



HQ 70/6.2  
AD09-10

June 17, 2009

## Memorandum

TO: USCIS Leadership

FROM: Donald Neufeld /s/  
Acting Associate Director, Domestic Operations

SUBJECT: Revisions to Adjudicator's Field Manual (AFM) Regarding Certain Alien Physicians  
Chapter 22.2(b) General Form I-140 Issues (AFM Update AD09-10)

### I. Purpose

This memorandum amends the Adjudicator's Field Manual by providing guidance on the adjudication of Form I-140, Petition for Alien Worker filed for certain physicians. In particular, this memo provides guidance to Immigration Services Officers (ISOs), formerly known as Information Immigration Officers (IIOs) or Adjudications Officers (AOs), on how to determine if a foreign Medical Degree (MD) is the equivalent of a U.S. MD degree, and thus an advanced degree, for EB2 purposes. This memorandum also addresses how to determine whether an alien physician has met the education, training and experience requirements of the labor certification and licensure in the area of intended employment, and it clarifies that all EB2 and EB3 alien physicians must overcome the "unqualified physician" inadmissible alien provisions of INA §212(a)(5)(B) at the time of the permanent job offer.

### II. Background

Section 203(b)(2) of the Immigration and Nationality Act (INA) and 8 C.F.R. 204.5(k) provide the basic framework for determining eligibility for the advanced degree professional (EB2) visa preference category. EB2 petitioning employers must obtain an approved individual labor certification from the Department of Labor (DOL) in accordance with the provisions of 20 C.F.R. 656 for petitions that do not involve a request for a national interest waiver (NIW).

To obtain a labor certification, the prospective employer must demonstrate to DOL, through a test of the labor market, that there are no able, willing, and qualified U.S. workers who are available to fill the proffered position in the geographic area where the job opportunity is located.

The employer must also demonstrate that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. (See INA §212(a)(5)(A)(i) and 20 C.F.R. 656.2(c)(1).)

An I-140 petition, supported by a DOL-approved labor certification, must establish that the physician beneficiary seeking the EB2 classification:

1. Is a member of the professions possessing an advanced degree or foreign equivalent degree in accordance with 8 C.F.R 204.5(k)(2);
2. Met the minimum education, training and experience for the permanent physician position, and has, or is eligible for, a full and unrestricted license to practice medicine in the state of intended employment as of the filing date of the labor certification application with DOL<sup>1</sup>, and;
3. Overcomes the “unqualified physician” inadmissible alien provisions of INA §212(a)(5)(B).

The petitioner must also establish that the permanent position offered requires an advanced degree or its equivalent.

### **III. New Field Guidance**

#### **A. Determining whether an Alien Physician's Foreign Medical Degree is Equivalent to a United States Advanced Degree.**

The United States is one of the few countries where medical school applicants are required to obtain a bachelor's degree as a prerequisite to admission to medical school. As a result, a United States MD is considered to be an advanced degree. In many other countries a person may be admitted to medical school directly out of high school. In these instances, the program of study for the foreign medical degree is longer in length (generally 5-7 years in duration) than the program for a less specialized foreign bachelor's degree (generally 3-4 years in duration.).

#### **B. Determining whether an Alien Physician has met the Minimum Requirements of the Permanent Physician Position as of the date of the Filing of the Labor Certification.**

USCIS ISOs must determine whether the alien physician met the minimum education, training and experience requirements of the labor certification as of the date of its filing with DOL in order to establish the alien's eligibility for the EB2 classification. These minimum job requirements are used in the labor market test in DOL's labor certification application process to determine if there are able, willing, and qualified U.S. workers who are available to fill the proffered position in the geographic area where the job opportunity is located. A U.S. worker is considered able and qualified for the position if s/he by education, training and experience, is able to perform the duties involved in the occupation in the normally accepted manner as customarily performed by other U.S. workers similarly employed. (See 20 C.F.R 656.10.)

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<sup>1</sup> Matter of Wing's Tea House 16 I&N Dec. 158; I.D. 2570 (BIA 1977); 20 C.F.R. 656.17(h); 20 C.F.R. 656.10(c)(7).

