered by the Certification Requirements?**

As in the proposed rule and the interim rules, seven occupations are covered. They are

1. Nurses
2. Physical therapists
3. Occupational therapists
4. Speech-language pathologists
5. Medical technologists (also known as clinical laboratory scientists)
6. Medical technicians (also known as clinical laboratory scientists) and
7. Physician Assistants

DHS considered and has chosen not to expand this list and has also decided not to define these health care occupations. Instead, they will continue with the practice of reviewing the duties of a worker on a case by case basis.

### **How Will Health Care Workers Trained in the US be Treated?**

DHS has kept the controversial requirement from the proposed rule that health care

workers who possess state licenses or who were trained in the US must still be certified. According to DHS, they are strictly interpreting the law and Congress expressed no intention to exempt these workers.

Also, the DHS argues that the state screening processes alone would not demonstrate applicants' English skills and comparable training and unencumbered licensing.

DHS did, however, accept the suggestion of CGFNS in the final rule to allow for a more streamlined certification process for those nurses who trained in the US or who already are licensed here. Under the CGFNS proposal, a nurse who graduated from an entry-level program accredited by the National League for Nursing Accreditation Commission (NLNAC) or the Commission Collegiate Nursing Education (CCNE) would be exempt from the educational comparability review and English language proficiency testing. Also, nurses educated in the US in any other named discipline and who have graduated from a program accredited by the discipline would be evaluated under this same process. The DHS believes that this will substantially shorten the certification process and ease the paperwork burdens on nurses.

DHS and HHS have also agreed to use the same kind of streamlining for the following groups:

1. For OTs, graduation from a program accredited by the Accreditation Council for Occupational Therapy Education (ACOTE) or the American Occupational Therapy Association (AOTA).
2. For PTs, graduation from a program accredited by the Commission on Accreditation in Physical Therapy Education (CAPTE) of the American Physical Therapy Association (APTA); and
3. For speech language pathologists and audiologists, graduation from a program accredited by the Council on Academic Accreditation in Audiology and Speech Language Pathology (CAA) of the American Speech-Language-Hearing Association (ASHA).

For now, other health care workers not listed above need to go through a normal certification.

### **When and How will the Certification be Presented to the DHS?**

First, certifications will only be valid for a five year period. So it is possible that some nurses may have to go through the process more than once if they are in the US for an extended period on a non-immigrant visa or they simply wait several years before applying for admission to the US.

In the proposed regulation, the DHS said that it would NOT be necessary to present the credentialing certification each time a worker enters the US. The presentation of an I-94 or a fee receipt showing that the worker was processed for admission under NAFSA can be used as evidence that the worker previously presented a certificate.

**NOTE, HOWEVER, that the DHS has changed its mind.** It will now only accept a valid health care worker certificate or certified statement as evidence that the worker is admissible. According to DHS, the proposal would not work because I-94s are

supposed to be surrendered for many travelers and I-94s don't always contain information on a worker's occupation. Green card holders, however, do not need to show the certificate to be admitted each time.

### **How Will Certificates Be Presented When Applying for a Change of Non-Immigrant Status in the US?**

The new rule adds a section that outlines the procedure for submitting a certificate when a change of nonimmigrant status is requested in the US.

Due to concerns that requiring workers already in the US in nonimmigrant visas to immediately get certifications could disrupt the delivery of health care, DHS has decided that they will continue waiving the certification requirement for ONE year for health care workers already in the US. The DHS believes this will allow plenty of time for workers to meet the requirements for certification and for the credentialing organizations to get ready for a much bigger work load.

Therefore, any nonimmigrant health care worker admitted on or before July 26, 2004 will have the certification requirement waived. Furthermore, any petition or application to extend a worker's authorized stay or change his or her status will be denied unless the alien obtains the required certification no later than one year after the date of the worker's admission.

### **How Will Certificates Be Presented When Applying for an Immigrant Status in the US?**

Any applicant coming to the US as an immigrant or is applying for adjustment of status to perform labor in a health care occupation must submit a certification at the time of visa issuance or adjustment of status. So it should not be necessary to have VisaScreen completed at the time of filing the I-140.

### **How Will Organizations Qualify to Issue Health Care Worker Certificates?**

CGFNS is the only organization that can - at least initially - certify workers in any of the seven covered professions. They will still be subject to oversight and could lose their accreditation if DHS finds problem with their credentialing process.

All organizations must submit an I-905 Application for Authorization Workers (though CGFNS does not need to pay the \$230 fee). All applications are going to be handled by the BCIS Nebraska Service Center.

The DHS will notify the public of new organizations approved for certifying by publishing a public notice in the Federal Register and on its web site at [www.immigration.gov](http://www.immigration.gov). The list will also identify organizations whose authorization has been terminated.

More than one organization can be approved to issue certificates for the same occupation and such approvals shall be valid for five years at a time.

DHS has laid out in the final rule the specific standards that must be met in order to

qualify to issue certificates.

There are four guiding principles to the standards:

1. The DHS will not approve an organization unless the organization is independent and free of material conflicts of interest regarding whether an alien receives a visa.
2. The organization should demonstrate an ability to evaluate both the foreign credentials appropriate for the profession and the results of examinations for proficiency in the English language appropriate for the health care field in which the alien works.
3. The organization should also maintain comprehensive and current information on foreign educational institutions, ministries of health and foreign health care licensing jurisdictions.
4. If the health care field is one for which a majority of states require a predictor examination (such as nursing), the organization should demonstrate an ability to conduct the examination outside the US.

