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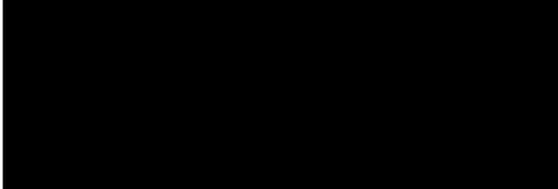
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



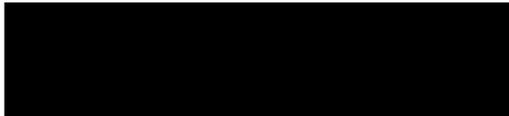
U.S. Citizenship
and Immigration
Services

Dr



FILE: EAC 08 131 51899 Office: VERMONT SERVICE CENTER Date: **APR 02 2010**

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.

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 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 filed this nonimmigrant petition seeking to employ the beneficiary in the position of an engineer as an H-1B nonimmigrant in a specialty occupation pursuant to § 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 petitioner is a private research and development corporation.

The petition cannot be approved due to the petitioner's failure to show that the beneficiary qualifies for an exemption from the Fiscal Year 2009 (FY09) H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

As of April 7, 2008, USCIS had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY09, which covers employment dates starting on October 1, 2008 through September 30, 2009. In general, H-1B visas are numerically capped by statute. Pursuant to § 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. On the Form I-129, the petitioner requested a starting employment date of October 1, 2008. Because the petitioner indicated on the Form I-129 that the beneficiary is a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in §§ 214(l)(1)(B) or (C) of the Act, 8 U.S.C. § 1184(l)(1)(B) or (C), and thus was exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was adjudicated by the director as a cap exempt case, even though the petition was filed prior to April 7, 2008.

The petitioner filed the Form I-129 on April 2, 2008 and requested a starting employment date of October 1, 2008. Because the petitioner indicated on the Form I-129 that the beneficiary is a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in §§ 214(l)(1)(B) or (C) of the Act, the petition was adjudicated as an H-1B cap exempt case when it was initially received by the service center. On April 15, 2008, the director denied the petition on the basis that the beneficiary is not a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in §§ 214(l)(1)(B) or (C) of the Act. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. *See* 8 C.F.R. § 103.2(b)(1). The petitioner does not dispute that the beneficiary is not a J-1 nonimmigrant alien who received a waiver of the two-year foreign residency requirement described in §§ 214(l)(1)(B) or (C) of the Act; however the petitioner does argue that the beneficiary is exempt from the FY09 H-1B cap pursuant to § 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7).

The 2009 fiscal-year cap for the issuance of H-1B visas, set by § 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), was reached on April 7, 2008. The Form I-129 petition was received on April 2, 2008; however, the petition was accepted and adjudicated as an H-1B cap exempt case because the petitioner 'mistakenly' indicated on the Form I-129 that the beneficiary met the cap exemption criterion at § 214(l)(2)(A) of the Act, 8 U.S.C. § 1184(l)(2)(A), by receiving a waiver of the 2-year foreign residence requirement as described in §§ 214(l)(1)(B) or (C) of the Act. The director denied the petition on the grounds that the beneficiary did not meet the requirements specified in §§ 214(l)(1)(B) or (C) of the Act.

On appeal, counsel on the one hand argues that the petitioner did not request an H-1B cap exemption and that the petitioner mistakenly stated that the beneficiary was exempt from the H-1B cap in the petition. However, on the other hand, counsel argues that this petition is, in fact, not subject to the H-1B cap under § 214(g)(7) of the Act because the beneficiary already holds H-1B status with a different employer. Counsel states that United States Citizenship and Immigration Services (USCIS) should have sent the petitioner a request for evidence (RFE) asking for additional documentation demonstrating why the petition is cap exempt.

The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director's denial letter; and (3) the Form I-290B, and supporting documentation.

On appeal, counsel first argues that the petition should have been adjudicated as an H-1B case that is subject to the cap because it was indicated on the address label and counsel's cover letter that this petition was being filed as an H-1B cap case. The address label for the petition was written as follows:

USCIS: Dept. Homeland Security
Premium Processing; VT. Svc. Center
ATTN: H-1B Cap
30 Houghton Street
St. Albans, VT 054782399

The AAO notes that the evidence of record indicates that a similar address is also used on counsel's cover letter for the initial Form I-129 filing stating "ATTN: H-1B Cap" on the fourth line.

