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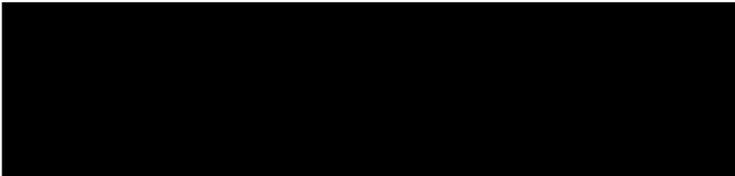
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 06 197 51753 Office: VERMONT SERVICE CENTER Date: JAN 28 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.

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 a software consulting and product development company. It seeks to employ the beneficiary as a software engineer, and endeavors to classify him 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 petitioner filed the Form I-129 petition on June 8, 2006. As of that date, 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) had been reached. The petition was accepted and adjudicated despite the cap limitation, however, because the petitioner indicated in Part C of the Form I-129 that the petition was exempt from cap limitations because the beneficiary had been previously granted status as an H-1B nonimmigrant in the past six years and not left the United States for more than one year after attaining such status. The petitioner concedes, on appeal, that the petition is not exempt from the aforementioned cap limitation. The petitioner further stated, in response to the director's request for evidence, that its claim of a cap limitation exemption on the Form I-129 was a clerical error, and that the beneficiary had not previously been the recipient of an H-1B visa. As such, the beneficiary does not qualify for exemption from the H-1B cap and the director's decision denying the petition shall not be disturbed.

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.