Outline from Donna Richardson for "Latest in Nurse Immigration (In Cooperation With CGFNS)" session 2

September __, 2004

Director, Regulations and Forms Services Division (HQRFS)
Department of Homeland Security
Bureau of Citizenship and Immigration Services
111 Massachusetts Avenue, NW, 3rd Floor
Washington, D.C. 20528

Re: BCIS 2320-04: Extension of Deadline for Certain Health Care Workers Required to Obtain Certificates

Dear Sir or Madam:

I am writing in response to the interim rule and request for comments published in the Federal Register on July 22, 2004 at 69 Fed. Reg. 43729 (the "Interim Rule"). CGFNS will take this opportunity to offer comments both on the extension of the deadline as announced in the Interim Rule, and also on matters that it has encountered to date in its administration of the July 25, 2003 Final Rule.

The Commission on Graduates of Foreign Nursing Schools ("CGFNS") has been authorized to certify international health care workers in all seven covered occupations pursuant to section 212(a)(5)(C) of the Immigration and Nationality Act ("INA"). CGFNS has twenty-seven years of experience in the field of certifying the credentials of internationally educated nurses and other health care workers, covering nearly 200,000 individual cases.

I. COMMENTS ON INTERIM RULE.

1. CGFNS has no objection to the extension of the deadline, but would not support any further expansion in the scope or the deadline.

CGFNS believes that the granting of the extension of the deadline to specified TN health care personnel provides an acceptable accommodation to certain health care providers, particularly those in states bordering Canada whose health care facilities are staffed by significant numbers of TN healthcare professionals who commute between the two countries each day. CGFNS requested the granting of a limited, precisely-targeted extension of this kind in a letter in February of 2004 to Secretary Ridge.

CGFNS would not support any expansion of the class of eligible aliens beyond TNs. International healthcare workers have been on notice since September 30, 1996, that they would eventually have to satisfy this certification requirement. Canadian TNs were the

only class with a plausible case that they had a practical problem in complying. The transition program provided in 8 CFR 212.15(n) of the July 2003 Final Rule provided a period of up to one year in which to obtain the necessary certificate to those nonimmigrant health care workers who entered the United States as late as July 25, 2004. Because large numbers of Canadian TNs entered the United States every morning and then returned to Canada every night, however, they could not take advantage of the extended transition period in the Final Rule (which for non-commuting aliens would typically last for more than one year). The extension of the deadline in this Interim Rule provides an equivalent amount of time for border-commuter TNs, which was not otherwise available to them under the Final Rule because of their daily returns to their homes in Canada.

Nor would CGFNS support any further extension of the deadline beyond July 26, 2005. Again, all covered international healthcare workers have had notice of this provision since 1996. Our contacts with some Canadian TNs and their representatives have shown that many in the group believe that all TNs should be "grandfathered in" and that any attempts at enforcement as to them should be dropped. Many remain unwilling to take any steps to meet the requirements of section 212(a)(5)(C). We would not be surprised to see another effort to create another "crisis" in the spring of 2005. Congressional intent is clear that section 212(a)(5)(C) is intended to apply to all foreign-educated health-care workers, notwithstanding any international treaties or trade agreements. We believe that the current extension is more than sufficient to accommodate those who wish to comply, and that future extension requests should be firmly rejected.

2. CGFNS statistics as of July 26, 2004, regarding the issuance of certificates to Canadian TN applicants show that fully documented applications were issued within two weeks after the final piece of documentation was received.

As of July 26 2004, CGFNS had issued a total of 2861 certificates to Canadian applicants since January 1, 2003. In the weeks before the July 26, 2004 deadline, CGFNS set an internal cutoff date of July 9, 2004: if we had received all required documents by that date, we promised applicants that their files would be reviewed and, if qualified, issued by the July 26, 2004 deadline. In addition CGFNS notified all Canadian schools and licensing authorities about the deadline, and provided them with a list of applicants who were identified as alumni of those institutions and prepaid trackable envelopes to facilitate return of the necessary documents. (Ironically many contacted CGFNS to alert us that many of the applicants had not requested their documents.) CGFNS also emailed and phoned applicants reminding them of the deadline and that required documents were outstanding. This internal deadline was obviously set before the decision by DHS to grant the extension of the deadline for certain TN applicants. In any case, CGFNS in fact met that internal cutoff date. All documentarily qualified applications received by July 9, 2004 were reviewed and, where qualified, were issued certificates before July 26, 2004. Some opponents of the July 2004 deadline contended that CGFNS was not able to handle the volume of applications it received. Our processing statistics demonstrate that this was not an accurate justification for extending the July 2004 deadline and would not be a justification for any party seeking to extend the July 2005 deadline.

