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U.S. Citizenship
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FILE: EAC 07 137 51428 Office: VERMONT SERVICE CENTER Date: OCT 01 2008

IN RE: Petitioner:
Beneficiary:



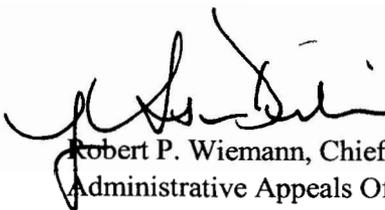
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, 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 design and development corporation that seeks to employ the beneficiary as a software engineer. 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 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(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as a beneficiary who, in the words of the Act, “has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).”

The director denied the petition on the ground that the beneficiary did not meet the requirements specified in section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), and thus the beneficiary was subject to the annual cap.

On appeal, counsel argues that the petitioner did not request an H-1B cap exemption and that the petitioner mistakenly stated that the beneficiary was exempt from the H-1B cap on the Form I-129. Counsel requests that CIS adjudicate the Form I-129 petition as one of the H-1B cap cases.

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)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C) as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who “has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.”

On appeal, counsel states that the beneficiary does not possess “a master's degree from a U.S. educational institution.” Counsel argues that CIS “cannot rely on a single erroneous check in a box, when it is contradicted by the remainder of the petition.” Counsel also states that “the petition was mailed to the Vermont Service Center in an envelope which clearly stated that it was a ‘bachelor's degree cap’ filing.”

The AAO notes that the mailing envelope is not in the record of proceeding. However, the phrase “bachelor’s degree cap” is not included in any of the documents submitted by counsel or the petitioner and a notation on a mailing envelope is not enough to raise questions as to eligibility. The petitioner indicated “yes” on the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, Part C, Question 7, that the “beneficiary of this petition earned a master’s or higher degree from a U.S. institution of higher education, as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a).” The Vermont Service Center accepted the petition, as a petition requesting adjudication under the cap exemption criterion at section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C). Upon review of the petition, the director determined that the petitioner had not submitted evidence demonstrating that the beneficiary had ever earned a master’s or higher degree from a U.S. institution of higher education; thus did not meet the cap exemption criterion based on the information in the record of proceeding. The director properly considered the petition and correctly determined that the beneficiary was subject to the annual cap. The AAO acknowledges the petitioner’s indication that it had checked the wrong box on the Form I-129; however, the director properly adjudicated the Form I-129 based on the record before CIS. The error notwithstanding, the director adjudicated the petition.

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)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C) because the beneficiary had not earned a U.S. master’s degree at the time that the petition was filed. Accordingly, the AAO will not disturb the director’s denial of the petition

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.