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

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FILE: WAC 04 136 54843 Office: CALIFORNIA SERVICE CENTER Date: OCT 24 2005

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:

[REDACTED]

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, Director
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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is an e-commerce company that seeks to employ the beneficiary as a purchasing agent. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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 director denied the petition because Citizenship and Immigration Services (CIS) had reached its numerical limits for new petitions for H-1B employment for the fiscal year. On appeal, counsel submits a brief.

Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(A), "Requests for petition extension or extension of an alien's stay shall not be counted for the purpose of the numerical limit." While the petitioner incorrectly marked box 4(b) (change the person(s) status and extend their stay), rather than box 4(c) (extend or amend the stay of the person since they now hold this status) on Form I-129, the evidence in the record reflects that the beneficiary was already in H-1B status and employed by a different petitioner. As a result, the petitioner was merely filing for an extension of the beneficiary's status with a change in employment and the beneficiary would not be counted against the numerical limit. The petition will be remanded to be adjudicated on its merits.

In addition, as the director noted in his decision, when the numerical limit has been reached, "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." 8 C.F.R. § 214.2(h)(8)(ii)(E) [emphasis added]. The director, had he been correct in his determination that the petition was subject to the numerical cap, should have rejected the petition and returned it along with the filing fee to the petitioner, rather than denying the petition.

The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the duties of a specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's April 16, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.