As of September 16, 2004, CGFNS has issued a total of 3436 Visa Screen certificates to TN applicants. There are currently 685 files that are ready-for-review (our current processing time at this stage is [15] days). We have 1093 files for which we are awaiting either transcripts, license validations, or passing scores on NCLEX or CGFNS predictor exams. There are 136 for which we are awaiting passing scores on English exams. We attribute the bulk of the additional TN applications received since July 2004 to ***non-commuter*** TNs – i.e., those TNs whose one-year transition period under the July 2003 Final Rule provided them with time beyond July 26, 2004 in which to obtain the required certificate. From this total of 5350 cases filed by TNs, we believe we are approaching the universe of TN health care workers in the United States. This is further evidence that a further extension of the transition period is unjustified and unnecessary.

3. There is likely to be some confusion over whether the extension applies to Clinical Laboratory Scientists (Medical Technologists) and Clinical Laboratory Technicians (Medical Technicians).

In order to qualify for the July 26, 2005 deadline, the Interim Rule requires TN healthcare workers to be employed and licensed in the United States as of September 23, 2003 (the effective date of the Final Rule). It is possible that confusion will arise as to whether many Medical Technologists and Medical Technicians in TN status who otherwise satisfy the Interim Rule will qualify, because the majority of U.S. jurisdictions do not license either of these occupations. There are, to our knowledge, only ten states which issue licenses to Clinical Laboratory Scientists: California, Florida, Hawaii, Louisiana, Montana, Nevada, North Dakota, Rhode Island, Tennessee, and West Virginia. We understand that the situation is similar in the case of Clinical Laboratory Technicians.

Because many of these workers are not licensed in the states where they are employed, some USCIS personnel may determine that the unlicensed workers do not qualify for an extension of the deadline under the terms of the interim rule. CGFNS believes that these workers do fulfill a significant role in patient care, and would have no objection to an interpretation that accepted these occupations under the terms of the Interim Rule without regard to whether these professionals practiced in a state that licenses them or not.

CGFNS advised USCIS of this potential ambiguity in a facsimile transmission to the Office of Program and Regulations Development on July 22, 2004.

II. COMMENTS ON FINAL RULE

A. The question of whether certificates authorized under the Final Rule expire five years after the date of issuance, or whether they are valid indefinitely if used within five years of the date of issuance, needs to be resolved promptly.

CGFNS is presently receiving applications for renewals from health care workers who have temporary visas (TN, H1-B and H1-C), hold VisaScreen^{TM} certificates that were issued more than five years ago, and believe that those certificates have now expired. These applications for renewals seem to come almost exclusively from Canadian TNs,

who are planning to remain in TN status for several additional years. We made an informal inquiry to DHS and were told that our reading coincided with that of the program person with whom we spoke: the certificates expire five years from date of issuance.

Some Canadian TNs and their employers argue, however, that the language regarding expiration and renewal of issued certificates, 8 CFR 212.15(k)(4)(viii) and (n)(4), could be read to say that the certificates may not actually expire five years after issuance. They interpret this language as requiring only that health professionals receiving certificates must use them within five years of issuance. The implication of that interpretation is that if used within 5 years, the certificate is valid indefinitely. On the other hand, the italicized caption of section 212.15(n)(4) reads, "*Expiration of certificate or certified statement*," and the language of section 212.15(k)(4) speaks of degradation of skills over time.

In public information sessions conducted by CGFNS around the country on section 212(a)(5)(C) and the Final Rule, the question has been raised on several occasions whether the certificates actually expire, and if so, what are the standards for renewal? If in fact the certificate expires in five years, the Final Rule notes that the Department of Health and Human Services (in consultation with the Department of Education) recognizes the testing-industry principle that English scores are only valid for a two-year period.

It is our view that if the individual has been working in the United States for a substantial portion of the time since issuance of the certificate, then re-establishment of English language competency would not seem necessary. On the other hand, if the individual has left the United States for a significant portion of the time since issuance, then re-qualification of English skills would seem appropriate.

The critical point, however, is that applicants and credentialing organizations alike need prompt guidance on the following questions:

1. Do the certificates expire five years after issuance, or are they valid indefinitely if used within five years of date of issuance?
2. If they do expire, what are the standards for renewal?
3. If they do expire, must English proficiency scores be subject to the 2 year validity rule, or would continuous U.S. employment satisfy this requirement?

