

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a health center with a family practice residency program that is affiliated with the University of Washington's School of Medicine. It seeks to employ the beneficiary as a medical resident in its family medicine program. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because he determined that the beneficiary was not qualified to perform the duties of the position. On appeal, the petitioner asserts that the beneficiary is qualified to perform the duties of the position. The petitioner submits further documentation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) 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.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires.

Pursuant to 8 C.F.R. § 214.2(h)(4)(viii)(A), an H-1B petition filed for a physician shall be accompanied by evidence that the physician:

- (1) has a license or other authorization required by the state of intended employment to practice medicine if the physician will perform direct patient care and the state requires the license or authorization, and
- (2) has a full and unrestricted license to practice medicine in a foreign state or has graduated from a medical school in the United States or in a foreign state.

In addition, 8 C.F.R. § 214.2(h)(4)(viii)(B) states that the petitioner must establish that the alien physician is:

(1) coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency, and that no patient care will be performed, except that which is incidental to the physician's teaching or research; or

(2) the alien has passed the Federation Licensing Examination (or an equivalent examination

as determined by the Secretary of Health and Human Services); and

(i) has competency in oral and written English which shall be demonstrated by the passage of the English language proficiency test given by the Educational Commission for Foreign Medical graduates; or

(ii) is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for further evidence, dated May 7, 2004; (4) the petitioner's letter that responds to the director's request; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a physician trainee in its residency program in family practice. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter of support; and the petitioner's letter in response to the director's request for further evidence.

The director denied the petition because he determined that the beneficiary was not qualified to perform the duties of the position, since she had not passed Step 3 of the United States Medical Licensing Exam (USMLE). The director also determined the record was insufficient to establish that the state of Washington did not require licensure for the beneficiary. On appeal, the petitioner asserts that the beneficiary is qualified to perform the duties of the position. The petitioner also submits a score report from the USMLE for the beneficiary's Step 3 examination. The document indicated that the beneficiary took the examination on May 25, 2004 and passed the examination. The petitioner also submits further documentation on requirements for licensure of medical residents in the state of Washington.

With regard to the issue of licensure, in its initial petition, the petitioner submitted an excerpt from the Revised Code of Washington (RCW) on exemptions from licenses, and noted that exemption eight stated that an individual serving a period of post-graduate medical training in a program of clinical medical trainings sponsored by a college or university is not required to have a license to perform medical services in his or her duties as a trainee. The petitioner also submitted a document identified as an affiliation agreement between the petitioner and the University of Washington School of Medicine, Department of Family Medicine. This document makes no reference to the licensure of medical residents. In the petitioner's response to the director's request for further evidence, the petitioner stated that the state of Washington did not require resident physicians to be licensed in order to provide direct patient care as they are in clinical training and are supervised by fully licensed faculty physicians. The petitioner then cited to the same letter submitted in the initial petition with regard to the RCW provisions. On appeal, the petitioner submits a letter from [REDACTED] Licensing Program Manager, Medical Quality Assurance Commission, State of Washington Department of Health, Olympia, Washington. [REDACTED] states that with regard to training licenses as indicated in the state statute, individuals in training programs are not required to have a license so long as they are utilized only in a training status, and refers to Chapter 18.71.030 of the RCW. [REDACTED] also notes that many training programs want a credential of some kind to be issued to the trainee, most likely for insurance or

reimbursement purposes. In these cases, [REDACTED] states that the licensing commission follows the statute governing issuance of limited licenses, and she refers to Chapter 18.71.095 of the RCW. [REDACTED] notes that with a limited license, the resident physician shall practice only under the supervision and control of a licensed physician, but such supervision and control shall not be construed to necessarily require the personal presence of the supervising physician at the place where services are rendered. [REDACTED] finally states that, under federal guidelines, such limited licenses cannot be issued without a social security number. Thus, it appears that medical residents, under the supervision and control of a licensed physician, are not required to have a license to practice medicine in the state of Washington, although the entities that train such medical residents can seek a limited license, if they so desire. While these materials are persuasive as to the two options available to training institutions with regard to licensure of medical residents, the issue could be definitively clarified by the petitioner, as to whether it or the University of Washington requires or does not require a limited license for medical residents. Resolution of this issue will not impact the adverse decision being made in this case for other reasons as will be discussed below.

