U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

MAR 02 2011

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:

[redacted]

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 $630. 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,

Michael T. Kelly

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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.

On the Form I-129 visa petition the petitioner stated that it is an information processing and manufacturing firm.

To employ the beneficiary in what it designates as a computer programmer (package solution consultant) position, the petitioner endeavors to classify him 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 director denied the petition, finding that the petitioner had filed more than one H-1B petition for the beneficiary during the same fiscal year (to wit: two such petitions), that the instant beneficiary is subject to the numerical cap described at section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), and that 8 C.F.R. § 214.2(h)(2)(i)(G) prohibits such multiple filings.

On appeal, counsel asserted that the petitioner filed the second H-1B petition, which is the subject of the instant appeal, because whether USCIS had received the first petition was unclear. Counsel provided additional evidence to support that assertion.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(G) states, in pertinent part:

> *Multiple H-1B petitions.* An employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act. If an H-1B petition is denied, on a basis other than fraud or misrepresentation, the employer may file a subsequent H-1B petition on behalf of the same alien in the same fiscal year, provided that the numerical limitation has not been reached or if the filing qualifies as exempt from the numerical limitation. Otherwise, filing more than one H-1B petition by an employer on behalf of the same alien in the same fiscal year will result in denial or revocation of all such petitions.

USCIS computer records show that the instant petitioner filed an H-1B petition with receipt number WAC 09 142 50269 for the instant beneficiary, which USCIS received on April 7, 2009. That petition was adjudicated on the merits and denied on July 7, 2009.

The petitioner filed the instant visa petition on April 9, 2009, while the previous visa petition was still pending. With the instant visa petition, counsel provided a typed request in large bold-face type:

ATTENTION:
DUPLICATE H-1B FILING ENCLOSED DUE TO FEDERAL EXPRESS
DELIVERY ERROR

IF OUR INITIAL SUBMISSION HAS BEEN RECEIPTED INTO YOUR SYSTEM, WE REQUEST THAT OUR DUPLICATE FILING AND ORIGINAL CHECKS (IN THE AMOUNT OF $2,320.00) BE RETURNED VIA THE ENCLOSED PRE-PAID FEDERAL EXPRESS ENVELOPE.

As was noted above, the previous visa petition had been received on April 7, 2009, and the instant petition was submitted while it was pending. In general, H-1B visas are numerically capped by section 214(g)(1)(A) of the Act. Counsel has made no argument that the beneficiary is exempt from that cap, and the AAO observes that none of the exemptions apply in this case.

As the instant petitioner filed two H-1B visa petitions for the instant beneficiary during the same fiscal year, and as the second was filed while the first was still pending, and as the beneficiary is subject to the cap, both of the visa petitions are subject to denial pursuant to 8 C.F.R. § 214.2(h)(2)(i)(G).[1]

On appeal, counsel observed that the second petition was filed because FedEx was unable to confirm that the first had been delivered to USCIS, and that the second filing included a request that it be returned, with the fee, if the first petition was found to have been delivered.[2] Counsel urges that receiving that file was clear USCIS error. Counsel provided no authority for the proposition that such a conditional submission is recognized by statute or regulation, and no authority for the proposition that the clerical workers at USCIS were prohibited from noting receipt of the visa petition package prior to inspecting its contents and reaching a decision on counsel's attempt to submit it only conditionally. The AAO finds no error in the receipt of that package by USCIS.

The AAO observes that 8 C.F.R. § 214.2(h)(2)(i)(G) prohibits petitioners from filing an H-1B visa petition for a beneficiary who then has a pending H-1B visa petition that was filed during the same fiscal year. That regulation contains no exception for cases in which the petitioner alleges that it was unable to confirm that the first visa petition was delivered. The AAO will enforce that regulation as written.

The AAO finds that the director was correct in her determination that the instant visa petition must be denied as if was filed contrary to the salient regulation. Accordingly, the appeal will be dismissed and the petition denied on this basis.

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[1] As was noted above, the previous visa petition was adjudicated on the merits. This was error. The petition should have been denied pursuant to 8 C.F.R. § 214.2(h)(2)(i)(G), without reaching any other issues.

[2] In support of the assertion that it was unable to confirm delivery of the first visa petition, counsel submitted a printout pertinent to tracking the first visa petition through FedEx's website. That printout shows that the package had departed Memphis, Tennessee on April 1, 2009, but contains no further information. The AAO notes that printout was produced on April 6, 2009, prior to delivery of the first visa petition to USCIS.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

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