

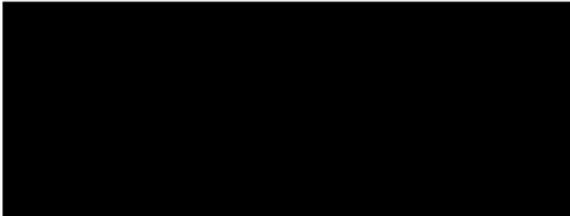
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services



D. Kim

MAY 01 2009

FILE: EAC 07 141 52498 Office: VERMONT SERVICE CENTER Date:

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center (VSC) denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the record remanded for the entry of a new decision based upon all the evidence on the record.

The petitioner is seeking classification of the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 director denied the petition, finding that the petitioner had failed to demonstrate that it had sufficient work at the H-1B level to employ the beneficiary. The director based the decision on the deficiency of evidence in the record due to the petitioner's failure to respond to a request for evidence (RFE).

The record indicates that the director issued an RFE on August 1, 2007. In the denial issued on November 1, 2007, the director notes that the petitioner replied to the RFE on September 14, 2007 but did not provide any additional documentary evidence. A review of the record indicates that the original RFE cover sheet, issued to the petitioner on August 1, 2007, was received and date-stamped by the VSC on September 14, 2007.

On appeal, counsel for the petitioner contends that it filed a timely response to the RFE with ample supporting documentation on September 14, 2007. In support of this contention, counsel submits the original and a photocopy of the response to the RFE along with a copy of the UPS envelope, both of which were date-stamped by the VSC on September 14, 2007. In addition, counsel submits a letter dated November 8, 2007 from the VSC informing counsel that no record of the petitioner's filing could be found. Also included on appeal is the VSC's original envelope, postmarked November 9, 2007, which was used to return the RFE to counsel.

Counsel notes on appeal, and the AAO concurs, that the VSC's letter of November 9, 2007 incorrectly identifies counsel of record as the beneficiary of the petition. Upon further review, the AAO notes that the VSC incorrectly identified the petitioner and the petition type (I-129 E as opposed to H-1B) in the letter. Upon review of the record, it appears that the cover sheet accompanying the petitioner's response to the RFE which included the petition's unique number and other identifying factors, although received and acknowledged by the director, became separated from the petitioner's supporting documentation and thus precluded the VSC from reuniting the response with the file.

Upon review of the record, the petitioner timely responded to the director's request for additional evidence. Consequently, the record will be remanded to the director to enter a decision based upon the evidence submitted in response to the RFE.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision dated November 1, 2007 shall be withdrawn and the record remanded for the entry of a new decision.