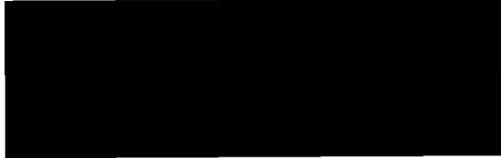


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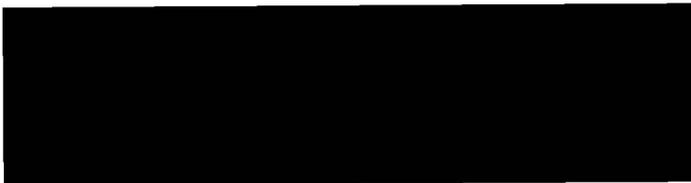
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FILE: WAC 07 140 51827 Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2008

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.

James Blunzinger, Jr

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 engaged in health care management and seeks to employ the beneficiary as a financial specialist. 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).

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 numerical 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.” The exemption criterion at section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), requires that the beneficiary earn a “master’s or higher degree from a United States institution of higher learning.”

The petitioner stated at the “Numerical Limitation Exemption Information” section on the Form I-129 that the beneficiary met the numerical cap exemption criterion at section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as a beneficiary who, in the words of the Act, “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)).” Thus, the basis of the petitioner’s request for approval was exemption from the numerical cap, and the petition was accepted and adjudicated on that basis.

In response to the director’s request for additional evidence, counsel stated that it had improperly marked the Form I-129, due to clerical error, to indicate that the beneficiary was exempt from the numerical cap as a result of having earned a master’s or higher degree from a United States institution of higher education. Counsel acknowledged that the beneficiary does not possess a master’s degree.

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 numerical cap.

As noted previously, the petitioner filed the petition on April 2, 2007. The petitioner marked the box at Page 11, Part C, Question 5 of the Form I-129 to indicate that the beneficiary was exempt from the numerical cap as a result of his having earned a master’s degree from a United States institution of higher education. The Vermont Service Center, therefore, accepted the petition as one involving a request for adjudication of a petition involving a beneficiary who earned a master’s degree from a United States institution of higher education. Upon review of the petition, the director determined that the petitioner had not submitted evidence demonstrating that the beneficiary had ever earned a master’s degree from a United States institution of higher education, and issued a request for evidence of the same on May 10, 2007. The AAO acknowledges counsel’s statement that the petitioner marked the incorrect box on the

“Numerical Limitation Exemption Information” section of the Form I-129, but that it properly informed CIS that the beneficiary does not possess a master’s degree at another portion of the Form I-129. However, the petitioner nonetheless informed CIS, via information provided in the “Numerical Limitation Exemption Information” section of the Form I-129, that it was filing the petition based upon the beneficiary’s possession of a master’s or higher degree from a United States institution of higher education. The director properly adjudicated the Form I-129 based upon that information. By the time the petitioner corrected its error, the numerical cap had been reached.

On appeal, counsel for the petitioner contends that the petition should not have been processed in the master’s degree exemption category because the beneficiary did not qualify for this exemption. Counsel further states that the petitioner clearly indicated on the Form I-129, H Classification Supplement, in Part A, Question 3, that the beneficiary’s highest level of education was a bachelor’s degree.

Although counsel argues that the petitioner’s rights to procedural due process were violated, she has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioner. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. Counsel’s claim that CIS “mistakenly put [the beneficiary] into the master’s degree cap category” and that it did so “[d]ue to an error by the service’s clerical staff” are not supported by the record. As noted previously, and despite contradictory information provided at another section of the Form I-129, the petitioner filed the petition as one involving a request for adjudication of a petition involving a beneficiary who earned a master’s or higher degree from a United States institution of higher education: it specifically marked the box at the “Numerical Limitation Exemption Information” portion of the Form I-129 to indicate that it sought the exemption. The AAO rejects counsel’s assertion that, because the director adjudicated the petition as filed by the petitioner, the director committed error. The director properly found the beneficiary unqualified for the numerical cap exemption category requested by the petitioner at the time the petition was filed. The petition may not be approved, as it is subject to the fiscal year 2008 numerical cap, which has been exhausted.

Moreover, the AAO rejects counsel’s assertion that the director “never processed the petition.” The director reviewed the petition as filed by the petitioner. Upon review of the petition, the director determined that the petitioner had not submitted evidence demonstrating that the beneficiary had earned a master’s or higher degree from a United States institution of higher education, and issued a request for evidence for the same. The petitioner has not met its burden of proof and the denial was the proper result under the regulation.

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.