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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 07 139 53017 Office: VERMONT SERVICE CENTER Date: SEP 0 1 2009

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act.

ON BEHALF OF PETITIONER:

[redacted]

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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom,
Acting 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 an information technology solutions provider that seeks to employ the beneficiary as a programmer analyst. 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 petitioner filed the Form I-129 petition on April 2, 2007. As of that date, the annual fiscal-year cap on the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A) had been reached. The petition was accepted and adjudicated despite the cap limitation, however, because the petitioner indicated on the Form I-129 that the beneficiary had earned a master's or higher degree from a U.S. institution of higher education, as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a), and was, therefore, exempt from the annual fiscal-year cap on the issuance of H-1B visas under section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(c).

The director denied the petition on the ground 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 thus the beneficiary was subject to the annual cap.

On appeal, counsel for the petitioner contends that the denial is "a complete abuse of discretion" and "goes against all facts, documentation and circumstances" of the beneficiary's case. Counsel contends that the petition was improperly adjudicated "under Masters quota" and "subjected to criteria which is not appropriate for a standard filed petition." In support of these contentions, counsel submits a letter and additional documentary evidence.

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) and the supporting documentation filed with it; (2) the director's denial letter; and (3) the Form I-290B, and supporting documentation.

Section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), 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."

In this matter, the original copy of the H-1B Data Collection Supplement submitted with Form I-129 clearly claims on Page 11, Question 7 of Part C., Numerical Limitation Exemption Information, that the beneficiary is claiming exemption based on possession of a master's degree or higher from a U.S. institution of higher learning. The Vermont Service Center accepted the petition as a petition requesting exemption from the annual cap based

on this information. Upon review of the petition, the director determined that the petitioner did not possess a master's degree and, therefore, was subject to the numerical limitations for fiscal year 2008.

On appeal, counsel contends that the director's adjudication of the petition under these provisions was erroneous, and insists that the petitioner did not claim to be exempt from the numerical limitations based on the beneficiary's possession of a master's degree. In support of this contention, counsel submits a photocopy of what it claims to be Page 11 of the H-1B Data Collection Supplement submitted in this matter, which indicates that Question 7 was answered in the negative. Upon careful review, however, the AAO notes that a comparison of the signatures on the original copy contained in the record and the photocopy submitted on appeal differ. Although the actual signatures appear to have been made by the same person, [redacted], it is clear that the supplemental form submitted with the petition is not the same form that the petitioner on appeal claims to have submitted with the petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If U.S. Citizenship and Immigration Services (USCIS) fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The director properly considered the petition based on the information supplied in the H-1B Data Collection Supplement, and correctly determined that the petition was not eligible for an exemption from the annual cap based on the beneficiary's possession of a master's degree or higher. The AAO acknowledges that the petitioner may have inadvertently checked the wrong box on the H-1B Data Collection Supplement to Form I-129; however, the director properly adjudicated the Form I-129 based on the record before USCIS. In fact, contrary to the assertions of the petitioner on appeal, the director correctly implies that, but for the exemption claimed by the petitioner, the petition would have been rejected as a cap-subject H-1B petition.[1] As such, the petition would have to be denied at this point in time as ineligible under the H-1B cap even if the exemption had not been claimed as asserted by the petitioner.

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 met that burden.

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

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[1] On April 3, 2007, USCIS announced that sufficient H-1B petitions had been received to meet the congressionally mandated cap for fiscal year 2008. *See* USCIS Update: USCIS Reaches FY08 H-1B Cap, http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf (accessed August 31, 2009). USCIS further noted that for all cap-subject filings received on April 2, 2007 and April 3, 2007, a random selection process would be used to determine which petitions would be accepted for processing and which ones would be rejected on the basis of the H-1B cap. *Id.* There is no indication in the file that the instant petition was among one of those randomly selected for processing. Instead, it appears that the instant petition would have been rejected if the H-1B cap exemption had not been claimed by the petitioner.