

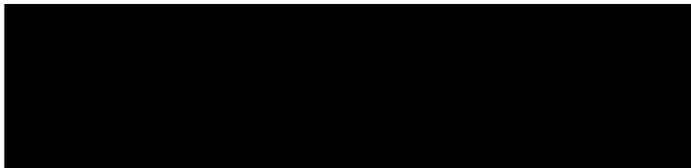
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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
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U.S. Citizenship
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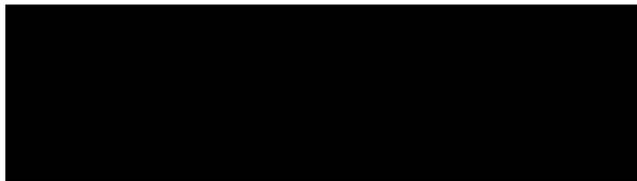
DZ

FILE: EAC 07 147 52945 Office: VERMONT SERVICE CENTER Date: OCT 01 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

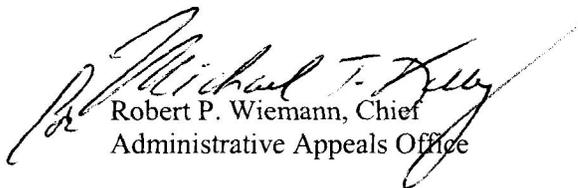
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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 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 company 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 record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 Act¹ (AC-21), 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."

The director, however, denied the petition on the basis of his determination 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 is therefore subject to the fiscal year 2008 numerical cap.

The 2008 fiscal year numerical 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 1, 2007. Although the petitioner filed the petition on April 2, 2007, it 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))."²

Upon review of the petition, the director determined that the petitioner had not submitted evidence demonstrating that the beneficiary possesses a master's or higher degree, and issued a request for evidence of the same on June 25, 2007. Upon review of the petitioner's response, the director properly determined that the beneficiary does not possess a master's or higher degree, and that the petition did not, therefore, qualify for the numerical exemption sought by the petitioner on the Form I-129. The AAO acknowledges the counsel's statement on appeal that the petitioner marked the incorrect box on the Form I-129. However, the director properly adjudicated the Form I-129 based upon the record before him. The petitioner's error notwithstanding, the director adjudicated the petition.

¹ American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

² The petitioner marked the box at Page 11, Part C, Question 7 of the Form I-129 to indicate that petition was exempt from the numerical cap. When asked the question "Has the beneficiary of this petition earned a master's or higher degree from a U.S. institution of higher education. . . .", the petitioner marked the "Yes" box.

As the petition was properly adjudicated, the petitioner may not receive a refund. Nor may the petition be approved, as it is subject to the fiscal year 2008 numerical cap, which was reached on April 1, 2007.

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 sustained that burden.

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