Finally, on this subject, in regard to the standards for renewal in the case of certificates issued but not used for more than five years (as set out in 212.15(k)(4)(viii), CGFNS notes that it is not capable of determining whether or not a certificate has been used within five years of issuance. We have no way of determining even if the person received a visa or entered the United States. If a certificate is not marked, or stamped, or otherwise identified as used by DHS, it will be presented to CGFNS in its original condition, and CGFNS will be bound to "renew" the certificate for another five years on

the basis of the standards provided in (K)(4)(viii), namely, re-verification of licensure and re-establishment of English qualifications. We do not have strong feelings about how the Department should resolve this question, but we do encourage DHS to provide clear guidance on this issue as soon as possible.

B. CGFNS believes that the automatic exclusion of healthcare workers educated in Quebec from the English-language proficiency exemption in the current regulations for sections 212(a)(5)(C) and 212(r) does not reflect sound policy; we would support the amendment of existing rules to grant language-exempt status to those educated in English in Quebec.

Section 212.15(g)(2)(ii) of 8 C.F.R. describes those aliens who are exempt from the English language requirements to include "Aliens who have graduated from a college, university, or professional training school located in . . . Canada (except Quebec . . . .)" CGFNS does not believe that the wholesale exclusion of professional schools located in Quebec for language-exemption purposes represents sound policy. While it is well known that many of the residents of Quebec are raised in and speak the French language, the province also is home to many who speak English from birth and who are educated in English-medium schools. The current language of the regulation serves to require those educated in Quebec in English-language schools to pass an English-language proficiency test, which does not seem rational or equitable. One example of a reputable English-language school in Quebec province is McGill University.

The purpose of the regulation quoted above is to grant the language exemption to those who are graduates of English-medium colleges, universities or professional training schools in countries where English is an official language. The companion language in 212.15(h)(iii and iv) confers eligibility for a 212(r) certified statement on those aliens who are "graduate[s] of a nursing program in which the language of instruction was English . . . located in Canada (except Quebec)." CGFNS believes that the focus on the medium of instruction is the critical factor that protects American consumers, as it is clear there is no intention to provide the exemption to those educated in French-language schools. The geographic location of the school within Canada should not be controlling.

We believe this policy provides sufficient ground for dropping the "(except Quebec)" carve-out from Canada's language exemption in 8 CFR 212.15(h)(iv). For the general rule in 8 CFR 212.15(g)(2)(ii), we suggest amending the exemption to read: ". . . Canada (except such institutions in Quebec in which the language of instruction is not English)".

C. CGFNS believes that DHS should clarify the definition of medical technologist as set out in §212.15(c).

Consistent with the legislative history to Section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Final Rule lists seven occupations which are subject to the certification requirement, including medical technologists (also known

as clinical laboratory scientists) and medical technicians (also known as clinical laboratory technicians).

CGFNS has been asked whether related medical technologists and technicians are covered, including dental technicians, opthamology technologists, ultra-sound technologists, cytogenetic technologists and cytotechnologists, just to name a few. We have consistently advised them that their profession is not included in those designated in the final rule. However many of these professionals are being told that they must have a VisaScreen^{TM} Certificate by U.S. consular officials abroad, border inspectors, and by various USCIS staff. After consultation with our Medical Technology Professional Standards Committee, we conclude that these additional professions are not covered, and that DHS should clarify this point. Our reasons for this conclusion follow.

1. Medical Laboratory Technologists and Technicians. Medical Technologists/Clinical Laboratory Scientists are the generalists in the medical laboratory. They perform complex chemical, biological, hematological, immunologic, microscopic, and bacteriological tests in the major areas of the clinical laboratory and other practice settings. This includes the area of immunohematology (blood banking) where they type and cross match blood samples for transfusions. They can practice in one, any combination, or all of these areas depending on practice site. As new major techniques and analyses are developed, they tend to first evolve as a research and development function and are then either incorporated into the general existing laboratory units or are gradually separated into a discrete area of practice. We therefore assume that Congress intended to cover medical laboratory generalists when it designated this profession for inclusion in the certification requirement.

2. Unrelated and Uncovered Professions. Based on Department of Labor job classification codes for Medical and Clinical Laboratory Technologist (29-2011.00) and Medical and Clinical Laboratory Technicians (29-2012.00) that are significantly different than those for other medical technologist occupations, we believe the following professions are clearly not covered by the Final Rule:

Medical Assistants -- 31-9092.00
Respiratory Therapists -- 29-1126.00
Medical Records & Health Information Technicians -- 29-2071.00
Medical Equipment Preparers -- 31-9093.00
Biomedical Engineers -- 17-2031.00
Respiratory Therapy Technicians -- 29-2054.00
Cardiovascular Technologist & Technicians -- 29-2031.00
Nuclear Medicine Technologists -- 29-2033.00
Radiologic Technicians -- 29-2034.02
Diagnostic Medical Sonographers -- 29-2032.00
Radiologic Technologists -- 29-2034.01
Biological Technicians -- 19-4021.00
Nuclear Monitoring Technicians -- 19-4051.02

Pharmacy Technicians -- 29-2052.00
Surgical Technologists -- 29-2055.00

3. Related Specialist Occupations. The following professions are related to medical laboratory technologists (clinical laboratory scientists) and medical laboratory technicians (clinical laboratory technicians) in that they are specialists in clinical laboratory science. Because they do not practice as clinical laboratory generalists, we do not believe they fall within the categories covered by the Final Rule or intended to be covered by Congress.

