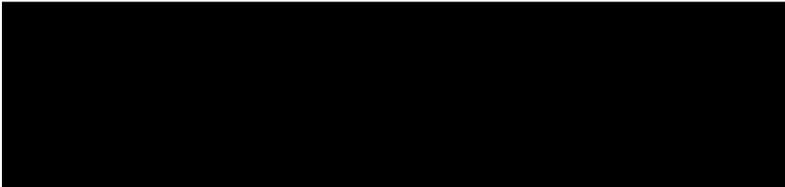


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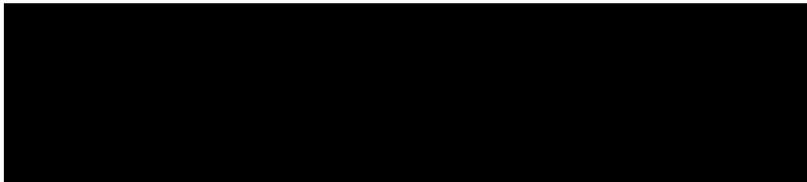
FILE: EAC 07 126 51408 Office: VERMONT SERVICE CENTER

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

The petitioner is an international non-profit organization that seeks to employ the beneficiary as a senior researcher. The petitioner, therefore, 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 2008 fiscal-year cap for the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), was reached on April 2, 2007. Although the Form I-129 petition was received on April 3, 2007, the petition was accepted and adjudicated because the petitioner indicated on the Form I-129 that the beneficiary met the cap exemption criterion at section 214(l)(2)(A) of the Act, 8 U.S.C. § 1184(l)(2)(A) because the beneficiary had received a waiver of the 2-year foreign residence requirement as described in section 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C).

The director denied the petition on the grounds that the beneficiary did not meet the requirements specified in section 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C), and thus the beneficiary was subject to the annual cap.

On appeal, counsel argues that the petitioner did not request an H-1B cap exemption and that the petitioner mistakenly stated that the beneficiary was exempt from the H-1B cap on the Form I-129. Counsel states that Citizenship and Immigration Services (CIS) should have sent the petitioner a request for evidence (RFE) and requests that CIS adjudicate the Form I-129 petition as one of the H-1B cap cases.

The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director's denial letter; and (3) the Form I-290B, and supporting documentation.

Section 214(l)(2)(A) of the Act, 8 U.S.C. § 1184(l)(2)(A), provides an exemption from the H-1B visa cap for individuals whose status is changed from J-1 to H-1B where the beneficiary has obtained a waiver of the two-year foreign residency requirement under Section 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C). The director determined that the beneficiary did not meet the criterion at Section 214(l)(1)(B) or (C) of the Act, and thus was not exempt from the numerical cap under this section.

Section 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C), pertains only to individuals who meet the requirements of section 212(e)(iii) of the Act, 8 U.S.C. § 1182(e)(iii), who have obtained J-1 visas in order to receive graduate medical education or training. *See* 212(e)(iii) of the Act, 8 U.S.C. § 1182(e)(iii). Although the beneficiary was previously in valid J-1 status and obtained a waiver of the 2-year foreign residence requirement, as demonstrated by the approval notice of the Form I-612 Application to Waive Foreign Residence Requirements, the beneficiary does not meet the requirements of section 212(e)(iii) of the

Act, 8 U.S.C. § 1184(l)(2)(A), because the beneficiary is not an alien physician and did not receive graduate medical education or training while he was in J-1 status. On appeal, counsel states that the petitioner mistakenly marked “yes” on the Form I-129, page 11, Part C. Numerical Limitation Exemption Information, question number 4 which states “Is the beneficiary of this petition a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in section 214(l)(1)(B) or (C) of the Act?” Counsel argues that it was not the petitioner’s intention to request an exemption of the numerical limitation, but rather that the petitioner wanted to disclose that the beneficiary obtained a waiver of the 2-year foreign residence requirement. Counsel goes on to argue that question misled the petitioner and that the petitioner believed that the question applied to all J-1 visa holders. Finally, counsel argues that the petitioner is not a “legal expert who can access the governing provision of question 4.” However, on page 4 of the Form I-129, counsel signed Part 7 declaring that he, not the petitioner, prepared the petition. Counsel’s arguments with regards to the petitioner’s confusion in answering the question are not persuasive. The evidence of record does not establish that the beneficiary meets the cap exemption criterion at section 214(l)(2)(A) of the Act, 8 U.S.C. § 1184(l)(2)(A) as the beneficiary is not an alien physician and did not obtain graduate medical education or training as a J-1 visa holder.

In his appeal brief, counsel also argues that pursuant to 8 C.F.R. § 103.2(b)(8), CIS is required to issue an RFE and states that:

By looking at the petition in its entirety, the adjudicating officer could easily note that the case is subject to H-1B Cap and the mark on the supplement form was made by simple mistake. Under the circumstance the adjudicating officer should have issued a RFE notice to clarify and to correct the obvious mistake. In the absence of clear evidence that the petition truly intended for requesting exemption of H-1B cap, the denial decision must be reversed.

