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Before The
State Of Wisconsin
MEDICAL EXAMINING BOARD

In the Matter of the Application for NIPA H.
SINH, M.D., Applicant

FINAL DECISION AND ORDER
Order No. **0003052**

Division of Legal Services and Compliance Case No. 13 MED 398

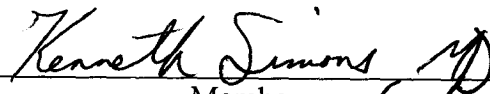
The State of Wisconsin, Medical Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Medical Examining Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated at Madison, Wisconsin on the 24th day of February, 2014.



Member
Medical Examining Board



1
Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

0003052

In the Matter of the Application for NIPA H.
SINH, Applicant

PROPOSED DECISION AND ORDER
DHA Case No. SPS-13-0049

Division of Legal Services and Compliance Case No. 13 MED 398

The parties to this proceeding for purposes of Wis. Stat. §§ 227.47(1) and 227.53 are:

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PROCEDURAL SUMMARY

On February 28, 2013, Dr. Sinh applied for a Wisconsin license to practice medicine.
(App. Ex. 118). Dr. Sinh had passed all of the requirements for Wisconsin licensure but was

asked to come in for an oral exam before the Wisconsin Medical Examining Board (Board) pursuant to Wis. Admin. Code § Med 1.06.¹ (Division Ex. 1, pp. 60-62).

The two-person oral examination was held on July 17, 2013. The reasons for the request for the two-person examination were that Dr. Sinh took the Step Three of the U.S. Medical Licensing Examination (USMLE)² four or more times and had not practiced medicine and surgery for a period of three years prior to the application. (Division Ex. 1, pp. 51-53) The Division's file further indicates, "Unable to decipher medical education and residency info" and "[h]as taken numerous times off" and "[l]ong gap practice medicine and not educated to do general practice." (*Id.*) The notes stemming from the oral examination reflect concern surrounding the amount of training in primary care and Dr. Sinh's readiness to practice independently. (Division Ex. 1, pp. 44-45)

Dr. Sinh was notified on July 18, 2013 that she was unsuccessful in the two-person examination and that if she wished to pursue the licensure process, she was required to be reexamined by the full Board on August 14, 2013 or on September 18, 2013. (App. Ex. 119; Division Ex. 1, p. 43). The full Board oral examination was held on August 14, 2013. Thereafter, Dr. Sinh received a letter from the Board dated August 22, 2013, denying her license application with the reason expressed as "Unable to practice with reasonable skill and safety based upon your lack of adequate clinical experience for the last three years." As its legal basis, the notice of denial cited Wis. Stat. §§ 448.05(2) and 448.06(2). (Division Ex. 1, p. 55)

Dr. Sinh subsequently retained an attorney to assist her and, pursuant to Wis. Admin. Code SPS § 1.07, her attorney requested a hearing.

FINDINGS OF FACT

1. Dr. Sinh is a foreign-trained medical graduate who became a physician in India in 1990 and is qualified in India to practice both in primary care and anesthesiology. (App. Ex. 100, 101, 105, 106 and 116 Hrg. Trans., pp. 26-27, 63-64)

¹ Wis. Admin. Code § Med 1.06(1)(a) states:

(1)

(a) All applicants shall complete the computer-based examination under sub. (3)(b), and an open book examination on statutes and rules governing the practice of medicine and surgery in Wisconsin. In addition, an applicant may be required to complete an oral examination if the applicant:

...

7. Has been graduated from a medical school not approved by the board.

...

11. Has not practiced medicine and surgery for a period of 3 years prior to application, unless the applicant has been graduated from a school of medicine within that period.

Moreover, Wis. Admin. Code § Med 1.08(2) states that if an applicant has been examined four or more times in another licensing jurisdiction before achieving a passing grade, then the board may require further professional training or education and in doing so, may consider any information available, including the results of the applicant's performance on the oral examination.

² The Division's file notes actually refer to the "FLEX" examination. The Division states that FLEX was the former name for the USMLE, and the applicant does not dispute that assertion.

2. Exhibit 100, which was not before the Board at the time of the Board's denial, is a timeline of Dr. Sinh's educational and professional activities from 1984 until the present.

