

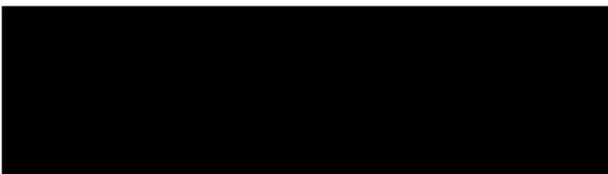
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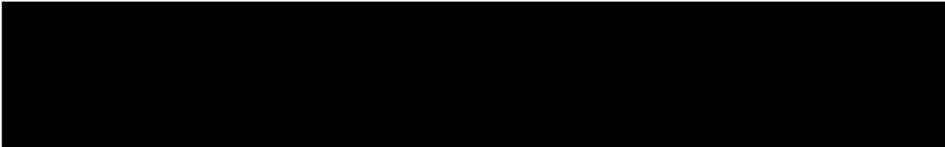


FILE: EAC 07 130 53466 Office: VERMONT SERVICE CENTER Date: FEB 01 2008

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:



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 hotel that seeks to employ the beneficiary as a corporate marketing coordinator. 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 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(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 states, in part, as follows:

The Service has denied [the beneficiary's] petition based on the fact that her documentation did not match the answer provided to a question in Part C of the I-129 H-1B Data Collection Sheet.

A Request for Evidence should have been issued to clarify the discrepancy between her documentation and the answer to the form in question. This would have allowed [the beneficiary] to correct the answer provided to a question in Part C of the I-129 H-1B Data Collection Sheet, and her H-1B petition would have been reclassified under the numerical limitation for FY 2008.

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 director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not

required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility. Counsel's argument is 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.