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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: EAC 06 247 51529 Office: VERMONT SERVICE CENTER

Date:

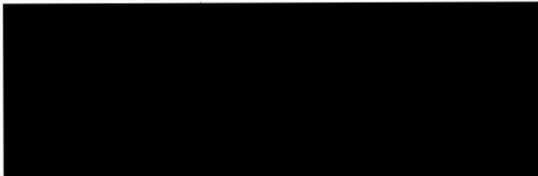
JAN 04 2008

IN RE: Petitioner:
Beneficiary:



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:



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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded for the director to reject the petition and return the filing fee.

The petitioner is a restaurant that seeks to employ the beneficiary as a *chef de partie du poisson*. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 on the basis that it is subject to the numerical limitations for fiscal year 2007. The director also found that the petition was rejected four times for not having the proper American Competitiveness and Workforce Improvement Act (ACWIA) fee of \$1,000, or demonstrating eligibility for an exemption of such fee.

On appeal, counsel asserts, in part, as follows:

Whether or not the processing fees were correct or incorrect the application was timely received and should have been accepted by the Service, and either the Service should have billed the additional \$750.00 or accepted the fees as tendered.

In any event should the Service prevail in the above arguments the filing fee . . . should be returned or should have been returned.

Pursuant to 8 C.F.R. § 103.2(a)(7)(i):

[A]n application or petition which is not properly signed or is submitted with the wrong filing fee shall be rejected as improperly filed. Rejected applications and petitions, and ones in which the check or other financial instrument used to pay the filing fee is subsequently returned as nonpayable will not retain a filing date. . . .

The denial of a petition for improper payment of filing fees is not a matter within the jurisdiction of the AAO. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). To the extent that the appeal seeks relief from the denial of the petition for the incorrect payment of the filing fee, the appeal will be rejected.

The director also denied the petition because of answers the petitioner had provided on the petition or on Part C of the Form I-129 H-1B Data Collection Sheet. The director indicated that the petition would have been rejected based on numerical limitation had the petitioner not provided incorrect information on the petition. Specifically, in Part B of the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, the petitioner incorrectly indicated that the petitioner currently employed no more than 25 full-time equivalent employees in the United States, including any affiliate or subsidiary of its company. However, information on the petition reflects that the petitioner has 134 employees. While it appears that the petitioner did not provide

consistent answers to the question about the number of its employees, the director improperly accepted the petition for filing. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(D):

If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year.

The director's determination of the appropriate fee under Part B, section 9 of the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement has no bearing on whether the petition seeks exemption from the numerical limitations. Nowhere on the petition or on the H-1B Data Collection and Filing Fee Exemption Supplement does the petitioner indicate that it is exempt from the numerical limitations, or that it is subject to the numerical limitations for those with master's or higher degrees obtained from a United States institution or for those subject to a free trade agreement.

The petition should have been rejected and the fee returned as subject to the numerical limitations under 8 C.F.R. § 214.2(h)(8)(ii)(D). Accordingly, the petitioner has overcome this portion of the director's grounds upon which the director denied the petition. The decision of the director will be withdrawn and the matter will be remanded for rejection of the petition and return of the filing fee.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden with respect to the portion of the director's decision accepting the petition for filing.

ORDER: The director's December 6, 2006 decision is withdrawn. The petition is remanded to the director for rejection of the petition and return of the filing fee.