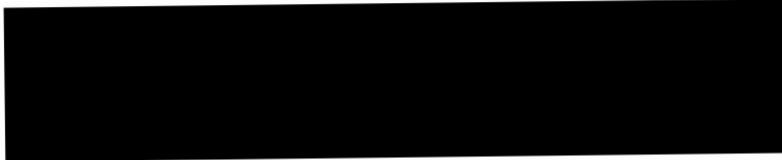




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy

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D-2

FILE: EAC 07 159 51735 Office: VERMONT SERVICE CENTER Date: SEP 30 2008

IN RE: Petitioner:
Beneficiary:



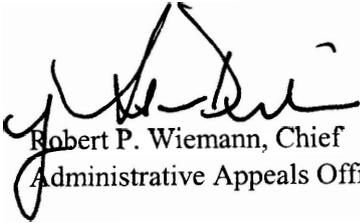
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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. The matter is now before the Administrative Appeals Office (AAO). The appeal is dismissed. The petition is denied.

The petitioner provides educational services. It seeks to employ the beneficiary as a special education teacher. 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 27, 2007; (2) the director's July 30, 2007 denial decision; and (3) the Form I-290B, counsel's brief, and documentation in support of the appeal. The AAO has considered the record in its entirety.

On July 30, 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 27, 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 for this reason.

On appeal, counsel asserts that the petitioner's inadvertent clerical error when completing the H-1B Data Collection and Filing Fee Exemption Supplement in Part C should not be used as a basis for a denial of the petition. Counsel contends that CIS may have rightly ruled that the petition and the beneficiary are not cap exempt, but if so, CIS should have rejected the petition and returned the fee if the available visa cap had been reached. The AAO disagrees. The error on the part of the petitioner required an adjudication of 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.

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