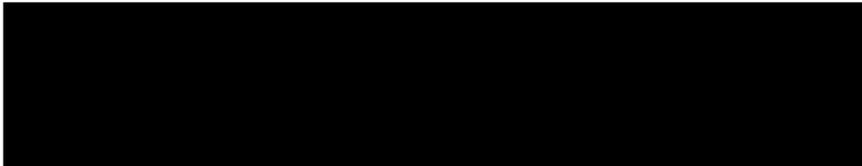


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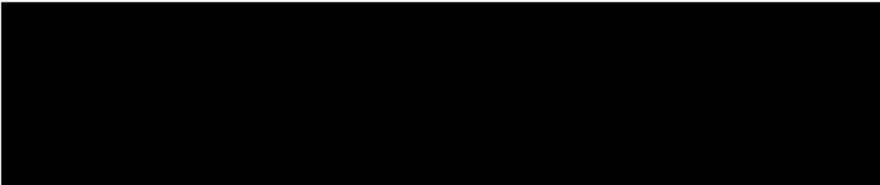
D-2

FILE: EAC 07 128 51058 Office: VERMONT SERVICE CENTER Date: MAR 03 2006

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal is dismissed. The petition is denied.

The petitioner states on the Form I-129 that it provides accounting, auditing, and tax services and that it seeks to employ the beneficiary as an associate. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 record of proceeding before the AAO includes: (1) the Form I-129 filed on April 2, 2007; (2) the director's April 14, 2007 denial decision; and (3) the Form I-290B and counsel's brief submitted in support of the appeal. The AAO has considered the record in its entirety.

On April 14, 2007, the director denied the petition. The director observed that the Form I-129 listed the beneficiary as a J-1 nonimmigrant. The director also noted that the petitioner checked the box on the H-1B Data Collection and Filing Fee Exemption Supplement in Part C, Numerical Limitation Exemption Information, indicating that the beneficiary is a J-1 nonimmigrant alien who had received a waiver of the two-year foreign residency requirement described in section 214(L)(1)(B) or (C) of the Act.

As of the date the petition was filed, April 2, 2007, Citizenship and Immigration Services (CIS) had received sufficient numbers of H-1B petitions to reach the 65,000 numerical limitation for fiscal year 2008. The Vermont Service Center properly accepted the petition, as a petition requesting adjudication based on a numerical limitation exemption. Upon review of the petition, the director determined that the record did not establish that the beneficiary of the petition had received a waiver of the two-year foreign residency requirement described in section 214(L)(1)(B) or (C) of the Act as these waivers applied only to alien physicians; thus, the director denied the petition.

On appeal, counsel for the petitioner asserts that its client inadvertently completed the H-1B Data Collection Supplement form incorrectly. Counsel contends that Question 4 in Part C, Numerical Limitation Exemption, of the H-1B Data Collection Form is unclear. Counsel notes that CIS had issued an approval of the I-612, Application to Waive Foreign Residence Requirements, (EAC 07 013 10009) based on a "No Objection" statement from the Guatemalan government, pursuant to Section 214(L)(1)(A) of the Act. Counsel also asserts that a review of the Form I-129 and supporting documentation would have confirmed that this was not a cap exempt case. Counsel avers that a mere administrative error should not merit a denial.

The AAO acknowledges counsel's assertions; however, even though the petitioner inadvertently checked the wrong box on the Form I-129, the inconsistent information in the record required CIS to review and then adjudicate the cap issue. That issue was properly reviewed and adjudicated and resulted in a denial of the petition. As the petition required adjudication, albeit on a threshold issue, the petition could not be rejected. The director properly denied the petition.

As always the burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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