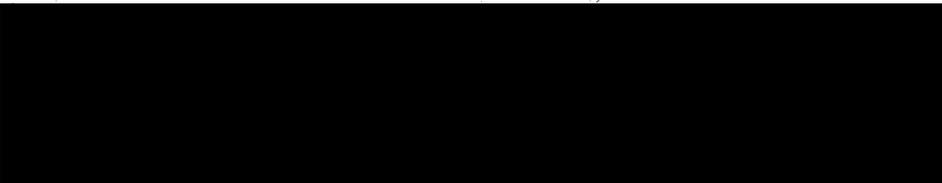




U.S. Citizenship
and Immigration
Services

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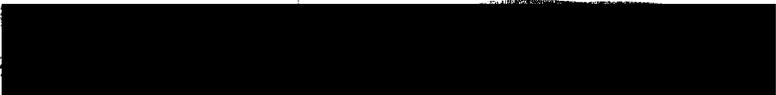
Office: TEXAS SERVICE CENTER

Date:

SEP 20 2004

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a pediatric multi-subspecialty clinic. It seeks to employ the beneficiary permanently in the United States as a Pediatric Hematologist/Oncologist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the qualifications required on the ETA 750, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Eligibility in this matter hinges on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). In this instance, the priority date is March 16, 2001.

The Form ETA 750, Block 14, indicates that the position of Pediatric Hematologist/Oncologist requires a medical degree. Block 14 requires no minimum experience, but Block 15, Other Special Requirements, states that the beneficiary must be "eligible for licensure as a physician in the State of Florida and eligible for certification by the National Board of Hematology and Oncology.

The director found that the evidence submitted initially was insufficient to establish the petitioner's ability to pay the proffered wage and to establish the beneficiary's qualifications. The director therefore on April 30, 2002 requested evidence pertinent to those issues. In response counsel submitted a letter dated July 17, 2002, accompanied by additional evidence. The present record does not indicate clearly which documents were submitted initially and which were submitted in response to the request for evidence (RFE), but the evidence now in the record consists of the following: a copy of a letter dated October 25, 1993 from the Educational Commission for Foreign Medical Graduates (ECFMG) stating that the beneficiary had passed steps 1 and 2 of the United States Medical Licensing Examination (USMLE); a copy of the beneficiary's medical diploma dated February 2, 1994 from the University of Vienna; a copy of a certificate dated May 16, 1994 from the ECFMG stating that the beneficiary had passed steps 1 and 2 of the USMLE and the English proficiency examination; a copy of a certification from the Mayo Foundation that the beneficiary had completed a thirty-six month program from March 13, 1995 to March 12, 1998 as a resident in pediatric and adolescent medicine at the Mayo Clinic, Rochester, Minnesota; a copy of a certificate of the beneficiary as a diplomate of the American Board of Pediatrics dated October 19, 1999; copies of two certificates of the beneficiary dated in 2000 for memberships in professional pediatric associations; an undated Curriculum Vitae of the beneficiary; letters of support for the beneficiary from nine medical doctors, all dated in February 2001; a letter dated September 5, 2001 from the petitioner's chief pediatrician stating the petitioner's job offer to the beneficiary;

a letter dated July 15, 2002 from the petitioner's chief pediatrician stating that the beneficiary had been hired for the offered position; a copy of the petitioner's Florida tax exemption certificate; a copy of the beneficiary's occupational license dated October 23, 2001 issued by Orange County, Florida; a copy of a lease agreement dated December 16, 2004 between the petitioner as tenant and a Florida partnership as landlord; a brochure of the petitioner; a printout of several pages of the petitioner's Internet web site; and an annual report of the petitioner for 2001.

The director determined that the evidence did not establish that the beneficiary was eligible for licensure as a physician in Florida or that the beneficiary was eligible for certification by the National Board of Hematology and Oncology. The director determined that there was no evidence in the record that the beneficiary had passed Step 1, Step 2 and Step 3 of the USMLE. The director therefore found that the beneficiary was inadmissible as an unqualified physician. The director then denied the petition.

