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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

D2



FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: FEB 01 2011

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:

SELF-REPRESENTED

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 \$630. 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,

Joe *Michael T. Kelly*
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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.

On the Form I-129 visa petition the petitioner stated that it is a “communications company for prepaid calling cards & wireless phones.” In order to employ the beneficiary in a position it designates as a computer programmer position, the petitioner endeavors 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).

The director denied the petition, finding that its approval is barred by the numerical cap on H-1B visa petitions. On appeal, the petitioner asserted that, if approval is barred by the cap, then the visa petition and fee should have been returned without adjudication.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner’s Form I-129 and the supporting documentation filed with it; (2) the service center’s request for additional evidence (RFE); (3) the response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B and the petitioner’s appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. The instant visa petition was filed for an employment period to commence in October 2005. The 2006 fiscal year (FY06) extends from October 1, 2005 through September 30, 2006. The instant petition is therefore subject to the 2006 H-1B cap, unless exempt. Further, on August 12, 2005, U.S. Citizenship and Immigration Services (USCIS) issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY06. The petitioner filed the instant visa petition on August 31, 2005. Unless this visa petition is exempt from the cap, therefore, it cannot be approved. At issue in this matter, therefore, is whether the beneficiary qualifies for an exemption from the FY06 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

Section 214(g)(5) of the Act states, in pertinent part:

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or otherwise provided [H-1B status] who –

(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity.

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

(C) has earned a master's or higher degree from a United States institution of higher education . . . until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

The record contains no evidence that the petitioner in this matter is an institution of higher education, a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization. Further, the record contains no indication that the beneficiary has earned a master's or higher degree from a United States institution of higher education.

The petition cannot be approved due to the petitioner's failure to show that the beneficiary qualifies for an exemption from the FY06 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

The AAO finds that the director was correct in her determination that the record before her established that the beneficiary is subject to the numerical cap. The AAO also finds that the argument submitted on appeal has not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed. A remaining issue, however, is the petitioner's assertion that, because approval was barred by the cap, the visa petition and fee should have been returned.

The AAO notes that the visa petition, as submitted by the petitioner, indicated, on Page 11 of the Data Collection Supplement, at Part C, Item 4, that the petitioner claimed that the beneficiary is a J-1 nonimmigrant alien who received a waiver of the 2-year foreign residency requirement described in section 214(l)(1)(B) or (C) of the Act.

Those provisions grant, under some circumstances, waiver of the cap to aliens who are the subject of a request by an interested State or Federal agency, although admission of those aliens would otherwise be barred by the cap. The instant case contains no indication that the beneficiary was granted waiver under that section or that he is eligible for that waiver. By indicating on the visa petition that the beneficiary was eligible for that waiver, however, the petitioner raised an issue that required adjudication.¹ This

¹ The regulations now make clear that a review of a petitioner's exemption claim is considered to be an adjudication for purposes of determining eligibility for the benefit sought. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B); 73 Fed. Reg. 15389, 15393 (Mar. 24, 2008). Although that regulation was not in effect when the instant visa petition was submitted, any claim of eligibility pursuant to an exemption must necessarily be adjudicated, and the AAO finds that regulation thus added merely codified the practice then in effect. As such, the proper action was to receipt in and adjudicate the instant petition instead of rejecting it

foreclosed the possibility of returning the visa petition and fee to the petitioner without adjudication. The AAO finds that the director was correct to accept and adjudicate the petition and not to return the fee. No return of that fee is due to the petitioner.

The record suggests an additional issue that was not addressed in the decision of denial.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. Whether the petitioner would employ the beneficiary in a specialty occupation was also properly at issue in this case.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which (2) requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

On the visa petition in the instant case, the petitioner characterized the proffered position as a computer programmer position. The petitioner’s general manager stated, in a note signed December 3, 2005 and submitted in response to the RFE, that the position is a professional web developer position.

The AAO recognizes the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational

outright when it was received by USCIS, and the instant visa petition was adjudicated within the confines of the ordinary course of the administration of the Act.

requirements of the wide variety of occupations that it addresses.² The *Handbook* describes the educational requirements of computer programmer positions, in the section entitled Computer Software Engineers and Computer Programmers, as follows:

Many programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

The *Handbook* describes the educational requirements of web developer positions, in the section entitled Computer Network, Systems, and Database Administrators, as follows:

Applicants for . . . Web developer positions generally need a bachelor's degree in a computer-related field, but for some positions, related experience and certification may be adequate.

The *Handbook* does not indicate that either computer programmer positions or web developer positions are categorically specialty occupation positions. The petitioner might still demonstrate that the proffered position in the instant case qualifies as a specialty occupation position, however, by demonstrating that its duties are sufficiently complex that it can only be performed by a person with a minimum of a bachelor's degree or the equivalent in a specific specialty.

In that regard, the petitioner's general manager noted, in his December 3, 2005 note, that the petitioner's business and its web presence, involve Voice Over Internet Protocol (VOIP). The general manager appeared to imply that the duties of the position are therefore more complex than a typical computer programmer or web developer position, and that the proffered position therefore requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

In support of that assertion, the petitioner provided three vacancy announcements. None of the positions they announce appear to involve VOIP. Two of the vacancy announcements submitted indicate that the positions require a bachelor's degree, but not that the degrees required must be in any specific specialty. The other announcement indicates that a bachelor's degree in computer science or computer information systems is preferred, but not required. Those announcements are very poor support for the proposition that the instant position requires a minimum of a bachelor's degree or the equivalent in a specific specialty and qualifies as a specialty occupation. The record contains no other evidence on point.

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed December 27, 2010.

The petitioner has failed to demonstrate that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the visa petition will be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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. The appeal will be dismissed and the petition denied.

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