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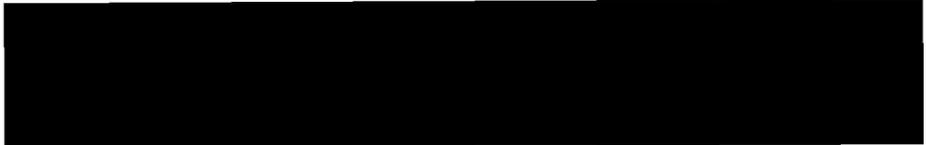
U.S. Department of Homeland Security  
20 Massachusetts Avenue NW, Room 3000  
Washington, DC 20529



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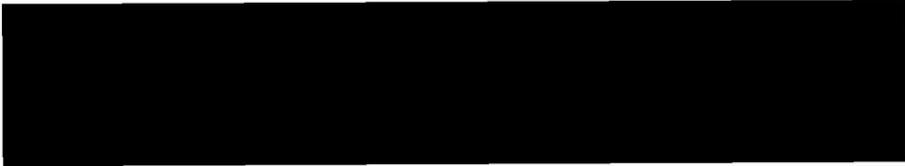


FILE: EAC 07 163 51607 Office: VERMONT SERVICE CENTER Date: SEP 30 2008

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.

*for Robert P. Wiemann*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded for the director to reject the petition and return the filing fee.

The petitioner is a computer software 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 revocation; and (3) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 4, 2007, it was accepted and adjudicated, and ultimately approved, because the petitioner indicated at Page 1, Part 2 of the Form I-129 that the beneficiary was currently in H-1B status (and therefore exempt from the numerical cap).

Upon review of the petition, the director determined that the beneficiary had in fact not been in H-1B status at the time the petition was filed; he held F-1 status at the time the petition was filed. As such, the petition was subject to the 2008 fiscal year numerical cap, and the petition should not have been adjudicated. Accordingly, the director revoked approval of the petition on August 20, 2007.

While the AAO agrees with the director that the petition should not have been approved, it disagrees with his course of action in correcting the error. Rather than issuing a revocation, the director should have reopened the matter on his own motion, and rejected the petition and returned the filing fee to the petitioner, as the petition should not have been adjudicated.

As noted previously, the petitioner indicated, incorrectly, at Page 1, Part 2 of the Form I-129 that the beneficiary was currently in H-1B status (and therefore exempt from the numerical cap). However, the petitioner did state that the beneficiary was currently in F-1 status at Page 2, Part 3 of the Form I-129, and the supporting documentation also indicated that the beneficiary held F-1 status. While it appears that the petitioner did not provide consistent answers to the question of the beneficiary's nonimmigrant status at the time the petition was filed, the director improperly accepted the petition for filing. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(D):

If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year.

The director's determination of the beneficiary's current nonimmigrant status under Page 1, Part 2 of the Form I-129 has no bearing on whether the petition seeks exemption from the numerical cap.<sup>1</sup> Nowhere on

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<sup>1</sup> Had the petitioner indicated at Page 11, Part C of the H-1B Data Collection and Filing Fee Exemption Supplement to Form I-129 that the petition was exempt from the numerical cap, the AAO's analysis of this matter would change. Had the petitioner made that assertion, the petition would not be rejected, and the

the petition or on the H-1B Data Collection and Filing Fee Exemption Supplement does the petitioner indicate that it is exempt from the numerical cap.

The petition should have been rejected and the fee returned as subject to the numerical limitations under 8 C.F.R. § 214.2(h)(8)(ii)(D). The decision of the director will be withdrawn and the matter will be remanded for rejection of the petition and return of the filing fee.

On appeal, counsel states the following:

It is respectfully submitted that any mistakes which may have occurred during the processing of this application were the result of Service error rather than any action on the part of the petitioner to mislead or misrepresent the nature of the application. In addition to the numerous annotations on the applications, the supporting documents further shows [sic] that the application is for an initial H-1B and not a renewal. . . .

In light of the Service's error, it is further submitted that the initial approval should be reinstated.

The AAO disagrees. The record is clear that the petition should not have been approved, as it was clearly subject to the numerical cap. In receiving the approval, the petitioner and the beneficiary received a benefit to which they were not entitled.

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 director's August 20, 2007 decision is withdrawn. The petition is remanded to the director for rejection of the petition and return of the filing fee.

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petitioner would not receive a refund of the filing fee. In that case, the director's adjudication of the petition would have been proper. However, as the petitioner did not make such an assertion, the director should not have adjudicated the petition.