It is not permissible for a U.S. employer to require fewer or less restrictive requirements of the beneficiary than it would require of U.S. workers. Similarly, U.S. employers may not specify unduly restrictive requirements on the labor certification application. The employer must also attest in the labor certification application that the job opportunity's terms, conditions and occupational environment are not contrary to Federal, state or local law. Further, the approved labor certification is valid only for the particular job opportunity specified therein. (See 20 C.F.R. 656.24(b)(2)(i), and 656.30(c)(2).) In these cases, the job opportunity is for a physician who is to be engaged in the practice of medicine involving direct patient care.

Though a given labor certification may not specify that an MD license is required for a physician position, physicians involved in patient care must obtain a license to practice medicine in the location where they are to be employed as a matter of state or territorial law. Therefore, it follows that *any* candidate for a permanent position as a physician providing patient care must either possess a permanent license to practice medicine or be eligible for such a license in the location of the intended employment in order to be qualified for entry into the position at the time of the job offer

C. Determining whether the Alien Physician has Overcome the “Unqualified Physician” Alien Provisions of INA §212(a)(5)(B).

INA §212(a)(5)(B) renders inadmissible those alien physicians who are coming to the United States principally to perform services as a member of the medical profession unless they have passed parts I and II of the National Board of Medical Examiners Examination (NBME exam) or an equivalent exam, (currently the U.S. Medical Licensing Examination - USMLE), as determined by the Secretary of Health and Human Services, and they are competent in written and oral English. However, this inadmissibility ground only applies to alien physicians seeking admission as an alien classified under INA §203(b)(2) or §203(b)(3), who will be involved in patient care and who have graduated from a medical school not accredited by the Secretary of Education. Medical researchers and teachers are not subject to this requirement. In addition, the inadmissibility ground does not apply if the alien was fully and permanently licensed to practice medicine in a U.S. state on January 9, 1978, and was practicing medicine in a U.S. state on that date. In addition, the definition of "graduates of a medical school" in INA §101(a)(41) excepts aliens who are of national or international renown in the field of medicine.

This memorandum provides revised guidance which clarifies that all EB2 and EB3 alien physicians must overcome the “unqualified physician” inadmissible alien provisions of INA §212(a)(5)(B) at the time of the permanent job offer. EB2 alien physicians seeking a National Interest Waiver (NIW) must provide documentation in accordance with 8 C.F.R. 204.12(c)(4) to establish eligibility relative to INA §212(a)(5)(B) at the time of filing of the NIW I-140 petition. In contrast, a physician petition filed with an individual labor certification, must establish eligibility under INA §212(a)(5)(B) at the time of the filing of the labor certification.

Reminder: Petitioners have the option to file a new, amended Form I-140 petition for any petition that they believe may have been wrongly decided under the guidance provided in this memo. However, USCIS ISOs may not accept requests for the reopening of previously denied or revoked petitions in untimely filed motions to reopen or reconsider.

#### IV. AFM Update

Accordingly, the Adjudicator's Field Manual is revised as follows:

-  1. Chapter 22.2 (j)(1)(B) through (D) are revised and (E) is added to read as follows:

(B) Foreign Equivalent Degrees. Pursuant to section **203(b)(2)(A)** of the INA certain "qualified immigrants who are members of the professions holding advanced degrees or their equivalent..." are eligible for the EB2 immigrant classification. The Joint Explanatory Statement of the Committee of Conference, made at the time Congress adopted the Immigration Act of 1990, stated that the equivalent of an advanced degree is "a bachelor's degree plus at least five years progressive experience in the professions." See H.R. Rep. No. 101-955, 101st Cong., 2d Sess. 121 (1990). USCIS has incorporated this standard with respect to establishing equivalency to a *master's* degree in its regulations at **8 CFR 204.5(k)(3)(i)(B)**.

8 CFR 204.5(k)(2) defines an advanced degree to be "*any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.*" An alien can satisfy the advanced degree requirement by holding any of the following: (1) a U.S. master's degree or higher, or a foreign degree evaluated to be the equivalent of a U.S. master's degree or higher; or (2) a U.S. bachelor's degree, or a foreign degree evaluated to be the equivalent of a U.S. bachelor's degree, plus five years of progressive, post-degree work experience. An alien who does not possess at least a U.S. bachelor's degree or a foreign equivalent degree will be ineligible for this classification.