On appeal counsel states that the beneficiary has passed all three parts of the USMLE, and that the beneficiary is eligible for licensure as a physician in Florida and for certification by the National Board of Hematology and Oncology. Counsel submits additional evidence in support of those assertions. The evidence newly-submitted on appeal consists of a copy of a score report dated November 4, 1992 from the ECFMG showing the beneficiary's passing score on Step 1 of the USMLE; a copy of a score report dated October 25, 1993 from the ECFMG showing the beneficiary's passing score on Step 2 of the USMLE; a copy of a section from a regulation on medical licenses, identified in counsel's brief as being from the Minnesota physician's licensing board; a copy of the beneficiary's Minnesota medical license dated May 17, 1997; a copy of the beneficiary's California medical license dated May 25, 2000; a copy of a letter dated December 23, 2002 from the director of the Federal of State Medical Boards of the United States, Inc. stating that the beneficiary sat for the USMLE Step 3 in December 1994 and was mailed her results at that time; a copy of a request for USMLE examination results dated December 20, 2002 submitted by the beneficiary to the Federal of State Medical Boards; and a letter from the chief pediatrician of the petitioner stating that the beneficiary had passed all parts of the USMLE prior to beginning her residency at the Mayo Clinic and explaining terminology concerning the job requirement of "eligible for licensure as a physician in the State of Florida and eligible for certification by the National Board of Hematology and Oncology," as used in the ETA 750, Block 15.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The evidence in the record before the director included a copy of a letter dated October 25, 1993 for the beneficiary from the Educational Commission for Foreign Medical Graduates (ECFMG) and a copy of a certificate dated May 16, 1994 for the beneficiary from the ECFMG. Each of those documents shows that the beneficiary passed Step 1 of the USMLE in September 1992 and Step 2 of the USMLE in September 1993.

According to the Internet web site of the National Board of Medical Examiners (NMBE), the USMLE is the successor examination to the NMBE certifying examinations, Part I, II and III. The NMBE's web site says that the USMLE is co-owned and co-sponsored by NMBE and the Federation of State Medical Boards (FSMB).

The NMBE web site describes the USMLE as follows:

Step 1 assesses whether medical school students or graduates can understand and apply important concepts of the sciences basic to the practice of medicine; it is often taken on completion of the basic medical science component of the medical school curriculum, usually

at the end of the second year of medical school. Step 2 assesses whether medical school students or graduates can apply the medical knowledge, skills, and understanding of clinical science essential for the provision of patient care under supervision; the Step 2 components are usually taken prior to graduation from medical school. Many medical schools in the United States require students to pass Step 1 and Step 2 prior to graduation. Step 3 assesses whether medical school graduates can apply the medical knowledge and understanding of biomedical and clinical science considered essential for the unsupervised practice of medicine; it is usually taken during or after the first year of postgraduate residency training. Step 1 and Step 2 of the USMLE are also taken by students and graduates of medical schools outside the United States and Canada for purposes of certification by the Educational Commission for Foreign Medical Graduates (ECFMG®).

National Board of Medical Examiners, The United States Medical Licensing Examination (USMLE), <http://www.nbme.org/programs/usmle.asp> (accessed September 10, 2004).

In finding that the beneficiary was inadmissible as an unqualified physician the director cited "Title 8, Code of Federal Regulations, Part 212(a)(5)(B)," and set out language in block indentation presented as a quotation from that regulation. However, no such section exists in the Code of Federal Regulations. The director apparently intended to cite the Immigration and Nationality Act (INA), section 212(a)(5)(B), 8 U.S.C. § 1182(a)(5)(B). Moreover, the language presented by the director as a quotation is not the exact language of that statutory section, but rather is a paraphrase of the statutory language, and a paraphrase which also includes an inserted parenthetical reference to the USMLE which does not appear in the text of the statutory section.

The relevant portion of the director's decision states as follows:

Title 8, Code of Federal Regulations, Part 212(a)(5)(B) related to Unqualified physicians.

An alien who is a graduate of medical school not accredited by a body or bodies approved for the purpose by the Secretary of education and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible unless

- (i) the alien has passed...an equivalent examination as determined by the Secretary of Health and Human Services (the USMLE) and
- (ii) is competent in oral and written English.

There is no evidence in the record that the beneficiary has passed Step I, Step II, and Step III of the USMLE. The beneficiary is an unqualified physician and is inadmissible.

Director's Decision, page 3 (formatting, spelling, capitalization and punctuation as in the original).

The actual language of section 212(a)(5)(B) of the INA, 8 U.S.C. § 1182(a)(5)(B), is as follows:

Unqualified physicians. – An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien

(i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and

(ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

No regulation of CIS states whether the USMLE has been determined to be an equivalent examination to the National Board of Medical Examiners Examination, nor does any regulation issued by the Department of Health and Human Services address that issue.

