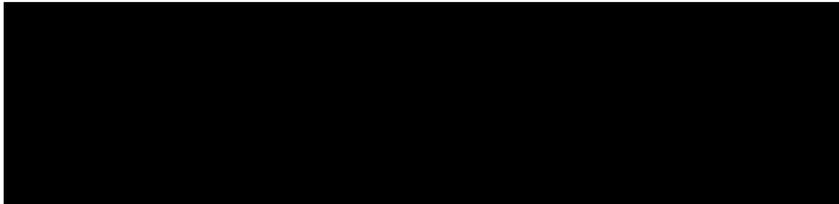


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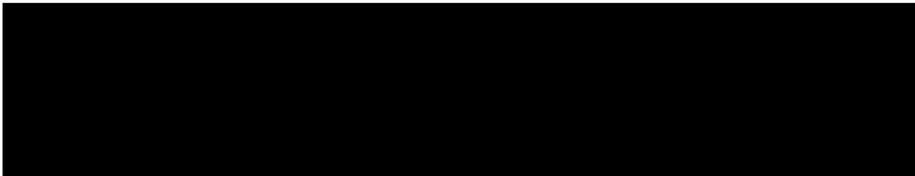
FILE: EAC 07 126 51687 Office: VERMONT SERVICE CENTER Date: **MAR 03 2006**

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:



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.

for 
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO). The appeal is dismissed. The petition is denied.

The petitioner states on the Form I-129 that it manufactures and sells electrical equipment and that it seeks to employ the beneficiary as a technical export sales engineer. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 includes: (1) the Form I-129 filed on April 2, 2007; (2) the director's April 14, 2007 denial decision; and (3) the Form I-290B and May 10, 2007 statement in support of the appeal. The AAO has considered the record in its entirety.

On April 14, 2007, the director denied the petition. The director observed that the Form I-129 listed the beneficiary as a J-1 nonimmigrant. The director also noted that the petitioner checked the box on the H-1B Data Collection and Filing Fee Exemption Supplement in Part C, Numerical Limitation Exemption Information, indicating that the beneficiary is a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in section 214(L)(1)(B) or (C) of the Act.

As of the date the petition was filed, April 2, 2007, Citizenship and Immigration Services (CIS) had received sufficient numbers of H-1B petitions to reach the 65,000 numerical limitation for fiscal year 2008. The Vermont Service Center properly accepted the petition, as a petition requesting adjudication based on a numerical limitation exemption. Upon review of the petition, the director determined that the record did not establish that the beneficiary of the petition had received a waiver of the two-year foreign residency requirement described in section 214(L)(1)(B) or (C) of the Act, as these waivers applied only to alien physicians; thus the director denied the petition.

The AAO acknowledges counsel's statement that the petition sought the beneficiary's employment as an engineer, not as a physician, as well as counsel's assertion that CIS should have known from this information that this was a cap case and not a waiver case. The AAO also acknowledges counsel's contention that a request for further evidence would have clarified the issue. However, the fact that the information in the petition required clarification required CIS to review and adjudicate the petition. The error on the part of the petitioner required an adjudication of the cap issue. That issue was properly reviewed and adjudicated and resulted in a denial of the petition. As the petition required adjudication, albeit on a threshold issue, the petition could not be rejected. The director properly denied the petition.

As always the burden of proof in this proceeding 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.