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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



PUBLIC COPY

File: SRC 00 028 53992 Office: Texas Service Center Date:

AUG 31 2001

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: Approval of the nonimmigrant visa petition was revoked by the director, after appropriate notice, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a healthcare management company. It seeks to employ the beneficiary as a psychiatrist for a three year period. The director determined that the petitioner had not established that the beneficiary, as a foreign medical graduate, had passed the examinations determined to be appropriate by the Secretary of Health and Human Services.

Counsel states that it is arbitrary and capricious of the United States Department of Health and Human Services regulations not to allow a physician to use a mixture of the Federation Licensing Examination (FLEX) and the United States Medical Licensing Examination (USMLE) examinations to qualify for H-1B classification. Counsel further states that the State of Kentucky, where the beneficiary is to work, is a health professional shortage area and that the beneficiary's services are needed in this jurisdiction. Counsel argues that the beneficiary has been judged qualified to practice medicine by the State of Kentucky and is qualified to obtain a license in any state of the Union and that the regulation in question interferes with the States's right to regulate the admission of persons's qualified to practice medicine.

The petitioner also requests oral argument. Oral argument, however, is limited to cases where cause is shown. It must be shown a case involves unique facts or issues of law which cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. The petitioner's request for oral argument is, consequently, denied.

Section 101(a) (15) (H) (i) (b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a) (15) (H) (i) (b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i) (1) of the Act, 8 U.S.C. 1184(i) (1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i) (2) of the Act, 8 U.S.C. 1184(i) (2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such

degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Section 212(j)(2) of the Act provides in part that a graduate of a foreign medical school who is coming to perform services as a member of the medical profession may not be admitted as a member of the medical profession pursuant to section 101(a)(15)(H)(i)(b) unless he or she has passed the FLEX or an equivalent examination as determined by the Secretary of Health and Human Services. Furthermore, 8 C.F.R. 214.2(h)(4)(viii)(B)(2) provides that a petitioner seeking to employ a physician who graduated from a medical school in a foreign state under section 101(a)(15)(H)(i) must establish that the beneficiary has passed the FLEX or an equivalent examination as determined by the Secretary of Health and Human Services.

On September 16, 1992, the Department of Health and Human Services published a notice in the Federal Register, Vol. 57, No. 180, which indicated that Parts I, II, and III of the National Board of Medical Examiners (NBME) certifying examinations and Steps 1, 2, and 3 of the USMLE were recognized as equivalent to the FLEX. The notice did not provide that combinations of these examinations are equivalent to the FLEX. Hence, combinations of these examinations may not be used to meet the statutory requirement that an alien has passed the FLEX.

The record reflects that the beneficiary has passed Step 3 of the USMLE and Component I of the FLEX. However, the beneficiary has not passed Step 1 or Step 2 of the USMLE or Component II the FLEX. The petitioner has not demonstrated that the Department of Health and Human Services will accept this combination as equivalent to passage of the FLEX. Accordingly, the petition may not be approved.

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 not sustained that burden.

ORDER: The appeal is dismissed.