

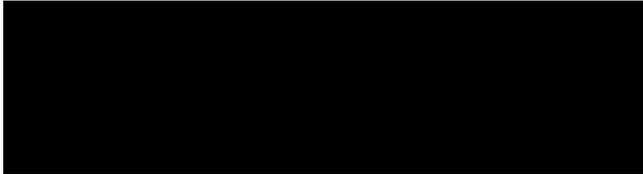
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

DI

PUBLIC COPY



FILE: WAC 04 176 52702 Office: CALIFORNIA SERVICE CENTER Date: JAN 24 2006

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.

A handwritten signature in blue ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
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 rejected.

The petitioner is a medical office that seeks to employ the beneficiary as a medical and laboratory contract services manager. The petitioner 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 director denied the petition because the proffered position was not a specialty occupation, and because Citizenship and Immigration Services (CIS) had reached its numerical limits for new petitions for H-1B employment for the fiscal year. On appeal, counsel submits a brief.

On appeal, counsel states that the petitioner did not believe that the beneficiary was subject to the numerical cap because he was the beneficiary of a previously approved H-1B petition, which he had never used. Counsel further states that the issue "is a gray area of the law subject to various interpretations, thus, **petitioner asked the service both on the application and in the petitioner's letter to keep October 1, 2004 as an alternative date** if the Service found that beneficiary is subject to the cap." [Emphasis in the original]. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(A), "Requests for petition extension or extension of an alien's stay shall not be counted for the purpose of the numerical limit." The regulation at 8 C.F.R. § 214.1(c)(4) states, "An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. There are exceptions to this rule, but none of them apply to the instant petition. The beneficiary never availed himself of the previously approved petition, and therefore did not maintain that status.

In addition, counsel states that the director should have considered that the petitioner listed two different dates of intended employment, one of which would not have been subject to the numerical cap as it would be included in the numbers for the following fiscal year. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A petitioner may not list a variety of options on a petition, in order to meet a changing situation.

As the director noted in his decision, when the numerical limit has been reached, "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." 8 C.F.R. § 214.2(h)(8)(ii)(E) [emphasis added]. The director should have rejected the petition and returned it along with the filing fee to the petitioner, rather than adjudicating the petition.

The denial of a petition for reaching the numerical cap is not a matter within the jurisdiction of the AAO. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003).

As the petition was rejected because the petition was filed after the numerical cap was reached for the fiscal year, the appeal must be rejected.

ORDER: The appeal is rejected.