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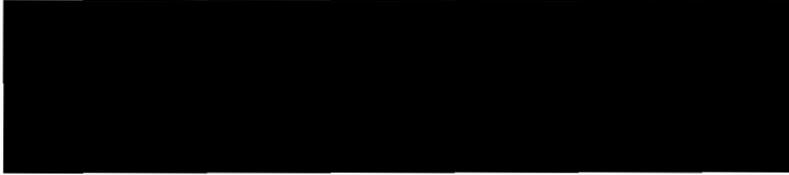
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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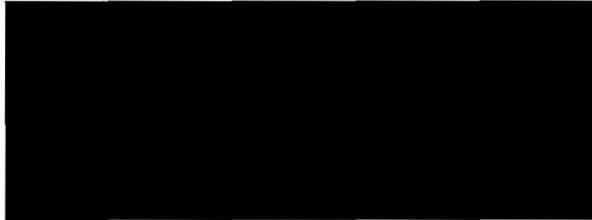
FILE: EAC 07 127 50592 Office: VERMONT SERVICE CENTER Date: **AUG 04 2008**

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 appeal will be dismissed. The petition will be denied.

The petitioner is a teacher recruitment and placement business that seeks to employ the beneficiary as a special education teacher. 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 annual fiscal-year cap on 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 petitioner filed the Form I-129 petition on April 2, 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)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C), as a beneficiary who was granted a waiver of the 2-year foreign residence requirement.

The director denied the petition on the basis that it is subject to the numerical limitations for fiscal year 2008.

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

The petition was denied because the petitioner mistakenly checked [an] answer on the H-1B Data Collection and Filing Exemption Supplement, Form I-129W that was not applicable to the beneficiary. This was an inadvertent clerical error. . . . [T]he petitioner's fees should have been properly used or returned.

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, 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 she 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 the director "should have either put the petition in the pool along with other competing petitions or should have rejected it and refunded the fees to the employer if the available visa cap had been reached." Counsel additionally argues: "Certainly, a petitioner's funds should not be confiscated because of a harmless error." Counsel's arguments 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.

As indicated in the director's decision, the petition was not rejected based on numerical limitation as the petitioner provided incorrect information on the petition. Specifically, in Part C of the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, the petitioner incorrectly indicated that the beneficiary is 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. However, upon adjudication, the evidence of record reflects that the beneficiary is not subject to the two-year residence requirement and therefore was not granted a two-year foreign residency waiver as a foreign medical graduate. Thus, the director properly determined that the petitioner is ineligible for the numerical limitation exemption.

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 not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.