(C) Education Credentials Evaluation: In cases involving foreign degrees, ISOs may favorably consider a credentials evaluation performed by an independent credentials evaluator who has provided a credible, logical and well-documented case for such an equivalency determination that is based solely on the alien's foreign degree(s). In addition, ISOs may accept a comparable evaluation performed by a school official that has the authority to make such determinations and is acting in his or her official capacity with the educational institution.

ISOs should consider the opinions rendered by an education credential evaluator in conjunction with a review of the alien beneficiary's relevant education credentials, and other available credible resource material regarding the equivalency of the education credentials to college degrees obtained in the U.S. Opinions rendered that are merely conclusory in nature, which do not provide a credible roadmap that would clearly lay out the basis for the opinions are not persuasive. It is important to understand that any educational equivalency evaluation performed by a credentials evaluator or school

official is solely advisory in nature and that the final determination continues to rest with the ISO.. (See Matter of Caron International, 19 I&N Dec. 791 (Comm. 1988), Matter of Sea, Inc. 19 I&N Dec. 817 (Comm 1988), and Matter of Ho, 19 I&N Dec. 582 (BIA 1988).)

(D) United States Medical Degree (MD) Equivalency of Foreign Medical Degrees. The United States is one of the few countries where medical school applicants are required to obtain a bachelor's degree as a requirement for admission to medical school. As a result, a United States MD degree is considered to be an advanced degree. In many other countries a person may be admitted to medical school directly out of high school. In these instances the program of study for the foreign medical degree is longer in length (generally 5-7 years in duration) than is required for a less specialized foreign bachelor's degree (generally 3-4 years in duration.) In some countries the name of the degree is "Bachelor of Medicine, Bachelor of Surgery", and the program of study may involve ONLY medicine, to include some limited basic sciences. A foreign medical degree may qualify as the equivalent of a U.S. MD degree and thus an advanced degree for EB2 purposes if, at the time of the filing of the labor certification application, the following two conditions are met:

1. The alien beneficiary:

- A. Has been awarded a foreign medical degree from a medical school that requires applicants to obtain a bachelor's degree equivalent to a U.S. bachelor's degree as a requirement for admission, **or**;
- B. Has been awarded a foreign medical degree and a foreign education credential evaluation is provided that comports to section (C) above, that credibly describes how the foreign medical degree is equivalent to a medical degree obtained from an accredited medical school in the United States, **or**;
- C. Has been awarded a foreign medical degree and has passed the National Board of Medical Examiners Examination (NBME) examination or an equivalent examination, such as the U.S. Medical Licensing Examination (USMLE), Steps 1, 2 & 3,

2. The alien beneficiary was fully eligible for the position described on the labor certification application, on the date that it was filed, by establishing that:

- A. He or she had a full and unrestricted license to practice medicine in the state of intended employment and continues to hold such an unrestricted license, **or**;
- B. His or her foreign medical degree is shown to meet the medical degree requirements to be eligible for full and unrestricted licensure specified by the medical board governing the place of intended employment.

See Matter of Wing's Tea House 16 I&N Dec. 158; I.D. 2570 (BIA 1977); 20 C.F.R. 656.17(h); 20 C.F.R. 656.10(c)(7).

Note: EB3 Alien beneficiaries who are to be engaged in the provision of patient care must also show that they were fully eligible for the position described on the labor certification application on the date it was filed by meeting the licensure requirements in condition #2 above.

Each U.S. State, the District of Columbia, and the U.S. territories have a medical board which devises its own medical degree requirements that must be met in order to be licensed to practice medicine therein. (See section 22.2(j)(5)(A) of the AFM for further information regarding U.S. state and territorial U.S. medical degree requirements.)