A reference to the USMLE is found in the Department of State regulation at 22 C.F.R. § 62.27, pertaining to foreign medical graduates entering the United States as exchange visitors for training, research, teaching and other areas not involving the clinical practice of medicine. That regulation states, in pertinent part:

Such Foreign Medical Graduates shall:

...

(5) Have passed either Parts I and II of the National Board of Medical Examiners Examination, the Foreign Medical Graduate Examination in the Medical Sciences, the United States Medical Licensing Examination, Step I and Step II, or the Visa Qualifying Examination (VQE) prepared by the National Board of Medical Examiners, administered by the Educational Commission for Foreign Medical Graduates. [NB--Graduates of a school of medicine accredited by the Liaison Committee on Medical Education are exempted by law from the requirement of passing either Parts I and II of the National Board of Medical Examiners Examination or the Visa Qualifying Examination (VQE)];

22 C.F.R. § 62.27(b) (2004)

In the instant petition, the Form ETA 750 does not specifically require that the beneficiary be admissible to the United States. Questions of inadmissibility of a beneficiary of an I-140 petition are normally addressed during the adjudication of a beneficiary's application to adjust status to permanent residence or application for an immigrant visa, following the approval of an I-140 petition. Nonetheless, in the instant case, the inadmissibility provision of INA section 212(a)(5)(B), 8 U.S.C. § 1182(a)(5)(B), pertaining to unqualified physicians relates directly to one of the job qualifications listed on the Form ETA 750. A beneficiary who is inadmissible under INA section 212(a)(5)(B) could not satisfy the requirement listed in block 15 of the Form ETA 750 that the beneficiary be "eligible for licensure as a physician in the State of Florida." Therefore it is appropriate to address the inadmissibility issue of INA section 212(a)(5)(B) in the adjudication of the instant I-140 petition.

In light of the information above that the USMLE is the medical examination currently sponsored by the National Board of Medical Examiners, the statutory reference in INA section 212(a)(5)(B) to "parts I and II of the National Board of Medical Examiners Examination" is deemed to refer to Step 1 and Step 2 of the USMLE.

The director's decision states that "[f]oreign medical graduates are required to pass Step I, Step II, and Step III of the United States Medical Licensing Examination (USMLE)." The director cites no legal authority in support of this assertion. In the director's paraphrase of INA section 212(a)(5)(B) the director omits any reference to the required passing of Part I and Part II of the National Board of Medical Examiners Examination.

The director erred in stating that foreign medical graduates are required to pass Steps 1, 2, and 3 of the USMLE. Based on the above finding that the USMLE is the examination currently sponsored by the National Board of Medical Examiners, INA section 212(a)(5)(B), 8 U.S.C. § 1182(a)(5)(B), declares inadmissible only those foreign medical graduates who have failed to pass Steps 1 and 2 of the USMLE.

The director's decision states, "[t]here is no evidence in the record that the beneficiary has passed Step I, Step II, and Step III of the USMLE." That statement is technically accurate because the conjunction "and" in that statement encompasses all three steps of the USMLE examination. However, as noted above, the record before the director did contain evidence establishing that the beneficiary had passed Steps 1 and 2 of the USMLE.

With regard to Step 3 of the USMLE, that step of the examination is not relevant to a beneficiary's inadmissibility under INA section 212(a)(5)(B), 8 U.S.C. § 1182(a)(5)(B). Nonetheless, passing Step 3 appears to be a prerequisite to state licensure as a physician, since, according to the NBME Internet web site, Step 3 of the examination is usually taken "during or after the first year of postgraduate residency training." National Board of Medical Examiners, The United States Medical Licensing Examination (USMLE), <http://www.nbme.org/programs/usmle.asp> (accessed September 10, 2004).

In the director's RFE, a specific request was made for evidence "that the beneficiary has passed Step I, Step II, and Step III of the USMLE." Counsel's response to the RFE failed to include any direct evidence that the beneficiary had passed Step 3 of the USMLE. Nonetheless, the record before the director included evidence that the beneficiary was licensed as a physician in Minnesota and California prior to the priority date. On the beneficiary's Curriculum Vitae, the beneficiary states that he is licensed as a physician in Minnesota and California, and gives his license numbers for each state. The Curriculum Vitae is undated, but a letter dated February 9, 2001 in the record from [REDACTED] of the Children's Cancer Research Institute states that the beneficiary is licensed in Minnesota and California. Since that letter is dated before the March 16, 2001 priority date, it is evidence that the beneficiary already held two state physician's licenses as of the priority date. That information appears to imply that the beneficiary had passed Step 3 of the USMLE as of the priority date.