3. Dr. Sinh received a Bachelor of Medicine and Bachelor of Surgery (MBBS) from B.J. Medical College in Ahmedabad, India, the largest medical college in Asia. In order to obtain an MBBS, medical students are required to complete four and a half years of medical school and a one-year internship. Obtaining her MBBS permitted Dr. Sinh to practice primary care in India. (App. Exs. 100, 101, 116, p. 1; Hrg. Trans. pp. 26-27, 60-63)

4. A letter from the Dean of B.J. Medical College states that Dr. Sinh was a "leading participant" in seminars, clinical case presentations and discussions, that she has a good moral character, is hard working and has good communication skills, as demonstrated by her interactions with teachers and colleagues. (App. Ex. 105; Hrg. Trans., p. 61)

5. Following completion of her MBBS, Dr. Sinh completed a residency in anesthesiology in India at the Sheth K.M. School of Post Graduate Medicine and Research (Sheth K.M. University), from March of 1991 to November of 1993, receiving a dual degree, a Diploma in Anesthesiology (D.A.) and an M.D., a Doctor of Medicine in anesthesiology. (App. Exs. 100, 101, 116, pp. 2-3; Hrg. Trans., pp. 27, 63-64)

6. A letter from Dr. Jayshri Balksian Desai of Sheth K.M. University states that he enthusiastically recommends Dr. Sinh and that Dr. Sinh would be a fine and compassionate doctor with exceptional interpersonal and research skills. (App. Ex. 106; Hrg. Trans., pp. 61-62)

7. From January 1994 through September 1998 and from June 1999 through February 2000, Dr. Sinh practiced as an anesthesiologist in India, working full-time in three different hospitals. (App. Ex. 100; Hrg. Trans., p. 28)

8. Dr. Sinh also worked exclusively as a primary care physician in a private practice clinic from September 1998 to June 1999 and then again from May 2000 to November of 2000. In addition, when she had time off from her anesthesiology work at the hospitals, she practiced as a primary doctor at a clinic she ran with her brother, who is also a physician. (App. Ex. 100; Hrg. Trans., pp. 28, 66-68)

9. In January 2001, Dr. Sinh got married, and in April of 2001, moved to the United States. She currently lives in Oakland, California and became a U.S. citizen in 2006. (App. Ex. 100 Hrg. Trans., p. 23)

10. In June of 2001, Dr. Sinh enrolled in Kaplan Medical Institute in San Francisco to assist her with the USMLE, Steps One and Two. Within two months of enrolling, she became ill and believed she had pneumonia. She was seen as a patient at the University of California San Francisco (UCSF), and after obtaining an x-ray and other testing, was diagnosed with multidrug resistant tuberculosis. She was very ill for several months and was treated for 18 months. During that time, she had been registered for the USMLE exam, Step One, but she postponed it. (App. Ex. 100; Hrg. Trans., pp. 30-31)

11. While still undergoing treatment, in December of 2002, Dr. Sinh took the USMLE, Step Two, and failed. In October of 2003, she took Step One of the USMLE and passed, and in 2004, passed Step Two of the USMLE. (App. Ex. 100)

12. From May through November of 2005, Dr. Sinh participated in an externship at San Francisco General Hospital, in the tuberculosis control division, working with the director of that division, Dr. L. Masae Kawamura, who had treated Dr. Sinh when she had tuberculosis. (App. Ex. 100; Hrg. Trans., p. 33)

13. In a letter dated October 4, 2005, Dr. Kawamura indicates that she found Dr. Sinh to be “energetic, attentive, and motivated to learn” and that she was a “stable and mature physician, who is prompt, reliable, intelligent, and works well with staff and patients.” The letter further states that Dr. Kawamura was impressed with Dr. Sinh’s work ethic and high level of interest in patient care, management and follow-up. (App. Ex. 108; Hrg. Trans., p. 33)

14. From June 2005 through March 2007, Dr. Sinh worked with Dr. Alan Gelb and Renee Cibulka at the San Francisco General Hospital as an emergency room (ER) volunteer. She was promoted to the Physician Volunteer Program (PVP), designed for foreign-trained physicians, in which she shadowed and assisted attending doctors as they made their rounds. In that capacity, Dr. Sinh worked with ER patients. (App. Ex. 100; Hrg. Trans., pp. 35-37)

