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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services



D-2

FILE: EAC 07 131 50859 Office: VERMONT SERVICE CENTER

Date: OCT 01 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

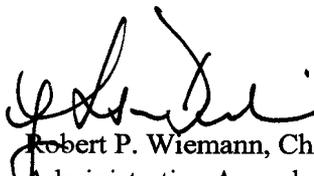
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

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 development corporation that seeks to employ the beneficiary as a computer systems analyst. 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 2008 fiscal-year cap for 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 2, 2007. Although the Form I-129 petition was received 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)(7) of the Act, 8 U.S.C. § 1184(g)(7) because the beneficiary was currently in H-1B status.

The director denied the petition on the grounds that the beneficiary did not meet the requirements specified in section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7) and thus the beneficiary was subject to the annual cap.

On appeal, the petitioner states that the beneficiary is currently in H-4 status and that on “the [Form] I-129, part 2, number 5, letter C was selected erroneously” and that the petitioner intended to select letter B. The petitioner argues that it intended to request a change of status for the beneficiary and not an extension of H-1B status.

The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner’s Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director’s denial letter; and (3) the Form I-290B, and supporting documentation.

Section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), provides an exemption from the H-1B visa cap for individuals who have been previously counted within the 6 years prior to the approval of a Form I-129 petition, unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. The director determined that the beneficiary did not meet the exemption criterion at Section 214(g)(7) of the Act, and thus was not exempt from the numerical cap under this section.

Upon reviewing the petition, the director determined that the beneficiary did not meet the requirements specified in section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), and therefore, was subject to the annual cap. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. *See* 8 C.F.R. § 103.2(b)(1).

The AAO finds that the evidence of record does not establish that the beneficiary is exempt from the H-1B visa cap under the requirements of section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7) because the beneficiary was not previously in H-1B status. Accordingly, the AAO will not disturb the director’s denial of the petition

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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.