Final Rules for H-1B, Foreign Doctors

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This article will address the final procedures specifically for H-1 B nonimmigrants as well as new eligibility criteria for foreign doctors, as amended by the INS.

The new rules form the final amendments to the Immigration Act of 1990 and its subsequent ruling, the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA). The two previous provisions differed specifically on issues relating to H-1B filing procedures and eligibility standards for foreign doctors. The new rule, having taken into consideration various responses to the two previous immigration provisions, thus provides a final, definitive directive to H-1 B filing procedures and standard entry requirements for foreign doctors.

Under the final rule, an H-1B petition must be accompanied by a certified Labor Condition Application. The application must be approved and certified by the Department of Labor. Prior to this rule, the INS simply deemed that a copy of an LCA application is sufficient as proof of filing an LCA with the Department of Labor.

It is important that a petitioner understands the import of abiding by this rule. Failure to comply endangers a petitioner's chances of recruiting and petitioning other non-immigrant workers to its staff. Violating this specific provision of the final rule specifically strips a petitioner for one year of the opportunity to file for petitions under the H, L, O and P nonimmigrant visa classifications, as well as all immigrant visa classifications. The final rule also makes clear that a petitioner shall be made to understand that the filing of H-1B nonimmigrant petition obligates the petitioner to make sure a return transportation is available to the alien. There is, however, no need to post a bond to prove that this requirement is met. The INS ruled that the mere filing of a petition indicates an employer's ability and intention to comply with INS requirements.

The new provision concerning foreign medical graduates reflects the stringent requirements of the pre-interim period. The interim rules of the Immigration Act of 1990 (IMMACT) allowed foreign doctors to perform direct patient care. Under the new rule, two conditions are established before alien doctors can be classified under an H-1B: first, an invitation from a nonprofit private educational or research institution or agency to teach or conduct research, and second, passing the Federation Licensing Examination (FLEX) or its equivalent as determined by the Department of Health and Human Services.

Foreign medical graduates are also expected to demonstrate a proficiency in oral and written English. All these requirements presupposes that the alien has graduated from a US accredited school of medicine.

The FLEX examination applies only to foreign medical graduates. The final rule exempts alien graduates from US medical schools from such requirement because, as various commenters point out, US medical schools do not require their graduates to take the FLEX exams as part of their training or conditions for licensing.

The final rule also took into consideration comments that doctors of national and international renown are exempted from the FLEX requirement. They must, however, comply with the licensure requirements as set by the state of their intended employment.

The INS does not exempt alien graduates from Canadian medical schools, maintaining under the final provision that a Canadian medical license is not equivalent to the FLEX.