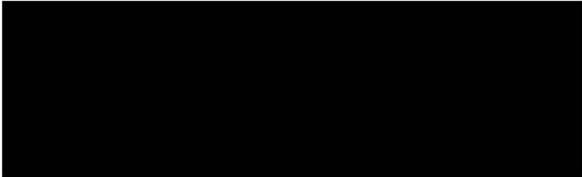




U.S. Citizenship  
and Immigration  
Services

D,



DEC 02 2009

FILE: EAC 08 028 00136 Office: VERMONT SERVICE CENTER Date:

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, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, 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 The director's decision will be withdrawn and the matter remanded to the director to reopen the matter and reject the petition pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(D).

The petitioner is a manufacturing business that seeks to employ the beneficiary as a mechanical engineer drafter. 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). The Form I-129, Petition for a Nonimmigrant Worker, was filed on October 26, 2007.

On April 25, 2008, the director denied the petition, determining that U. S. Citizenship and Immigration Services (USCIS) had received sufficient numbers of H-1B petitions to reach the 65,000 numerical limitation for fiscal year (FY) 2008 as of April 2, 2007 and had received sufficient numbers of H-1B petitions to reach the additional 20,000 "US Master's degree" numerical limitation for FY 2008 as of May 1, 2007. The director denied the petition as "it has now come to the attention of USCIS that your petition is subject to the numerical limitations for FY 2008."

The issue in this matter is whether the petitioner requested an exemption for the beneficiary from the numerical limitations set by the FY 2008 H-1B cap. In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act., the total number of H-1B visas issued per fiscal year may not exceed 65,000. On April 3, 2007, USCIS issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY08, which covers employment dates starting on October 1, 2007 through September 30, 2008. The petitioner filed the instant Form I-129 on October 26, 2007 and requested a starting employment date of December 1, 2007. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(D), 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.

Upon review of the Form I-129 H-1B Data Collection Supplement, Part C, Numerical Limitation Exemption Information, the petitioner checked "no" for each of the criterion listed for consideration as exempt from the numerical limitations set for H-1B visas. Thus, the petitioner did not request consideration for an exemption from the numerical limitations set for H-1B visas. For this reason, the director's decision must be withdrawn. The AAO remands the matter to the director to reopen on service motion for the purposes of rejecting the petition pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(D).

**ORDER:** The director's April 25, 2008 decision is withdrawn. The matter is remanded for the issuance of a service motion to reopen to reject the petition pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(D).