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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



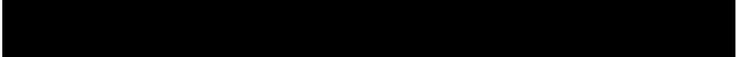
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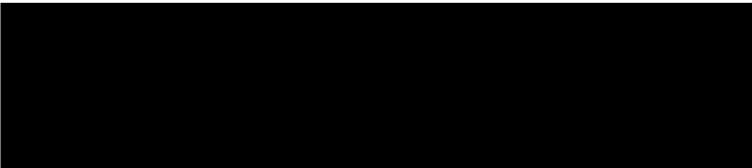


FILE: EAC 07 239 52934 Office: VERMONT SERVICE CENTER Date: **MAR 02 2010**

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Prew  
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 AAO will dismiss the appeal.

The petitioner is a facility that the Thoroughbred Retirement Foundation (TRF) operates in Lexington, Kentucky for retired thoroughbred horses. To employ the beneficiary as [REDACTED], the petitioner filed this nonimmigrant petition to classify the beneficiary as an H-1B 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 director denied the petition because he found that the evidence of record, as supplemented by the documents submitted in response to the service center's request for additional information, established that the petitioner had erroneously claimed exemption from both (1) the statutory annual limitation on the number of H-1B petitions filed for the related fiscal year (the H-1B cap), and (2) an additional H-1B filing fee required of all but certain categories of petitioning employers.

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), the total number of H-1B visas issued per fiscal year (FY) may not exceed 65,000. As the petition was filed on August 17, 2007, for an employment period to commence in August 2007, it was subject to the H-1B cap for FY2007.<sup>1</sup> On June 1, 2006, U.S. Citizenship and Immigration Services (USCIS) issued a notice that as of May 26, 2006 it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY2007, and that any H-1B petitions received after May 26, 2006 would be rejected.

The petitioner initially claimed an additional-fee exemption by filing the Form I-129 H-1B Data Collection Supplement<sup>2</sup> with the "Yes" box check-marked at section 2 of Part B, which asks if the petitioner is "a nonprofit organization or entity related to or affiliated with an institution of higher education, as such institutions of higher education are defined in the Higher Education Act of 1965, Section 101(a), 20 U.S.C. section 1001(a)." Likewise, the petitioner initially claimed exemption

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<sup>1</sup> Although not noted by the petitioner, the AAO observes that the director's decision mistakenly referenced the H-1B cap for FY2008 instead of the cap for FY2007. To remedy this error, the AAO hereby corrects the pertinent sentence at page 2 of the director's decision by substituting therein "May 26, 2006" for "April 2, 2007," and "2007" for "2008," so that the sentence now reads as follows:

As of May 26, 2006, the United States Citizenship and Immigration Services (USCIS) received sufficient numbers of H-1B petitions to reach the 65,000 numerical limitation for fiscal year (FY) 2007.

As reflected in the petitioner's silence with regard to this issue, the director's mistaken cap reference is not material to the correct disposition of the petition, as the record establishes that the petition was filed after the pertinent H-1B cap had been reached, and is therefore deemed to be harmless error.

<sup>2</sup> The petitioner filed the Form I-129 H-B Data Collection Supplement (Rev. 04/01/06).

from the H-1B cap by filing the Form I-129 H-1B Data Collection Supplement with the “Yes” box check-marked at section 2 of Part C, Numerical Limitation Exemption Information, which also asks if the petitioner is “a nonprofit organization or entity related to or affiliated with an institution of higher education, as such institutions of higher education are defined in the Higher Education Act of 1965, Section 101(a), 20 U.S.C. section 1001(a).”

In her response to the RFE’s request for evidence to establish the petitioner’s status as the type of non-profit entity asserted at Parts B and C of the Form I-129 H-1B Data Collection Supplement, counsel for the petitioner states that she had mistakenly asserted an incorrect basis for exemption on the Form I-129 H-1B Data Collection Supplement, and that the petitioner actually qualifies for exemption as “a non-profit research organization as defined in 8 CFR § 214.2(h)(19)(iii)(C).” As evident in his decision, the director accepted counsel’s attestations as amending the Form I-129 H-1B Data Collection Supplement to assert the additional-fee exemption specified at section 3 of Part B, and the H-1B cap exemption specified at section 3 of Part C. Both of these exemptions apply only to a petitioner that is “a nonprofit organization or a governmental research organization, as defined in 8 C.F.R. § 214.2(h)(19)(iii)(C),” the regulation cited by counsel in her response to the RFE.<sup>3</sup>

As will be discussed below, the AAO finds that the director’s decision to deny the petition was correct, as the petitioner has failed to establish that it qualifies for the exemptions that it asserted. The AAO bases this decision upon its review of the entire record of proceeding, as supplemented on appeal by the Form I-290B; counsel’s letter of October 15, 2007; counsel’s brief in support of the appeal; the October 15, 2007 letter from the Director of Institutional Research and Assessment (DIRA) at Asbury College; and tax forms for the year 2005.

As clearly noted in those sections, to qualify for either of the exemptions asserted by the petitioner at section 3 of Part B and at section 3 of Part C of the Form I-129 H-1B Data Collection Supplement, the petitioner must be a nonprofit organization or a governmental research organization, as defined in 8 C.F.R. § 214.2(h)(19)(iii)(C). This regulation states:

*A nonprofit research organization or governmental research organization. A nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research. A governmental research organization is a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research*

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<sup>3</sup> The AAO notes that counsel unsuccessfully attempted to supplement her RFE response after it was filed at the service center on September 11, 2007 by faxing additional documents, including an amended Form I-129 H-1B Data Collection Supplement. Per the regulations at 8 C.F.R. § 103.2(b)(11), a petitioner is afforded only one opportunity to file materials in response to an RFE.

and investigation in the sciences, social sciences, or humanities. Applied research is, research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

The AAO acknowledges that the petitioner is a nonprofit organization engaged in highly commendable work. Unfortunately, however, the documentary evidence in the record does not support counsel's claim on appeal that the petitioner is "primarily engaged in basic research and applied research." The AAO further notes that neither the TRF publications, the TRF corporation documents, the newspaper articles, the magazine articles, nor any other document submitted into the record supports counsel's assertion that "research is a core component" of the TRF mission. The AAO recognizes that the letter from the DIRA at Asbury College asserts that the petitioner "is primarily engaged in basic and applied research" and that the petitioner is "developing new research initiatives." However, the author's narrative neither provides a factual foundation for this conclusion nor indicates that the author understands how the regulation at 8 C.F.R. § 214.2(h)(19)(iii)(C) defines "basic and applied research." Also, the AAO specifically finds that the EQUINA program as described in the DIRA's letter does not constitute either basic or applied research as defined at 8 C.F.R. § 214.2(h)(19)(iii)(C). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

For the reasons discussed above, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

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, and the petition is denied.