With regard to the beneficiary's qualifications, the petitioner has not established that the beneficiary is qualified to perform the duties of the position. This issue primarily concerns whether the beneficiary is required to pass all three Steps of the USMLE examination to meet Citizenship and Immigration Services (CIS) statutory criteria for H-1B physician trainees or medical residents.

The petitioner submitted the beneficiary's certification from the Educational Commission for Foreign Medical Graduates (ECFMG) with regard to her oral and written English skills. The petitioner also submitted the beneficiary's diploma from the Faculty of Medicine and Medical Specialties, The Tamil Nadu [REDACTED] Medical University. [REDACTED] In its response to the director's request for further evidence, the petitioner stated that the beneficiary had two baccalaureate degrees and that the second one, a bachelor degree in surgery, MBBS, was the equivalent to a U.S. medical degree. The petitioner referred to the ECFMG certification as proof of the educational equivalency of the beneficiary's medical degree from an Indian college of medicine to a degree in medicine from a U.S. accredited educational institution. The petitioner stated that since July 1, 1996, the ECFMG has required primary source verification of medical education documentation prior to approving ECFMG certification. The petitioner also submitted evidence that the beneficiary had passed Steps 1 and 2 of the three-part USMLE examination. On appeal, the petitioner submits a score report from the USMLE for the beneficiary's Step 3 examination. The document indicated that the beneficiary took the examination on May 25, 2004 and passed the examination.

In examining the beneficiary's necessary qualifications for an H-1B medical resident, the petitioner established all eligibility criteria outlined in 8 C.F.R. § 214.2(h)(4)(viii)(B), with the exception of whether the beneficiary completed all three steps of the USMLE. In examining this issue, the AAO follows guidance provided in a final rule published by the legacy INS in 60 Fed. Reg. 62021-01 (December 4, 1995). This rule, entitled "Temporary Alien Workers Seeking H Classification for the Purpose of Obtaining Graduate Medical Education or Training," states: "graduates of foreign medical schools will continue to be permitted to pursue a medical residency under the H-1B classification, provided, of course, that all regulatory and statutory requirement for the classification are met."

With regard to meeting the statutory requirements for examinations outlined in 8 C.F.R. § 214.2(h)(4)(viii)(B)(2), the Department of Health and Human Services issued a notice in the Federal Register entitled "Equivalent Examinations for Alien Physicians Seeking Temporary Nonimmigrant H-1B Visa Status." See 57 FR 42755-01 (September 16, 1992). This notice states that the Secretary of Health and Human Services recognized Parts I, II and III of the National Board of Medical Examiners (NBME) certifying examinations, and the Steps 1, 2, and 3 of the then-new United States Medical Licensing Examinations (USMLE) program, to be the equivalent of the FLEX medical examination for purposes of section 101 of the Act (8 U.S.C. § 1101), as amended by the Miscellaneous and Technical Immigration and Naturalization Amendments (MTINA) of 1991. See *id.* The notice also states: "First and foremost, any examination(s) determined equivalent to the FLEX and for use for the H-1B visa, must have like power to assess possession of the expertise requisite to practice quality medicine anywhere in the United States." Based on these two rules, it appears that the beneficiary has to complete all three Steps of the USMLE which has replaced both the FLEX and the NBME examinations, to meet the criteria outlined in 8 C.F.R. § 214.2(h)(4)(viii)(B)(2).

Although the petitioner on appeal submits the beneficiary's test results for Step 3 of the USMLE exam, CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Documents submitted by the petitioner establish that the beneficiary passed Step 3 on May 25, 2004, which is after the filing of the instant petition with CIS on April 30, 2004. At the time of the filing of the instant petition, the beneficiary was not qualified to perform the duties of the proffered position, and thus the petitioner was not eligible for the benefit sought.

Although the petitioner established the majority of the statutory criteria for H-1B eligibility, it did not establish that the beneficiary had taken and passed all three steps of the USMLE exam prior to filing the visa petition. Based on the previous discussion, the beneficiary was required to pass all three steps of the USMLE to be found qualified to perform the duties of the job. Since at the time of the filing of the instant petition, the beneficiary had not passed Step 3 of the USMLE, she is not qualified to perform the duties of the position.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified for the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition. It is noted that petitioner may refile the petition without prejudice and submit any evidentiary documentation that was nonexistent at the time the petitioner first filed the petition.

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. The petition is denied.