

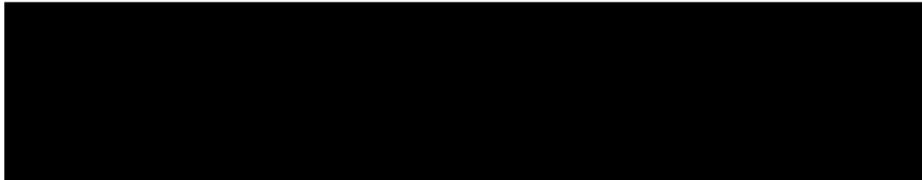
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U.S. Citizenship
and Immigration
Services

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FILE: EAC 06 195 53713 Office: VERMONT SERVICE CENTER Date: **FEB 21 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, 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 a software consulting and product development firm that seeks to employ the beneficiary as a software engineer. The petitioner seeks 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal, with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the ground that the U.S. Citizenship and Immigration Services (USCIS) received sufficient numbers of H-1B petitions to reach the statutory numerical limitation (the H-1B cap) for fiscal year 2007 (FY07) and the petitioner did not qualify for an exemption from the H-1B cap. The director noted in his decision that USCIS received sufficient numbers of H-1B petitions to reach the numerical limitation for fiscal year 2007 on May 26, 2006. The instant petition was filed on June 7, 2006.

The issue before the AAO is whether the petitioner qualifies for exemption from the FY07 H-1B cap. The AAO agrees with the director that the petitioner is not an institution of higher education or a nonprofit entity related to or affiliated with an institution of higher education.

As stated in the director's request for additional evidence, as of May 26, 2006, USCIS had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY07, which covers employment dates starting on October 1, 2006 through September 30, 2007. On the Form I-129, the petitioner requested a starting employment date of October 1, 2006. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)¹, the director determined that the petition could be rejected. However, because the petitioner indicated on the Form I-129 that the beneficiary had been previously granted status as an H-1B nonimmigrant in the past six years and had not left the United States for more than one year after attaining such status, and was thus exempt from the FY07 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was accepted. The petition was then denied upon adjudication on the ground that the petitioner failed to demonstrate that it in fact qualifies for this exemption.

¹ 8 C.F.R. § 214.2(h)(8)(ii)(E) provides, in pertinent part:

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.

On October 31, 2006, the director requested additional evidence of the beneficiary's prior H-1B status. The petitioner responded on November 10, 2006, and stated that the beneficiary had never been a beneficiary of the H-1B classification. The petitioner explained that, "it was a clerical error" to have checked the box on the Form I-129 stating that the beneficiary was previously granted H-1B status.

On December 14, 2006, the director denied the petition concluding that it is subject to the numerical limitations for fiscal year 2007.

On appeal, the petitioner states the following:

As you had noted in the Notice that USCIS has decided that the current petition is subject to the Numerical limitation on the available Visa numbers.

I am not denying that fact, but due to a clerical error on our side, the Petition has been accepted and a Visa number has been assigned for the current Fiscal year, if the petition stands denied then I will stand to loose the Fees and expenses incurred in the process and more over the Visa number will just go wasted without any single person's benefit.

The H-1B cap is the limit on the number of H1B petitions for "new employment" that can be approved in a particular fiscal year. Individuals in H1B status, who previously have been counted against the cap, are not counted against the cap again when they file to extend H1B status, whether through the same or a new employer.

Section 214(g)(7) of the Act, 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 any alien who has already been counted, within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

As noted by the petitioner on appeal, it made a clerical error on the Form I-129 that the beneficiary had previously obtained H-1B classification. Because of this clerical error, the petition was appropriately accepted for adjudication. The AAO agrees with the director that the instant petition is not exempt from the H-1B cap pursuant to Section 214(g)(7) of the AC-21 since the beneficiary has not already been counted against the cap. In addition, the petitioner did not submit any evidence to establish that the petition is exempt from the H-1B cap pursuant to 8 C.F.R. § 214.2(h)(19)(iii)(B) as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act.

The petition does not qualify for an exemption from the H-1B cap under section 214(g)(7) of the Act. Accordingly, the AAO will not disturb the director's decision and the petition must be denied because the H-1B cap for FY07 has been reached.

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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 sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.