

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

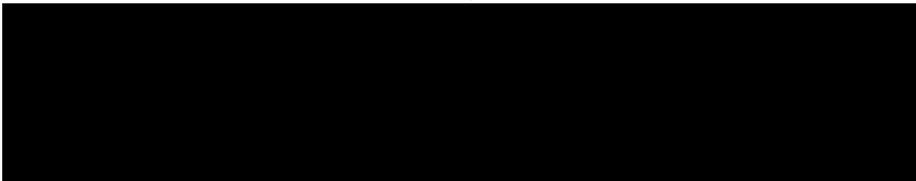
FILE: WAC 07 138 52942 Office: CALIFORNIA SERVICE CENTER Date: **FEB 01 2008**

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 of the 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 a manufacturing business that seeks to employ the beneficiary as an executive staff technical translator. 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 director denied the petition on the basis that it is subject to the numerical limitations for fiscal year 2008, as the beneficiary did not meet the requirements specified in section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C).

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 1, 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(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as a beneficiary who, in the words of the Act, “has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).”

On appeal, counsel asserts that although “box 7 on page 11 was mistakenly checked ‘yes’ . . . this ignores the overwhelming evidence in the Petition that Appellant was not seeking an exemption.” Counsel also asserts, in part, as follows:

[R]eview of the Petition establishes that this was not a Master’s degree case. Therefore, at the very least USCIS should have returned the fees because it mistakenly placed the Petition with the Master’s cases and ran the lottery before realizing the Petitioner was not seeking an exemption.

[I]t should have been apparent that Appellant did not seek an exemption. Therefore, the Petition should have been considered for the lottery.

Section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who “has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.”

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 7 which states “Has the beneficiary of this petition earned a master’s or higher degree from a U.S. institution of higher education, as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)?” Counsel argues that it was not the

petitioner's intention to request an exemption of the numerical limitation. Finally, counsel argues that "it should have been apparent that Appellant did not seek an exemption." Counsel's arguments are not persuasive. The AAO finds that the evidence of record does not establish that the beneficiary is subject to the expanded H-1B visa cap under the requirements of section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C) because the beneficiary had not earned a master's degree. 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.