15. In a letter dated August 8, 2006, Drs. Gelb and Cibulka noted that the PVP program, in which Dr. Sinh participated, was “open only to our most experienced and trusted volunteers” and that in Dr. Sinh’s work with the PVP, she worked more hours in her first six months than many volunteers work over a year’s time. The physicians concluded that Dr. Sinh “has all of the qualities that form an excellent physician” and that she is “compassionate, intelligent, hard-working, dedicated and a pleasure to work with.” (App. Ex. 109, Hrg. Trans., p. 35)

16. Dr. Jeffrey Tabas, an Associate Professor of Medicine at UCSF School of Medicine and an attending physician in the ER of San Francisco General Hospital, indicated in an October 19, 2005 letter that Dr. Sinh helped ER residents attending the trauma cases, wound suturing and conducting CPR. He further stated that Dr. Sinh continued to show efficiency and competency in tasks such as gathering information from patient records, contacting primary care physicians, attending rounds and other duties as directed by the physicians. He also noted that he occasionally asked her questions regarding radiographs or electrocardiograms that they reviewed and that she showed knowledge in these areas. (App. Ex. 107; Hrg. Trans., pp. 35-36)

17. From June to November of 2006, Dr. Sinh worked in the anesthesia department at UCSF with Dr. Jens Krombach, an anesthesiologist from Germany, shadowing him in the operating room. Dr. Krombach indicated in a letter dated October 16, 2006 that Dr. Sinh showed a very strong desire to learn and that she was punctual, energetic, and dedicated, with reliable work habits and a positive attitude. (App. Exs. 100, 110; Hrg. Trans., pp. 37-38)

18. From July 2006 to January 2007, Dr. Sinh also worked as a research assistant at UCSF Mt. Zion, in the anesthesiology department, assisting a professor in researching the issue of ventilator associated pneumonia in ICU patients. (App. Ex. 100; Hrg. Trans., p. 39)

19. In September of 2007, Dr. Sinh became pregnant. Six weeks into her pregnancy, she had bleeding and was admitted to the emergency room at UCSF and stayed for observation for one day. She was 40 years old and her pregnancy was therefore considered to be high-risk. Two weeks after her admission to the emergency room, in November of 2007, she took Step 3 of the USMLE and failed. (App. Ex. 100; Hrg. Trans., p. 24)

20. From November of 2007 to April of 2008, Dr. Sinh began an externship at a clinic, working for Dr. Bhupinder Bhandari.

21. Dr. Sinh went on maternity leave in May of 2008 and her son was born in June of 2008. (App. Ex. 100; Hrg. Trans., p. 24)

22. From June 2009 to June 2010, Dr. Sinh completed a residency program in general surgery at Bronx Lebanon in New York, which was highly competitive to get into. The facility was a level one trauma center and Dr. Sinh had the opportunity to treat surgical emergencies such as gunshot and stab wounds. Other experiences at Bronx Lebanon included dealing with patients with substance abuse issues and mental health issues. Dr. Sinh completed rotations in general surgery, orthopedics, anesthesiology, ICU, and in clinics. (App. Ex. 113; Hrg. Trans., pp. 44-45)

23. Dr. John Cosgrove, the program director and chairman in the Department of Surgery at Bronx Lebanon, states in a letter dated November 25, 2009, while Dr. Sinh was still at Bronx Lebanon, that Dr. Sinh meshes very well with the clinical team at Bronx Lebanon, that it is a very difficult first year which she was handling quite well, and that she is compassionate and a team player. In a separate note to Dr. Sinh dated June 14, 2010, Dr. Cosgrove thanked Dr. Sinh for her "excellent service" to Bronx Lebanon. (App. Exs. 111 and 112; Hrg. Trans., pp. 47-48)

24. Dr. Harish Nirujogi testified on Dr. Sinh's behalf at the hearing. Dr. Nirujogi was a fellow intern with Dr. Sinh and is now the chief resident in surgery at Bronx Lebanon. He was already qualified as a surgeon in India at the time he worked with Dr. Sinh. Drs. Nirujogi and Sinh worked together as interns in 2009 and 2010. They did rotations together, doing the same rotation for at least three months. He mainly worked with her in the intensive care unit and at the clinics. Much of what the interns did would be considered primary care. At the clinic, their duties included taking patient histories and doing physicals for inpatients. They also wrote daily progress notes and saw patients for their first postoperative follow-ups. They sometimes did small procedures like incision and drainage. (Hrg. Trans., pp. 48, 76-81)