A change from the proposed regulations is the addition of language clarifying that a not-for-profit corporation that has a self-perpetuating board of directors may still demonstrate that it is independent and free of material conflicts of interest regarding whether the alien receives a visa.

Another addition to the proposed rules is that credentialing organizations will be required to request evidence of a worker's degree and transcript from the issuing educational and licensing authorities rather than from the applicants. This new rule is designed to reduce fraud.

The regulations also have a number of specific requirements that must be met by certifying organizations including the following:

- the organization must be independent of any other group that functions as a representative of the occupation or profession or serves as or is related to a recruitment/placement organization
- the organization must be able to render impartial advice regarding an individual's qualifications regarding training, experience and licensure.
- the organization must be completely independent in all of its day-to-day activities.
- the organization should provide applicants with their results as quickly as possible and if an applicant fails, the applicant should be quickly provided with information on his or her areas of deficiency
- the organization should take steps to ensure applicants' information is kept confidential
- the certifying organization must have a formal policy for renewing the certification if an applicant's original certification has expired before the individual first seeks admission to the US or applies for adjustment of status
- the organization shall provide all qualified applicants with a certificate in a timely manner
- the organization shall examine, evaluate and validate the academic and clinical requirements applied to each country's accrediting bodies or the educational institution

- the organization should evaluate the licensing and credentialing systems of each country or licensing jurisdiction to see which systems are equivalent to that of the majority of licensing jurisdictions in the US
- the organization shall be prepared to submit information requested by DHS for use in investigating allegations of non-compliance with standards
- the organization shall establish procedures to track the ability of certificate holders to pass US licensing or certification exams. Information on passage rates shall be supplied to HHS on an annual basis or the DHS as part of the five year reauthorization application.

### **What Kinds of Organizations Can Qualify to Be a Credentialing Organization?**

According to DHS, any organization, including a state agency, can be found eligible for authorization to issue certificates as long as it meets the majority of the standards noted above.

### **How Will the DHS Monitor Credentialing Organizations?**

The DHS has stated that it intends to develop a process to monitor credentialing organizations to ensure that the organization continues to follow the standards in the new rule. As part of this process, the DHS will review and reauthorize programs every five years. If the DHS makes adverse findings, it can initiate termination proceedings. It also may conduct additional reviews at any time in the five year period. CGFNS sought to be exempt from this requirement, but were rebuffed by DHS.

### **How Much Time Will Credentialing Organizations Have to Issue Certificates?**

The DHS considered requiring organizations to issue certificates in a specified period of time. But instead they decided to simply state in the regulations that organizations must issue certificates in a timely manner to as to minimize any delays that may affect a worker's ability to proceed with his or her application for an immigration benefit. It did, however, state in the regulation's preamble that it reserves the right to initiate termination proceedings against organizations that are unduly slow in issuing certificates. It also can waive the certification requirement in individual cases upon request.

### **How Much Can a Credentialing Organization Charge for a Certificate?**

The DHS does not specify how much an organization can charge, but the regulation does state that the fee charged should not unduly impair a worker's ability to seek an immigration benefit.

### **How Can a Certificate Be Revoked from a Worker?**

A credentialing organization must develop policies and procedures for revoking certificates if it finds that a worker was not eligible to receive the certificate at the time it was issued. Also, for workers whose certificates are revoked, credentialing

organizations are responsible for notifying the Nebraska Service Center which may revoke the visa petition and initiate removal proceedings.

The DHS has added a requirement since the proposed regulation that requires an organization issuing certificates include in its revocation process a mechanism to revoke a certificate when it learns that a holder is no longer eligible to hold a certificate.

### **What Does the Certificate Need to Include?**

The certification needs to include the following information:

1. The name, designated point of contact to verify the validity of the certificate, address and telephone number of the certifying organization;
2. The date the certificate was issued?
3. The health care occupation for which the certificate was issued; and
4. The alien's name and date and place of birth.

### **What are the Testing Organizations and Scores Approved for the English Language Certification Requirement?**

The tests and scores will be published periodically in the Federal Register and on the DHS web site at [www.immigration.gov](http://www.immigration.gov).

Score requirements are currently as follows:

1. Physical and Occupational Therapists -

ETS: TOEFL: Paper-based 560, Computer-based 220; TWE: 4.5; TSE: 50;

2. Nurses and other health care workers requiring a bachelors degree -

ETS: TOEFL: Paper-based 540, Computer-based 207; TWE: 4.0; TSE: 50;  
TOEIC Service International: TOEIC: 725; plus TWE: 4.0 and TSE: 50; or  
IELTS: 6.5 overall with spoken band score of 7.0 (this would require the Academic module).

3. Occupations requiring less than a bachelor's degree -

ETS: TOEFL: Paper-based 530, Computer-based 197; TWE: 4.0; TSE: 50;  
TOEIC Service International: TOEIC: 700; plus TWE: 4.0 and TSE: 50; or  
IELTS: 6.0 overall with spoken band score of 7.0 (this would require the Academic or the General module).

Note that graduates of health profession programs in Australia, Canada (except Quebec), Ireland, New Zealand, the United Kingdom and the United States are deemed to have met the English language requirements.