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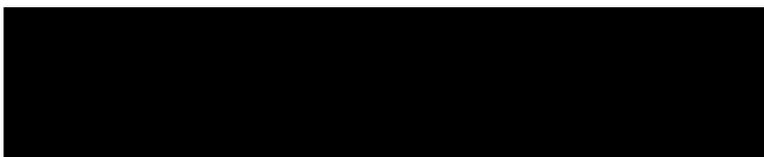
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 06 190 50535 Office: VERMONT SERVICE CENTER Date: DEC 11 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner provides software consulting, training, and development services. It seeks to employ the beneficiary as a software engineer. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On December 6, 2006, the director denied the petition. The director determined that the petition was based on a change of status request under a Free Trade Agreement and thus the petitioner was claiming the petition was exempt from the 2007 numerical cap. On appeal, the petitioner indicates that it improperly indicated on the Form I-129 that the petition was filed under the Free Trade Agreement. The petitioner adds that the beneficiary is in India and will apply for a visa at the United States Consulate in New Delhi, India.

The record of proceeding before the AAO includes: (1) the Form I-129 filed on May 30, 2006; (2) the director's December 6, 2006 denial decision; and (3) the Form I-290B and December 22, 2006 statement in support of the appeal. The AAO has considered the record in its entirety.

The Form I-129 was filed May 30, 2006.¹ The petitioner indicated on the Form I-129, Part 2, Question 5, Box (f), that the petition was based upon a: "Change status to a nonimmigrant classification based on a Free Trade Agreement." The Vermont Service Center accepted the petition, as a petition requesting adjudication of a change to a nonimmigrant classification based on a Free Trade Agreement. Upon review of the petition, the director determined that the petitioner had not submitted evidence demonstrating that the beneficiary had ever been in a valid TN status; thus was not eligible to change status based on the information on the petition or in the record. The director properly considered the petition and correctly determined that the petition was not subject to a Free Trade Agreement. The AAO acknowledges the petitioner's indication that it had checked the wrong box on the Form I-129; however, the director properly adjudicated the Form I-129 based on the record before CIS. The error notwithstanding, the director adjudicated the petition.

As always the burden of proof in this proceeding 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.

¹ On May 26, 2006, Citizenship and Immigration Services received sufficient numbers of H-1B petitions to reach the 65,000 numerical limit on issuing H-1B visas for fiscal year 2007. The cap numbers for petitions filed under a Free Trade Agreement were not reached for fiscal year 2007.