8 C.F.R. § 103.2(b)(8) does not require the issuance of an RFE, but instead makes such requests discretionary and allows for the denial of a petition without the issuance of an RFE. 8 C.F.R. § 103.2(b)(8)(i) and (ii) states:

(i) Evidence of eligibility or ineligibility. If the evidence submitted with the application or petition establishes eligibility, USCIS will approve the application or petition, except that in any case in which the applicable statute or regulation makes the approval of a petition or application a matter entrusted to USCIS discretion, USCIS will approve the petition or application only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. *If the record evidence establishes ineligibility, the application or petition will be denied on that basis.* (emphasis added)

(ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

Upon reviewing the petition, the director determined that the beneficiary did not meet the requirements specified in section 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C), and therefore, was subject to the annual cap. The record of evidence establishes that the beneficiary is not eligible for an exemption to the H-1B cap and therefore, the director's denial of the petition meets the requirements of 8 C.F.R. § 103.2(b)(8). An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. *See* 8 C.F.R. § 103.2(b)(1).

In addition, counsel quotes the following excerpts from a February 2005 memorandum from William R. Yates, Associate Director, Operations, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, to Regional Directors, Service Center Directors, District Directors, and Officers-in-Charge, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)* HQPRD 70/2 (February 16, 2005) (hereinafter referred to as "Yates Memorandum"):

[T]he May 4, 2004 memorandum appears to have created a misimpression that cases could be denied without RFE or NOID even when a[n] RFE or NOID may have given the applicant or petitioner ("filer") a reasonable chance to resolve adjudicator's concerns about lack of evidence or about apparent ineligibility.

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[W]hen the evidence raises underlying questions regarding eligibility or does not fully establish eligibility, issuance of a[n] RFE or NOID is usually discretionary but strongly recommended.

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[U]nless the case is clearly ineligible for approval (i.e., denial decision) or the filer has demonstrated eligibility by the preponderance of evidence without special cause for concern (i.e., approval decision), adjudicators normally should issue a[n] RFE or a NOID, whichever is more appropriate.

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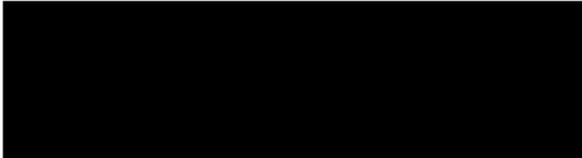
Adjudicating officers must evaluate records of proceeding in their entirety and are required by regulation to clearly explain the specific reasons for denial.

The Yates Memorandum provides the following guidance for the denial of petitions:

On one end of the spectrum, 8 C.F.R. § 103.2(b)(8) provides that an application of petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. Clear ineligibility exists when the adjudicator can be sure that an applicant or petitioner cannot meet a basic statutory or regulatory requirement, even if the filer were to be given the opportunity to present additional information.

In this case, the beneficiary is clearly ineligible and does not meet the cap exemption criterion at section 214(l)(2)(A) of the Act, 8 U.S.C. § 1184(l)(2)(A) despite its noting on the initial petition that it was cap exempt. Additional evidence would not have changed the beneficiary's eligibility. The discretionary RFE, that counsel argues should have been issued, would not have provided the petitioner with the opportunity to change its answer to Question 4 and thereby make a material change to the petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, pursuant to 8 C.F.R. § 103.2(b)(8), the director correctly denied the petition without issuing an RFE.

On appeal, counsel argues that the petition should have been adjudicated as an H-1B cap case because the petition was addressed as follows:



The AAO notes that the evidence of record indicates that the address as stated above was on the U.S. Postal Service Express Mail label for the initial filing of the Form I-129 petition. However, the second line, "ATTN: H-1B Cap," is only used on the address listed in the mailing label. Counsel's cover letter for the initial Form I-129 filing lists the same address, but does not include the second line stating "ATTN: H-1B Cap" nor does counsel state that the petition is an H-1B cap petition anywhere else in his cover letter. The address on the mailing label is not enough to raise questions as to eligibility and require the issuance of an RFE as permitted by 8 C.F.R. § 103.2(b)(8).

Finally, counsel argues that the "deprivation of Petitioner's chance to correct the unintended sole mistake in the Supplement page would significantly impair Petitioner's future business. The denial decision without evaluating petitioner's case in its entirety merely is rather a punishment to the unintended mistake, of which constitute a violation of Due Process Clause under 14<sup>th</sup> Amendment." Although counsel argues that the petitioner's right to procedural due process was violated, counsel has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioner. See *De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. A review of the record and of the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

The AAO finds that the evidence of record does not establish that the beneficiary is exempt from the H-1B visa cap under the requirements of section 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C) because the beneficiary did not receive graduate medical education or training while he was in J-1 status, as required by section 212(e)(iii). Accordingly, the AAO will not disturb the director's denial of the petition

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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 appeal is dismissed. The petition is denied.