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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship and Immigration Services

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THE LAXMI GROUP, INC.  
ATTN: PAT KRISHNAN  
4699 OLD IRONSIDES DR., #100  
SANTA CLARA, CA 95054

FILE: WAC 07 116 53019 Office: CALIFORNIA SERVICE CENTER Date: AUG 02 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:

[REDACTED]

**INSTRUCTIONS:** Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director initially approved the nonimmigrant visa petition. The director subsequently revoked the petition on November 26, 2008. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be revoked.

The petitioner states that it is an information technology services company. It seeks to employ the beneficiary as a Programmer Analyst and to classify him 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).

This H-1B petition was initially approved on March 21, 2007 with validity dates of March 22, 2007 to March 22, 2010. However, on September 19, 2008, the director issued a Notice of Intent to Revoke (NOIR) because a prior H-1B petition filed on behalf of the beneficiary by a different petitioner was revoked, thereby causing the beneficiary to be subject to the H-1B cap for Fiscal Year 2008, which rendered the present petition invalid.

The petitioner responded to the NOIR on October 17, 2008. However, the petitioner did not adequately respond to the director's basis for denial. The director therefore revoked the petition on November 26, 2008 because the petitioner did not overcome the grounds for revocation.

Counsel for the petitioner filed an appeal on December 23, 2008. Counsel argues that the prior petition filed by a different petitioner was revoked due to abandonment and therefore the beneficiary should be allowed to keep his H-1B visa number under section 214(g)(3) of the Act, 8 U.S.C. 1184(g)(3), thereby rendering him H-1B cap-exempt for FY 2008.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's NOIR; (3) the petitioner's response to the NOIR; (4) the notice of decision; and (5) Form I-290B with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons discussed below, the AAO finds that the evidence submitted on appeal is not sufficient to establish that the beneficiary is not H-1B-cap subject in FY 2008. Accordingly, the decision of the director will not be disturbed. The appeal will be dismissed, and the petition will be revoked.

Section 214(g)(3) of the Act reads as follows:

Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status. If an alien who was issued a visa or otherwise provided nonimmigrant status and counted against the numerical limitations of paragraph (1) is found to have been issued such visa or otherwise provided such status by fraud or willfully misrepresenting a material fact and such visa or nonimmigrant status is revoked, then one number shall be restored to the total number of aliens who may be issued visas or otherwise provided such status under the numerical limitations of paragraph (1) in the fiscal year in which the petition is revoked, regardless of the fiscal year in which the

petition was approved.

Also, Section 214(g)(7) of the Act, 8 U.S.C. 1184(g)(7) states:

Any alien who has already been counted, within the 6 years prior to the approval of a petition described in subsection (c) of this section, 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.

Counsel also cites to the Federal Register, Vol. 69, No. 225 (Nov. 23, 2004) as follows, in pertinent part:

How Will USCIS Treat H-1B Petitions That Are Revoked for Any Reason Other Than Fraud or Willful Misrepresentation?

For purposes of the annual numerical limitation, if an H-1B petition was approved in a prior fiscal year (e.g. FY 2001, 2002, 2003, 2004) but revoked in FY 2005, that revocation will have no effect on the FY 2005 cap and the number will not be restored to the total number of H-1B new petition approvals available for the remainder of FY 2005.

However, if an H-1B petition was approved in FY 2005 (and the approval was counted against the FY 2005 cap), and the H-1B petition subsequently is revoked during FY 2005 for any reason other than fraud or willful misrepresentation (e.g. the petitioner goes out of business), that number will be restored to the total number of H-1B petition approvals available for the remainder of FY 2005. If the same H-1B petition is revoked for any reason other than fraud or willful misrepresentation after the end of FY 2005, USCIS will not restore the number to the FY 2005 cap.

How Will USCIS Process H-1B Petitions That Are Revoked for Fraud or Willful Misrepresentation?

Section 108 of the American Competitiveness in the Twenty-first Century Act of 2000, Public Law 106-313 ("AC21"), sets forth the procedure when an H-1B petition is revoked on the basis of fraud or willful misrepresentation. Under AC21, one number for each petition that is revoked on the basis of fraud or misrepresentation shall be restored to the total number of H-1B petition approvals available for the fiscal year during which an H-1B petition is revoked, regardless of the fiscal year in which the petition was approved.

Contrary to the assertions of counsel, USCIS records indicate that the basis of the Notice of Intent to Revoke (NOIR) for the prior H-1B petition filed by the other petitioner on behalf of the beneficiary was that petitioner's suspected fraud or misrepresentation. Although that petitioner failed to respond to the NOIR, the director did not revoke the petition due to abandonment. Instead, the director noted the failure to respond,

attached the NOIR, and revoked the petition based on the grounds stated therein. In fact, a revocation due to abandonment is not permitted procedurally, as the regulations pertaining to abandonment, 8 C.F.R. §§ 103.2(b)(13)(i) and (15), are only relevant to the denial of an application or petition, not a revocation. Moreover, the director correctly noted in the prior petition's revocation decision that the petitioner was permitted to file an appeal of the revocation decision, an administrative remedy unavailable for an abandoned petition. *See* 8 C.F.R. § 103.2(b)(15) (noting that "[a] denial due to abandonment may not be appealed").

Under the plain language of Section 214(g)(3) of the INA, if an H-1B petition is approved through fraud or willful misrepresentation of a material fact and then that petition is later revoked, the beneficiary's visa number is forfeit. Because USCIS found that the prior petition had been approved as a result of fraud or willful misrepresentation, ultimately leading to the prior petition being revoked on that basis (with the prior petitioner's failure to respond to the NOIR constituting a tacit affirmation of the petition being based on fraud or misrepresentation as the prior petitioner did not present evidence addressing USCIS concerns in this regard), the director was correct in also revoking the present petition as the beneficiary could no longer be considered H-1B cap-exempt as of September 29, 2008, the date the prior petition was revoked. For this reason, the AAO will not disturb the director's decision to revoke the present petition.

The appeal will be dismissed and the petition revoked. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition is revoked.