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: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 04 2010

IN RE: Petitioner: [redacted]
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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the service center director and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded for further consideration and action.

The petitioner describes itself as a machine design and repair and sales business that seeks to employ the beneficiary as a screw machine setup/CMC set up/operator. 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).[1]

The primary issue on appeal is whether the director, instead of accepting and denying the H-1B petition, should have rejected the petition and returned the petitioner's H-1B filing fees.

The director accepted the petition for processing even though the petition is H-1B cap subject and was filed on January 28, 2009, long after April 7, 2008, the date USCIS announced that the H-1B cap for Fiscal Year 2009 had been reached. The petitioner did not request an exemption to the H-1B cap, nor does it appear that the petition is eligible to be processed under any exemption to the H-1B cap.

Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(B), "[p]etitions . . . that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year." 73 Fed. Reg. 15389, 15395 (Mar. 24, 2008). Therefore, the director should have rejected this petition rather than accepting it for processing. Further, except for petitions claiming an exemption from the H-1B cap, 8 C.F.R. § 214.2(h)(8)(ii)(D) provides that "[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." Based on the foregoing, the AAO hereby finds that, as the petitioner did not claim or otherwise indicate an exemption from the H-1B numerical limitation, the H-1B filing fees submitted in conjunction with this Form I-129 petition and supporting documents should be returned or refunded. However, the petitioner is not entitled to a refund of the filing fee submitted with the Form I-290B. *See generally* 8 C.F.R. § 103.3.

Therefore, the director's decision will be withdrawn and the matter will be remanded so that the director can properly reject and refund any filing fees associated with the instant H-1B petition in accordance with 8 C.F.R. § 214.2(h)(8)(ii)(D).

**ORDER:** The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.

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[1] The AAO notes that it does not appear that the proffered position is a specialty occupation or that the beneficiary is qualified to work in a specialty occupation, as is required for the H-1B classification. Consequently, if the petitioner decides to file a new petition for the beneficiary to work in the proffered position, the petitioner will need to submit evidence demonstrating that the proffered position requires at least a bachelor's degree or the equivalent in a specific specialty and that the beneficiary holds at least a bachelor's degree or the equivalent in that specific specialty.