25. Dr. Nirujogi described Dr. Sinh as a "very good physician" who was hard working and prompt in doing whatever she was told to do by the chief resident. He had no hesitation in saying she demonstrated clinical competence and stated that she was very good at patient care and that patients liked her. (Hrg. Trans., pp. 77-78)

26. During the residency at Bronx Lebanon, in October of 2009, Dr. Sinh's father became ill and was diagnosed with pneumonia and placed on a ventilator for three months. He died in January of 2010. Dr. Sinh visited him in India during his illness. One year later, her mother became ill and during her illness from October 2010 to January 2011, Dr. Sinh went to India to take care of her. (App. Ex. 100; Hrg. Trans., pp. 48-49)

27. In June of 2011, Dr. Sinh again took the USMLE, Step Three, and again failed. (App. Ex. 100)

28. Following completion of her residency at Bronx Lebanon, in August of 2011, Dr. Sinh resumed her work with Dr. Bhandari and his practice group, where she still works. Dr. Bhandari testified on Dr. Sinh's behalf at hearing and has written numerous letters of recommendation for her. (App. Ex. 104; Hrg. Trans., pp. 84-91)

29. Dr. Bhandari is an internal medicine and gastroenterology specialist. He obtained his primary medical degree in India and then went to England where he obtained a medical degree, called an MRCP. He then came to the United States and trained in internal medicine at Stonybrook, a University program, where he served as chief medical resident. Following that, he did four years of training at the University of California in San Francisco in gastroenterology and liver diseases. He has been practicing in the San Francisco area for approximately 17 years and is the chief medical assistant of a very large university program. He is board certified, is a diplomate of the internal medicine board, a fellow of the American College of Physicians, and a member of the Royal College of Physicians. (Hrg. Trans., pp. 85-88)

30. Dr. Bhandari is the principal in a primary practice of five physicians. His practice is very busy and includes many primary care patients as well as gastroenterology patients. His clinic sees patients from all socioeconomic backgrounds with a variety of medical problems, including a lot of "bread-and-butter" medical issues. (App. Ex. 104; Hrg. Trans., pp. 87-90)

31. Dr. Bhandari has been working with Dr. Sinh for approximately three years and has had the opportunity to observe her abilities very closely, including her examinations and interviews of patients. Drs. Bhandari and Sinh have follow-up discussions on the clinical issues and how to proceed with the patients' care, often based on investigations, labs, studies or x-rays. Dr. Sinh collaborates with Dr. Bhandari on plans and treatment. (*Id.*)

32. Dr. Sinh's work for Dr. Bhandari has included taking the patients' history; conducting physical examinations; reviewing lab results and radiological imaging studies where a patient has an ultrasound, CT scan or x-rays, reviewing reports; double-checking vitals taken by medical assistants; and discussing cases with Dr. Bhandari in detail. She sees patients by herself and patients ask to see her in particular. Dr. Sinh has worked with other physicians and a physician assistant in Dr. Bhandari's office. She stated that the kind of work she does is similar to a resident's work during a residency. She cannot write any prescriptions, however, because she does not have a license. (App. Ex. 104; Hrg. Trans., pp. 41-44)

33. Dr. Bhandari testified that Dr. Sinh was "quite knowledgeable and she always came up with good ideas" and that she exhibited clinical thinking that was in line with Dr. Bhandari's

practice. Dr. Bhandari believes that Dr. Sinh would make a good physician and trusted her judgment. The patients, staff and colleagues all liked her. Her duties in Dr. Bhandari's clinic are similar to those of a resident in primary care or family medicine. Dr. Bhandari trusts her abilities as a physician and believes she would work well as an independent physician. He stated that Dr. Sinh could practice as a physician with reasonable skill and safety and had no hesitation in recommending her for Wisconsin licensure. He also would "definitely" allow Dr. Sinh to treat one of his family members. When asked by the Division's attorney whether he believed that Dr. Sinh is currently ready to practice as a solo practitioner or needs one more year of residency in primary care, Dr. Bhandari stated she is ready to serve as a solo practitioner now. (Hrg. Trans., pp. 87-91)

