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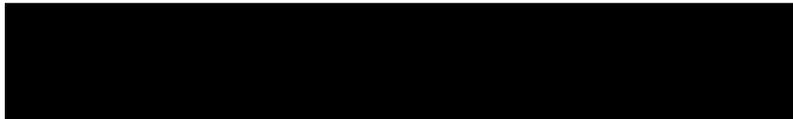


DZ

**JAN 25 2008**

FILE: EAC 06 192 54128 Office: VERMONT SERVICE CENTER Date:

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 an international law firm that seeks to employ the beneficiary as an academic associate. 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 May 26, 2006. Although the petitioner filed the Form I-129 petition on June 1, 2006, 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 2007.

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

[W]henver there is an error in fee submitted according to the information provided on the said form or the documents submitted, the Service rejects the package, not deny the case. Similarly, to be consistent, whenever there is an error on the answers to other questions on the same form, the package should be rejected, not denied.

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 it was not the petitioner’s intention to request an exemption of the numerical limitation. Finally, counsel argues that it is fundamentally unfair to let the petitioner “pay a huge amount of the government fees and then to deny his petition because of harmless errors of his counsel . . .” 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.