(E) Advanced Degree Position. Mere possession of an advanced degree is not sufficient for establishing an alien's eligibility for EB2 classification. Pursuant to **8 CFR 204.5(k)(4)**, the petitioner must demonstrate that (1) the position certified in the underlying labor certification application or set forth on the Schedule A application requires a professional holding an advanced degree or the equivalent, and; (2) the beneficiary not only had the advanced degree or its equivalent on the date that the labor certification application was filed, but also met all of the requirements needed for entry into the proffered position. The petitioner must demonstrate that the position, and the industry as a whole, normally requires that the position be filled by an individual holding an advanced degree. In this regard, the key factors are not whether a combination of more than one of the foreign degrees or credentials is comparable to a single U.S. bachelor's degree or an advanced degree, but rather that a combination of foreign degrees or credentials:

- Meets the minimum education requirements for the position in the individual labor certification approved by the Department of Labor, and;
- The minimum requirements for the position in the labor certification meet the definition of an advanced degree at 8 CFR 204.5(k)(2).

The requirement that the position requires, at a minimum, a person holding an advanced degree has resulted in a particular problem involving EB2 petitions filed on behalf of registered nurses. Although many such nurses possess advanced degrees, they are filling nursing positions in the United States that generally do not require advanced degrees. Specifically, the Occupational Information Network (O-Net) at <http://online.onetcenter.org/> indicates that, in the nursing profession, only managerial jobs (director of nursing or assistant director of nursing) or advanced level jobs (clinical nurse specialist, nurse practitioner, etc.) generally require advanced degrees. A registered nurse job, by contrast, usually does not require an advanced degree holder. ISOs should be aware that the long waiting periods currently required for issuance of third-preference employment-based immigrant visas has caused a "gap" between the available supply of visa eligible nurses and the high demand for nursing services. Nonetheless, adjudicators need to verify the actual minimum requirements for the nursing position offered in the petition. As stated, most nursing positions will not qualify for EB2 classification.

-  2. Chapter 22.2 (j)(5) is revised to read as follows:

(5) Petition for a Physician Which Is Supported by Individual Labor Certification.

(A) Determining Whether a Physician has met the Minimum Requirements for the Practicing Physician Position.

USCIS ISOs must determine whether the alien physician met the minimum education, training and experience requirements of the labor certification as of the date of its filing with DOL in order to establish the alien's eligibility for the EB2 classification. Although a given labor certification may not specify that an MD license is required for a physician position, physicians involved in patient care must obtain a license to practice medicine in the location where they are to be employed in the United States as a matter of state or territorial law (hereinafter any reference to state requirements is intended to also include U.S. territories and the District of Columbia). Therefore, it follows that any candidate for such a position must either possess a permanent license to practice medicine or be eligible for such a license in the state of the intended employment in order to be qualified for entry into the position at the time of the permanent job offer. In the case of an EB2 petition supported by a labor certification, the job offer is considered to have been made as of the date of the filing of the labor certification.

Each U.S. state has a medical board which devises its own educational, training, and experience requirements that must be met in order to be granted a permanent license, i.e. full and unrestricted license to practice medicine therein. A full and unrestricted license to practice differs from a limited license to practice medicine. Limited licensure is typically granted for physicians who are still working towards obtaining the credentials required for full licensure, or who may be providing limited medical care, such as a physician who is working at a summer camp as a camp physician for a short period of time. In general, there are two pathways to obtain permanent licensure to practice medicine as a physician; either as:

1. An initial applicant for licensure, or;
2. An applicant for licensure by endorsement.

The initial applicant pathway is for medical school graduates who have never obtained a permanent license to practice medicine as a physician in the United States, or in some instances, Canada. An initial applicant must show that s/he has the requisite medical degree, post-graduate training, residency and/or board certifications, and has passed the medical examinations required by the state medical board.

All U.S. states require a licensing candidate to make an application for licensure with their medical board to demonstrate that s/he meets the requirements of licensure

regardless of previous licensure. This pathway is often referred to as an endorsement application and involves:

1. A verification of the standing of the applicant's license(s) issued by another U.S. state or territory, and in some cases by a foreign country, and
2. A review of the applicant's education, training and medical examinations to determine if the applicant meets the requirement of the state medical board.

U.S. states do not generally allow a physician to practice medicine within their jurisdictional boundaries based on a license issued by another state or territory, i.e. automatic reciprocity. Certain exceptions may exist for physicians practicing at federal medical facilities and in other very limited circumstances.