34. In a letter to the Wisconsin Medical Examining Board dated September 10, 2013, Dr. Bhandari concludes by stating that Dr. Sinh is an "excellent candidate for medical licensure in the state of Wisconsin," that she "already has valuable experience and a very keen and able mind," and that she "will certainly be an asset for any medical practice." (App. Ex. 104, p. 1)

35. Dr. Sinh has not been paid for any of her work with Dr. Bhandari or with any of the other facilities in which she has worked since moving to this country. (Hrg. Trans., pp. 37, 40, 65)

36. In the summer of 2012, Dr. Sinh participated in a program at East Tennessee State University, Department of Family Medicine, called the International Medical Graduate Institute, which was a competitive program to get into. The program was an intensive program of three twelve-hour days in which participants had to present cases, engage with real patients and engage in simulations involving case scenarios. (Hrg. Trans., pp. 50-51)

37. An evaluation was completed in August of 2012 from Tennessee State and includes the following question and answer: "Is this student's level of function appropriate to his or her level of training? No. Her level of training in patient-centered communication skills is more comparable to a second-year ETSU medical student. She can remediate this." The end of the evaluation states that she is ready to enter or re-enter residency. (Hrg. Trans., p. 99)

38. After failing on three prior occasions, in February of 2013, Dr. Sinh passed Step Three of the USMLE. Step three is designed to assess whether an examinee "possesses the medical knowledge and understanding of clinical science considered essential for the unsupervised practice of medicine with an emphasis on patient management in ambulatory care settings." For one part of Step Three, Dr. Sinh's score was 211 where the minimum passing score was 190, and for the other part of Step Three, Dr. Sinh's score was 80 where the passing score was 75. (App. Ex. 117)

39. Dr. Sinh has passed the written test in Wisconsin to obtain licensure and all other requirements but for passing the oral examinations.

40. Dr. Sinh was nervous during her two oral examinations before the Board. She spoke quietly and softly. She did not provide detailed information to the Board about her work with Dr. Bhandari, and although she brought letters of recommendation with her to the oral

examinations, they were not requested and she did not provide them. Dr. Sinh likewise did not inform the Board of much of her other experience as set forth in the preceding paragraphs. (Hrg. Trans., pp. 36-37, 57-58)

41. One of the physicians on the two-person oral examination panel changed his mind during the full panel and believed that Dr. Sinh should be licensed. (Divison's Ex. 1, pp. 44, 56)

DISCUSSION AND CONCLUSIONS OF LAW

Wisconsin Stat. § 448.06(2) gives the Board discretion to deny licensure “[o]n the basis of unprofessional conduct on the part of the applicant, failure to possess the education and training required for that class of license or certificate for which application is made, or failure to achieve a passing grade in the required examinations.” The reason expressed in the Board’s Notice of Denial dated August 22, 2013, was “Unable to practice with reasonable skill and safety based upon your lack of adequate clinical experience for the last three years.” The Notice cited Wis. Stat. §§ 448.05(2)³ and 448.06(2).

Dr. Sinh argues that the Board’s decision to deny her application should be reversed. In support of her assertion, she relies on Wis. Admin. Code §§ SPS 1.07(3) and 1.08(4). Wisconsin Admin. § SPS 1.07(3) states that an applicant requesting a hearing must indicate “a description of the mistake in fact or law which constitutes reasonable grounds for reversing the decision to deny the application for a credential. . . .” Wisconsin Admin. Code § 1.08(4) provides the burden of proof for denial review proceedings:

(4) BURDEN OF PROOF. The applicant has the burden of proof to show by evidence satisfactory to the credentialing authority that the applicant meets the eligibility requirements set by law for the credential. The office of examinations has the burden of proof to show by a preponderance of the evidence that the applicant cheated on an examination or breached examination security.

