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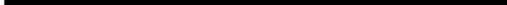
U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 231 52168 Office: CALIFORNIA SERVICE CENTER Date: **JUL 24 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 Director, California Service Center, denied the nonimmigrant visa petition and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a newly organized for-profit company formed to produce tomatoes and other vegetables for commercial sale. It seeks to employ the beneficiary as a research scientist. 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).

The petitioner filed the petition on July 30, 2007 and checked box (e) - change of employer as the basis for classification in response to question 2 on the Form I-129. The petitioner checked box (d) - amend the stay of the person(s) since they now hold this status, in response to question 5 on the Form I-129. The petitioner indicated that the beneficiary's H-1B status expired December 31, 2009 and that the petitioner intended to employ the beneficiary from June 16, 2007 to December 31, 2009. On the Form I-129 H-1B Data Collection Supplement, in response to Part C Question 6, the petitioner noted that the beneficiary's previous H-1B work was for an institution of higher education and thus would have been exempt from the numerical limitation on H-1B workers. The petitioner also submitted the Form ETA 9035E, Labor Condition Application (LCA) indicating the start date of certification as June 16, 2007 and ending June 15, 2010.

On December 11, 2007 the director denied the petition. The director found that the petitioner had filed its petition after the date on which Citizenship and Immigration Services (CIS) ceased accepting new H-1B petitions. The director noted that the beneficiary did not qualify for the exemption for aliens who had received a master's degree from a United States institution of higher learning.

On a motion to reconsider, counsel for the petitioner stated that the petitioner was not seeking H-1B status based on any exemption, but rather was seeking to hire the beneficiary based on Section 105 of the American Competitiveness in the 21st Century Act (AC21) which amended Section 214 of the Immigration and Nationality Act. Counsel cited INA Section 214(n), 8 USC § 1184(n) which states in pertinent part:

Increased Portability of H-1B Status.

(1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (1). Employment authorization shall continue for such alien until the new petition is adjudicated.

Counsel also referenced a private letter dated May 23, 2007, written by Efren Hernandez, III, Chief, Business and Trade Services Branch, Office of Service Center Operations USCIS, regarding a situation of an H-1B nonimmigrant moving from cap exempt to cap subject employment.

On May 16, 2008, the director noted the May 23, 2007 private letter written by Efren Hernandez III, Office of Service Center Operations. The director emphasized that Mr. Hernandez had indicated that Section 214(n) of the

Act, 8 USC § 1184(n), provides employment authorization until the H-1 B petition is either denied or adjudicated and had warned of the risk to a cap subject petitioner that when the cap is reached on the first day of filing and not all first day filers receive a cap number, the alien's work authorization under Section 214(n) would cease. The director reiterated her earlier decision that when the beneficiary moves from a cap exempt employer to an employer who is not cap exempt, and a cap number is not available at the time of filing, the petitioner is not eligible to continue to employ the beneficiary. The director certified this decision to the AAO on May 16, 2008, and informed the petitioner that it could supplement the record with a brief or written statement within 30 days of the May 16, 2008 decision.

Upon review of the record on certification, the petitioner has not submitted further evidence. The AAO concurs with the director's reasoning in this matter. When an H-1B visa holder begins work for a new employer prior to the adjudication of the new petition under the authority of Section 214(n) of the Act, 8 USC § 1184(n), the employment authorization conferred by Section 214(n) ceases when the H-1B petition is adjudicated. The record reflects that the H-1B petition in this matter is subject to the numerical cap. When the petition was filed there were no cap numbers available; therefore, the petition must be denied. Accordingly, the AAO will not disturb the director's December 11, 2007 denial of the petition and the subsequent May 16, 2008 decision certified to the AAO for review.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's May 16, 2008 denial of the petition is affirmed and the petition is denied.