



U.S. Citizenship
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FILE: EAC 07 143 53744 Office: VERMONT SERVICE CENTER Date: **SEP 30 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 hotel and provides hotel and hospitality services. It seeks to employ the beneficiary as an assistant general manager. 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 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) filed April 2, 2007 and the supporting documentation filed with it; (2) the director's July 27, 2007 denial letter; and (3) the Form I-290B, counsel's brief, and supporting documentation.

On July 27, 2007, the director denied the petition. The director observed 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 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. The director denied the petition.

On appeal, counsel for the petitioner asserts that CIS should have received this matter as subject to the numerical cap rather than cap exempt as the petition packet including the petitioner's letter and the attorney cover letter did not request cap exempt processing. Counsel also asserts that the beneficiary has received a waiver of her two-year foreign residency requirement and submits a Form I-797, Notice of Action Approval Notice, issued to the beneficiary on March 31, 2007. The Form I-797, Notice of Action states in pertinent part:

The United States Information Agency, based upon a "No Objection" statement from the government of your nationality, has recommended that you and any members of your immediate family be granted a waiver of the two-year foreign resident requirement of section 212(e) of the Immigration and Nationality Act, as amended. This recommendation only refers to the two-year foreign residence obligation which was incurred by virtue of your current or prior nonimmigrant status as a J-1 Exchange Alien.

The petitioner's indication on the H-1B Data Collection and Filing Fee Exemption Supplement in Part C, Numerical Limitation Exemption Information, 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 required CIS to process the application as cap exempt. Upon further review of the record of proceeding, the director found that the beneficiary could not receive 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. The beneficiary's receipt of the Form I-797, Notice of Action Approval Notice, for a waiver of the two-year foreign resident requirement of section 212(e) of the Immigration and Nationality Act, as amended, is not relevant to the cap exempt determination, as the beneficiary is not an alien physician. The petition in this matter that indicates that the beneficiary is cap exempt is a request for adjudication based on a numerical limitation exemption. The director properly adjudicated the numerical limitation exemption 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.

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