Although it is true that counsel marked on the address label and cover letter that this petition is subject to the H-1B cap, the petitioner's error in checking "yes" in Part C, item 4 of the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement (H-1B supplement form), which indicated that the beneficiary is exempt from the H-1B cap for receiving a waiver of the 2-year foreign residence requirement as described in §§ 214(1)(1)(B) or (C) of the Act, was sufficient for the director to assume that the petitioner wanted this case to be considered as H-1B cap exempt. It is reasonable for the director to assume that when, as in this case, a box in Part C of the H-1B supplement form is checked "yes," that the petitioner intends to file an H-1B cap exempt petition because, unlike the address label or the cover letter from counsel in this case, it is actually signed by the petitioner.

Moreover, the evidence provided by counsel on appeal that the instructions from a USCIS website, which state that: "H-1B employers filing petitions which are cap exempt are encouraged to file such petitions exclusively at the California Service Center at one of the addresses provided below. In this instance, the term 'cap exempt' refers only to those petitioners who are exempt from the numerical limitations identified in 8 CFR 214.2(h)(8)(A)," does not indicate any error on the part of the director with respect to processing the petition as H-1B cap exempt. The words "are encouraged" do not mean the same thing as "must" or "are required to." A petitioner filing an H-1B cap exempt case is not required to file a petition at the California

Service Center. Indeed, both the California Service Center and the Vermont Service Center are authorized to process H-1B cap exempt cases. Therefore, the director cannot be expected to assume that the petitioner made an error in checking the wrong box on the H-1B supplement form simply by virtue of the fact that the petition was filed at the Vermont Service Center instead of the California Service Center.

Given that the petitioner made a mistake in completing the H-1B petition forms, the AAO finds that the director did not err in processing this petition as H-1B cap exempt and ultimately finding that the beneficiary does not meet the requirements under §§ 214(1)(1)(B) or (C) of the Act.¹

Having concluded that the director at the Vermont Service Center was correct in processing the petition as an H-1B cap exempt case, the AAO will now examine, as counsel asserts, whether the beneficiary qualifies for an exemption from the Fiscal Year 2009 (FY09) H-1B cap pursuant to § 214(g)(7) of the Act.

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 the H-1B cap shall not apply to any alien who has already been counted, within the six years prior to the approval of the H-1B petition, unless the alien would be eligible for a full six years of authorized admission at the time the petition is filed.

The AAO generally agrees with counsel's assertion that an alien, who previously held H-1B status within the six years prior to the approval of the petition but did not exhaust his or her entire period of admission, would be exempt from the H-1B cap if it can be demonstrated that he or she was previously counted toward the limitations and that he or she is not again eligible for a full six years of authorized admission at the time the petition is filed. The threshold issue in this matter, however, which counsel overlooks, is that the evidence submitted indicates that the beneficiary is subject to the H-1B cap under § 214(g)(6) of the Act, 8 U.S.C. § 1184(g)(6).

The AAO notes that on the H-1B supplement form, the petitioner did not check "yes" for Part C, item 5, which asks whether the beneficiary of this petition has been previously granted status as an H-1B nonimmigrant in the past 6 years and not left the United States for more than one year after attaining such status, which it should have done. However, the petitioner did submit a copy of the Form I-797 indicating an approved petition for an H-1B change of status request filed on behalf of the beneficiary by Virginia Commonwealth University valid from July 1, 2007 to June 30, 2010. This petition was filed by Virginia Commonwealth University at the Vermont Service Center on January 18, 2007, during Fiscal Year 2007, and

¹ It must be noted that, by the time the director adjudicated this claimed cap-exempt H-1B petition on April 15, 2008, the FY09 cap had already been reached and the random selection process of the approximately 163,000 cap-subject H-1B petitions had already been conducted to select which non-cap-exempt petitions would continue to full adjudication. Therefore, even if the director had been required in the alternative to consider the instant petition as a cap-subject H-1B petition, no H-1B cap numbers remained available for this petition as of April 15, 2008, and it was impossible to determine after-the-fact whether this petition would have been one of the petitions that would have been randomly selected for full adjudication. Given that the error in this matter was that of the petitioner, not the director, it would be unjust and unfair to those petitioners not selected in the random selection process for the instant petition to now be deemed to have been a properly filed cap-subject H-1B petition and be given a full adjudication.

requesting a start date well after the H-1B cap had been reached for that fiscal year. Absent any evidence to the contrary, this document indicates that the petitioner also should have checked “yes” for Part C, item 6, which states “if the petition is to request a change of employer, did the beneficiary previously work as an H-1B for an institution of higher education, an entity related to or affiliated with an institution of higher education, or a nonprofit research organization or governmental research institution defined in questions 1, 2 and 3 of Part C of this form?”