Dr. Sinh argues that pursuant to these provisions, an applicant’s burden is to show by “satisfactory evidence” that the Board committed a mistake of fact or law in denying the application. She asserts that the Board committed a mistake of fact because, contrary to the Board’s conclusion, she is able to practice with reasonable skill and safety and has had sufficient clinical experience for the past three years to be granted her license. She also argues that the Board “arguably” made a mistake of law because the provisions it cited, Wis. Stat. §§ 448.05(2)

³ Wis. Stat. § 448.05(2) provides, in pertinent part:

LICENSE TO PRACTICE MEDICINE AND SURGERY. . . . If an applicant is a graduate of a foreign medical school which has not been approved by the board, and if such applicant has had postgraduate training in this country in a 12-month program approved by the board or has had other professional experience which the board deems has given the applicant the education and training substantially equivalent, and if such applicant has passed the examinations given by the educational council for foreign medical graduates or its successors, the board may make such additional inquiry including a personal interview as satisfies it that the applicant has had such education and training.

and 448.06(2), do not refer to clinical experience for the past three years prior to the application or practicing with reasonable skill or safety.

The Division responds that, while the wording related to the burden of proof contained in Wis. Admin. Code § SPS 1.08(4) is “unfortunate” and difficult to discern, that provision should be construed to require a showing by a preponderance of the evidence, not simply satisfactory evidence. The Division also states that it does not dispute Dr. Sinh’s qualifications, apart from her failure of the oral examinations. The Division further argues that the Board has a high degree of discretion in determining whether someone has passed the oral examination and that this determination can only be overturned if it is arbitrary and capricious. Because the Board’s determination that Dr. Sinh did not pass the examinations was not arbitrary or capricious, the Division argues, that determination should be upheld.

In the alternative, the Division states that this tribunal may take advantage of the following rule:

(5) EVIDENCE. The credentialing authority, the office of examinations and the applicant shall have the right to appear in person or by counsel, to call, examine and cross-examine witnesses and to introduce evidence into the record. If the applicant submits evidence of eligibility for a credential which was not submitted to the credentialing authority prior to denial of the application, the presiding officer may request the credentialing authority to reconsider the application and the evidence of eligibility not previously considered.

The Division likewise indicated in its opening statement: “That said, I know the board did not have the benefit of the testimony we’re going to hear today particularly from the physicians in California with whom she was apparently working in a capacity as a medical assistant or something, and so we remain open to that testimony.” (Hrg. Trans., p. 20)

I conclude that under the circumstances, the most reasonable course of action is to request that the Board reconsider the application based on the evidence (including the testimony) submitted at hearing as summarized in the findings of fact above. I cannot conclude that under either burden of proof advanced by the parties, the Board erred in denying Dr. Sinh’s application when Dr. Sinh failed, for whatever reasons, to submit her most persuasive evidence qualifying her for licensure.⁴ That said, it also appears unreasonable to uphold the Board’s denial, when the Board was deprived of significant information regarding Dr. Sinh’s qualifications, and the Division itself does not appear to seriously dispute that she has the requisite experience.⁵

⁴ I recognize that Dr. Sinh did not have counsel at the time she submitted her information to the Board and underwent the required oral examinations, and I have no doubt, based on the very thorough and well-organized presentation of the evidence by Dr. Sinh’s counsel in these proceedings, that had Dr. Sinh retained counsel prior to submitting her application and undergoing her examinations, counsel would have ensured that the Board had the same information as that presented here.

⁵ I also note that one of the two Board members conducting the two-person examination later changed his vote, ultimately concluding that Dr. Sinh should be licensed.

Also supporting reconsideration by the Board is the standard articulated in Wis. Admin. Code § SPS § 1.08(4), “evidence satisfactory *to the credentialing authority* that the applicant meets the eligibility requirements,” which suggests a great amount of Board discretion in granting or denying an application. It is more reasonable to allow the Board to exercise its discretion based on all of the relevant information, rather than to have this tribunal make a determination in the first instance, based on information that was not before the Board and which might make a difference in the Board’s decision.

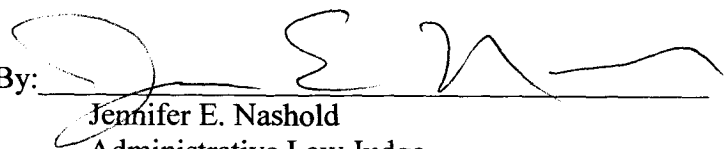
ORDER

Based on the foregoing, it is hereby ORDERED:

The record in this case is submitted to the Board to reconsider Dr. Sinh’s application and the evidence of eligibility not previously considered by the Board.

Dated at Madison, Wisconsin on January 31, 2014.

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By: 
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