In some states, applicants must pass the medical examinations, such as the United States Medical Licensing Examination (USMLE), within a certain number of attempts or within a certain timeframe in order for the examination results to be considered valid for licensure. In addition, approximately 75% of the U.S. states require foreign medical school graduates to complete additional post-graduate medical training or residencies beyond that required for U.S. medical school graduates.

In order to approve a petition supported by a labor certification filed on behalf of a physician seeking EB2 classification, the petitioner must show that, at the time of the filing of the labor certification, the physician:

1. Possesses a permanent license to practice medicine in the area of intended employment, or
2. Has met all of the requirements to be eligible to obtain such a license in the area of intended employment, notwithstanding eligibility requirements that are contingent upon his or her immigration status in the United States.<sup>2</sup>

USCIS ISOs are instructed to review the evidence provided in support of petitions with labor certifications to determine if the alien physician had a permanent license to practice or was eligible to obtain such a license in the location of intended employment at the time of filing of the labor certification. Information regarding the licensure requirements for U.S. states, the District of Columbia, and the U.S. territories can be obtained at <http://www.fsmb.org/>, and at the various U.S. medical board websites.

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<sup>2</sup> Some state medical boards will not issue a license to practice medicine unless the applicant presents evidence that s/he is legally authorized to be employed in the United States, or has obtained a U.S. Social Security Number (SSN.) State licensure criteria relating to the applicant's U.S. immigration status, such as requirements that the applicant must be a lawful permanent resident, or must otherwise possess employment authorization or an SSN should not be considered relevant as the EB2 petition is the means by which the alien will obtain lawful permanent resident status and eligibility to accept employment and obtain an SSN in the United States.

B. Determining whether the alien physician has overcome the "unqualified physician" inadmissible alien provisions of INA §212(a)(5)(B). See AFM Chapter 22.2(j)(6)(F)(iv), as revised.



3. Chapter 22.2 (j)(6)(F)(iv) is revised to read as follows:

(iv) Admissibility Requirements Established by Section 212(a)(5)(B) of the Act. The physician must meet the admissibility requirements established by section **212(a)(5)(B)** of the Act, relating to examinations that immigrant physicians must pass in order to immigrate. Evidence must be provided that the physician has passed parts I and II of the National Board of Medical Examiners Examination (NBME) or an equivalent examination as determined by the Secretary of Health and Human Services (HHS), and evidence that the beneficiary is competent in oral and written English. The examination that is currently being administered is the U.S. Medical Licensing Examination (USMLE).

The NBME (also known as the NBME) ceased to be administered in 1992. Examinations that are equivalent to the NBME are:

- Visa Qualifying Examination (VQE), which was administered from 1977 through 1984;
- Comprehensive Foreign Medical Graduate Examination in the Medical Sciences (FMGEMS), which was administered from 1984 through 1993;
- U.S. Medical Licensing Examination (USMLE), which was first administered in 1992 and continues to be administered today.

In addition to having passed either the NBME or one of its equivalents, the beneficiary is also required to provide evidence of competency in oral and written English. An Educational Commission for Foreign Medical Graduates (ECFMG) certification showing the beneficiary has passed the English language proficiency test to demonstrate the alien physician's English proficiency meets this requirement. Information regarding the ECFMG certification is available at <http://www.ecfmq.org/>.

Note: EB2 alien physicians seeking a National Interest Waiver (NIW) must provide documentation in accordance with 8 C.F.R. 204.12(c)(4) to establish eligibility relative to INA §212(a)(5)(B) at the time of filing of the NIW I-140 petition. In contrast, a physician petition filed with an individual labor certification, must establish eligibility under INA §212(a)(5)(B) at the time of the filing of the labor certification.



4. The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD-09-10            Chapter 22  
[INSERT  
SIGNATURE  
DATE OF THIS  
MEMO]

This memorandum revises Chapter 22  
of the *Adjudicator's Field Manual*  
(*AFM*) by amending section 22.2.

## **V.     Use**

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

## **VI.    Questions**

Questions regarding this memorandum should be directed through appropriate channels to Alexandra Haskell in the Business and Trade Services Branch of Service Center Operations.

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