Although passing Step 3 of the USMLE is apparently one requirement for eligibility for Florida licensure, the evidence submitted prior to the director's decision contains no information on other requirements for Florida licensure. The ETA 750 does not define the phrase in block 15, "eligible for licensure in the State of Florida." Therefore the record before the director, although containing highly laudatory letters about the beneficiary from nine physicians, failed to establish that the beneficiary met the technical requirements to be "eligible for licensure in the State of Florida" as of the March 16, 2001 priority date as required by the ETA 750.

Two documents in the record dated after the priority date indicate that the beneficiary did obtain a license as a physician in the State of Florida. An occupational license for the beneficiary as physician from Orange County, Florida is dated October 23, 2001. A letter dated July 15, 2002 from the chief pediatrician of the petitioner states that the beneficiary had been hired as a physician. But since both of those documents are

after the priority date, they fail to establish that the beneficiary was eligible for Florida licensure as a physician as of the priority date.

Another requirement in block 15 of the ETA 750 is that the beneficiary be "eligible for certification by the National Board of Hematology and Oncology." That phrase is undefined on the ETA 750 and no evidence submitted prior to the director's decision establishes the criteria for that job requirement. The record before the director contained evidence that the beneficiary was certified by the American Board of Pediatrics on October 19, 1999 and that he held membership in the American Society of Pediatric Hematology/Oncology in 2000 and membership in the American Society of Clinical Oncology as of October 1, 2000. Yet in the absence of evidence on the technical requirements for eligibility for certification by the National Board of Hematology and Oncology, the record before the director failed to establish that the beneficiary was "eligible for certification" by that Board as of the priority date.

For the foregoing reasons, the director was incorrect in finding the beneficiary inadmissible under INA section 212(a)(5)(B). Nonetheless, the director was correct in finding that the evidence submitted prior to the director's decision failed to establish that the beneficiary was "eligible for licensure as a physician in the State of Florida and eligible for certification by the National Board of Hematology and Oncology" as of the March 16, 2001 priority date.

Therefore the decision of the director to deny the petition was correct, based on the record before the director.

On appeal, the petitioner submits additional evidence indicating that the beneficiary had passed all three steps of the USMLE prior to the filing date of the petition. Counsel submits evidence that the beneficiary sat for Step 3 of the USMLE in 1994, that the Minnesota Board of Medical Practice requires an applicant for a medical license to have passed steps 1, 2 and 3 of the USMLE, and that the beneficiary was licensed to practice medicine in Minnesota in 1997. That evidence is additional evidence that the beneficiary had passed all three steps of the USMLE as of the priority date.

Concerning the requirements on the ETA 750 for eligibility for Florida licensure and eligibility for Board certification in Hematology and Oncology, counsel submits on appeal a letter dated December 23, 2002 from the chief pediatrician of the petitioner. That letter describes in detail the meaning of those qualification requirements as used on the ETA 750. The letter also states the specific reasons why the beneficiary was considered "eligible" for Florida licensure as a physician and for certification by the National Board of Hematology and Oncology as of the priority date. The letter explains that eligibility for licensure and eligibility for Board certification as those terms are used in the medical community do not refer to specific technical requirements, but rather refer to screening criteria used in the hiring process, based on a job applicant having successfully completed the entire USMLE examination and having completed a residency program, facts which indicate that the applicant is eligible for state licensing as a physician, and on having a background of high-level professional work in the field in which the applicant may be Board certified, in this case, in Hematology and Oncology. The letter dated December 23, 2002 from the petitioner's chief pediatrician, in conjunction with the other evidence submitted for the record, is sufficient to establish that the beneficiary satisfied the requirements of block 15 of the ETA 750 to be "eligible for licensure as a physician in the State of Florida and eligible for certification by the National Board of Hematology and Oncology" as of the March 16, 2001 priority date.

For the foregoing reasons, the evidence submitted by the petitioner on appeal is sufficient to overcome the decision of the director.

The issue is whether the beneficiary met all of the requirements stated by the petitioner in blocks 14 and 15 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has established that the beneficiary met all the requirements for the offered position as of the March 16, 2001 priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.