

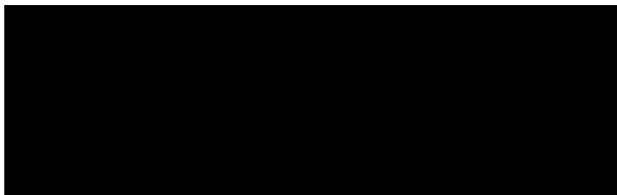
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE: EAC 07 136 52200 Office: VERMONT SERVICE CENTER Date: **JAN 08 2010**

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:

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, initially approved the nonimmigrant visa petition. Upon review of the matter, the director issued a Notice of Intent to Revoke (NOIR) the approval and ultimately revoked the petition's approval. 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, Petition for a Nonimmigrant Worker, the petitioner states that it provides contracting and outsourcing information technology services, that it employs 20 persons, that it was established in 2003, and that its gross annual income is an estimated \$3,500,000 and its net annual income is estimated to be \$150,000. The petitioner seeks to employ the beneficiary as a programmer analyst from October 1, 2007 to September 15, 2010. 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).

When filing the I-120 petition, the petitioner had indicated on the Form I-129, H-1B Data Collection Supplement, Part C that it was seeking an exemption from the numerical limitations for H-1B classification because the beneficiary had earned a master's or higher degree from a U.S. institution of higher education. On June 11, 2007, the director requested that the petitioner provide evidence that the beneficiary had received a master's degree. In a July 25, 2007 response, the petitioner noted that it had made an error when indicating that it sought an exemption from the numerical limitations for fiscal year (FY) 2008, as the beneficiary had not received her master's degree until May 31, 2007, a date subsequent to the date of filing the petition. The petitioner requested that the matter be considered as filed under the regular quota. The director, at that point, improperly approved the petition on September 9, 2007.

Upon review of the matter after the petition's approval, the director issued a NOIR, informing the petitioner of the error in approving the petition. The director ultimately determined that the beneficiary had been granted H-1B classification when she was not entitled to that classification and that the revocation in this matter did not preclude the beneficiary from pursuing another legal status to which she is entitled.

On appeal, the petitioner observes that it responded to the NOIR by December 21, 2007 so as to obtain the director's decision in this matter in ample time to file a new H-1B petition on behalf of the beneficiary for the master's 2009 quota; however, USCIS did not issue its revocation decision until April 28, 2008, thus the petitioner was unable to timely file a new H-1B petition.¹ The petitioner requests that the beneficiary be permitted to continue her H-1B status until October 2009 and that the beneficiary's SEVIS status be changed to F1 immediately so that the beneficiary may obtain an OPT extension until October 2009.

¹ The AAO observes that another petitioner filed a Form I-129 petition on the beneficiary's behalf and that such petition was approved for a validity period from October 1, 2009 to September 9, 2012.

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 and thus must be adjudicated pursuant to the master's exemption from the cap.² 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 2, 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 April 2, 2007 and requested a starting employment date of October 1, 2007.

Upon review of the Form I-129 H-1B Data Collection Supplement, Part C, Numerical Limitation Exemption Information, the petitioner checked "yes" for the criterion listed for consideration as exempt from the numerical limitations set for H-1B visas based upon the beneficiary's earning of a master's or higher degree from a U.S. institution of higher learning. However, as the beneficiary had not yet obtained a master's degree when the petition was filed, the director improperly approved the petition. The director's subsequent revocation of the approval, upon recognition of the error, is proper and the director's revocation decision is affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the approval of the petition will be revoked.

ORDER: The appeal is dismissed. The approval of the petition is revoked.

² The issue of the beneficiary's SEVIS status appears to be an administrative matter and not a matter that is properly before the AAO.