The National Credentialing Agency for Clinical Laboratory Personnel certify the following occupations (with the covered professions emphasized):

Clinical Laboratory Specialist in Cytogenetics [CLSp(CG)]
Certified Laboratory Specialist in Molecular Biology [CLSp(MB)]
Phlebotomy (CLPlb)
Clinical Laboratory Technician (CLT)
Clinical Laboratory Scientist (CLS)
Clinical Laboratory Scientist/Categoricals: Chemistry/Urinalysis, Genatikigt, Immunohematology, Microbiology
Clinical Laboratory Director (CLdir)
Clinical Laboratory Supervisor (CLsup)

The American Society for Clinical Pathology's Board of Registry offers certification in the following occupational categories:

Technicians
- ***Medical Laboratory Technician***, MLT (ASCP)
- Histotechnician, HT (ASCP)
- Phlebotomy Technician, PBT (ASCP)
- Donor Phlebotomy Technician, DPT (ASCP)
- Aphaeresis Technician, AT(ASCP)

Technologists
- ***Medical Technologist***, MT (ASCP)
- Blood Banking, BB (ASCP)
- Chemistry, C (ASCP)
- Cytotechnologist, CT (ASCP)
- Hematology, H (ASCP)
- Histotechnologist, HTL (ASCP)
- Immunology, I(ASCP)
- Microbiology, M(ASCP)
- Molecular Pathology, MP(ASCP)

Specialists
- Hemapheresis Practitioner, HP (ASCP)
- Blood Banking, SBB (ASCP)

Chemistry, SC (ASCP)
Hematology, SH (ASCP)
Immunology, SI (ASCP)
Microbiology, SM (ASCP)
Cytotechnology, SCT (ASCP)

Here are some examples of what these specialist occupations encompass:

Cytotechnologist. Cytotechnology is the microscopic study of cells obtained from body tissues. Through intensive examination, cytotechnologists can observe small cellular alterations to differentiate abnormal, malignant cells from normal cells. The two most commonly performed cytologic tests in the laboratory are the Pap Smear and Fine Needle Aspiration Biopsy. Cytologic interpretation is an invaluable tool for assisting doctors in detecting cancer in the uterine cervix, lungs, stomach, urinary tract, breast and other body cavities at its earliest and potentially most curable stage. Cytotechnologists work closely with anatomic pathologists and cytopathologists in the laboratory.

Cytogenetic Technologist. Cytogenetics is the branch of biology that focuses on the cellular aspects of heredity; with emphasis on the study of the structure, function, and abnormalities of human chromosomes. Cytogenetic Technologists practice in the cytogenetics laboratory. They prepare, examine, and analyze chromosomes found in biological specimens, such as amniotic fluids, bone marrow, and blood, to aid in diagnosis and treatment of genetic diseases. This includes the principles and methodologies for all major areas in a full service cytogenetic laboratory to include: specimen processing, cell and tissue culture techniques, harvest techniques, chromosome banding and staining techniques, fluorescent in situ hybridization techniques, microscopy and image analysis, and chromosome analysis.

Histotechnologist. Histotechnologists, also known as histologic technologists or tissue technologists, prepare and stain sections of body tissue for microscopic examination by pathologists. Histotechnologists are responsible for performing complex procedures for processing tissues and must make judgments concerning the quality of results. They identify tissue structure and cell components, relating the test results to physiological functions, and implementing new testing techniques and procedures. This work is often done while a surgical team is waiting for the results of the pathologist's diagnosis in order to resume surgery. These laboratory professionals work closely with the anatomic pathologist.

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Our conclusion is that the occupations in the "Unrelated" category are different professions and should not be covered by the Final Rule. The occupations in the "Related Specialist" category do not perform the general medical laboratory functions that Congress apparently intended be covered. The degree and certification requirements in these specialist occupations vary and are evolving, and we are not certain to what extent there are significant numbers of foreign-educated foreign nationals working in

these professions in the United States. It may be wise for the Departments of Homeland Security and Health and Human Services to monitor the evolution of these specialist occupations for potential coverage at a later date, but at the present time we do not see the basis or the compelling public health and safety need to do so.

Thank you for your consideration of these comments.

Sincerely,

Barbara L. Nichols,
Chief Executive Officer