Under § 214(g)(6) of the Act, any beneficiary who obtains H-1B status by benefiting from a cap exempt petition filed by an institution of higher education or a related or affiliated nonprofit entity under § 214(g)(5)(A) of the Act and has not previously been counted towards the cap, will then be counted towards the cap the first time he or she is employed by an employer that is not cap exempt. Without evidence to the contrary, the AAO must presume that Virginia Commonwealth University is an institution of higher education under § 214(g)(5)(A), 8 U.S.C. § 1184(g)(5)(A) of the Act that, based on the validity dates for the approved petition, was considered to be H-1B cap exempt by USCIS. This means that the beneficiary is now subject to the H-1B cap in this petition as the petitioner is a private research and development corporation.² Consequently, the AAO finds that the evidence of record does not establish that the beneficiary is exempt from the H-1B visa cap under the requirements of § 214(g)(6) of the Act. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the AAO will not disturb the director's denial of the petition.

Finally, the AAO will review counsel's assertion in Form I-290B that USCIS should have issued an RFE instead of a denial. The AAO notes that 8 C.F.R. § 103.2(b)(8) does not require the issuance of an RFE, but instead makes such requests discretionary and allows for the denial of a petition without the issuance of an RFE. 8 C.F.R. § 103.2(b)(8)(i) and (ii) state:

(i) Evidence of eligibility or ineligibility. If the evidence submitted with the application or petition establishes eligibility, USCIS will approve the application or petition, except that in any case in which the applicable statute or regulation makes the approval of a petition or application a matter entrusted to USCIS discretion, USCIS will approve the petition or application only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. *If the record evidence establishes ineligibility, the application or petition will be denied on that basis.* (emphasis added)

(ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

² The offer letter from the petitioner to the beneficiary that was submitted with the petition indicates that the petitioner's funding stems mainly from the U.S. government, specifically, the National Institutes of Health of the Department of Health and Human Services. Although the petitioner does not assert that it is an H-1B cap exempt employer under § 214(g)(5)(B), 8 U.S.C. § 1184(g)(5)(B), it is clear from the evidence of record that the petitioner does not qualify as an H-1B cap exempt employer on this ground, as it is neither a nonprofit research organization nor a United States government entity. See 8 C.F.R. § 214.2(h)(19)(iii)(C).

The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

It is reasonable for the director to make a decision based on the information the petitioner provides in the forms. Because the petitioner erred in completing the H-1B supplement form in at least four places,³ the director was correct in rejecting the petition. The burden is on the petitioner in making sure that the information in the forms is correct at the time the petition is filed.

Upon reviewing the petition, the director determined that the beneficiary did not meet the requirements specified in §§ 214(1)(1)(B) or (C) of the Act, and therefore, was subject to the annual cap. Because the H-1B cap for FY09 has already been reached, this petition may therefore not be further considered or approved. The record of evidence establishes that the beneficiary is not eligible for an exemption to the H-1B cap as claimed and, therefore, the director's denial of the petition meets the requirements of 8 C.F.R. § 103.2(b)(8).

Upon review, the petitioner has not established that it is exempt from the FY09 H-1B cap pursuant to §§ 214(g)(5) or (g)(7) of the Act. Accordingly, the petition must be denied.⁴ The AAO notes, however, that this decision shall not serve to bar the petitioner from re-filing a new petition with a start date of October 1, 2010, accompanied by evidence to show eligibility under the technical requirements at 8 C.F.R. § 214.2(h).

As stated previously, under § 291 of the Act, the burden of proof in these proceedings rests solely with the petitioner. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.

³ On the H-1B supplement form, in addition to incorrectly completing items 4, 5, and 6 in Part C, the petitioner also incorrectly checked "no" in Part B, item 9, when it should have checked "yes" in response to the question of whether it is an employer that employs no more than 25 full-time employees as it put that it only employs 6 employees on Form I-129.

⁴ A review of a petitioner's exemption claim is considered to be an adjudication for purposes of determining eligibility for the benefit sought. *See generally* USCIS Adj. Field Manual 31.3(g)(13) (2009).