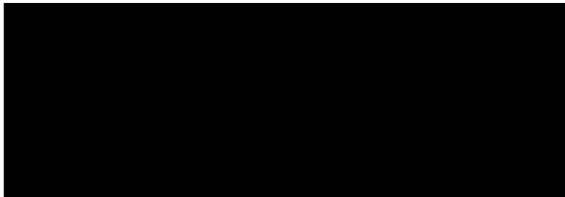


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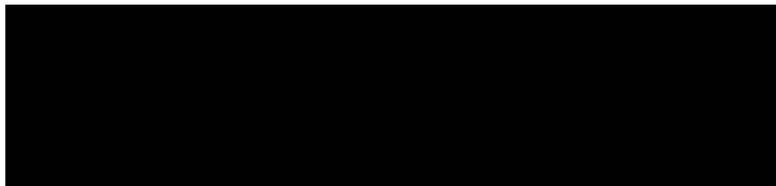
FILE: EAC 07 145 53333 Office: VERMONT SERVICE CENTER Date: NOV 05 2008

IN RE: Petitioner:
Beneficiary:



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:



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.


Robert P. Wiemann, 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 The director's decision will be withdrawn. The petition will be remanded to the director for further proceedings.

The petitioner is an information technology consulting firm. It seeks to employ the beneficiary as a programmer analyst and 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 stating that the petitioner had indicated "on the Form I-129 H-1B Data Collection Sheet," Part C, that it was exempt from numerical cap limitations for fiscal year 2008 because 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, §101(a), 20 U.S.C. § 1001(a). The director further stated that the petitioner indicated on page ten, question number five, of the Form I-129 (H-1B Data Collection and Filing Fee Exemption Supplement) that the beneficiary had earned a master's degree or higher from a U.S. institution of higher education. The record does not establish that the beneficiary has a master's degree or higher from a U.S. institution of higher education. The director, therefore, denied the petition.

On appeal, counsel asserts that the petitioner did not seek an exemption from numerical cap limitations for fiscal year 2008, and that the Form I-129 confirms that assertion. Counsel submitted with his appeal a copy of the Form I-129 and additional information, and asks that the petition be approved.

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, with the director stating that the petitioner had indicated "on the Form I-129 H-1B Data Collection Sheet," Part C, that the petition was exempt from cap limitations because 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, §101(a), 20 U.S.C. § 1001(a). A review of the record establishes that the petitioner did not indicate on the Form I-129 H-1B Data Collection Supplement, Part C (Numerical Limitation Exemption Information), that the beneficiary had earned a master's or higher degree. The petitioner clearly indicated that the beneficiary had not earned a master's or higher degree from a U.S. institution of higher education. The petitioner, therefore, was not seeking an exemption from the cap limitation. As such, the director's decision shall be withdrawn and this matter remanded to the director to process the I-129 petition according to standard operating procedures.

Further, as previously stated, the director noted in his decision that the petitioner indicated on page ten, question number five, of the Form I-129 (H-1B Data Collection and Filing Fee Exemption Supplement) that the beneficiary had earned a master's degree or higher from a U.S. institution of higher education. The Form I-129 filed with CIS does contain a check mark in the referenced section which confirms the director's statement. The copy of the Form I-129 submitted by the petitioner on appeal, however, does not contain that check mark. This discrepancy, however, is not material to the adjudication of this case. The information contained on page ten, question number five, of the Form I-129 (H-1B Data Collection and Filing Fee Exemption Supplement) is in Part A (General Information) of the filing fee exemption supplement, and it does not request an exemption from numerical limitations. The pertinent section on the data collection

supplement pertaining to numerical limitation exemption information is Part C, where the petitioner stated that the beneficiary did not have a master's or higher degree from a U.S. institution of higher education. The information contained in that section does not seek a numerical limitation exemption.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. This matter is remanded to the director for additional proceedings commensurate with the directives of this opinion.