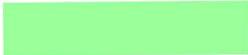


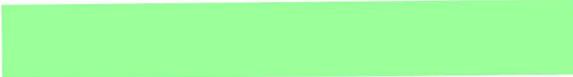
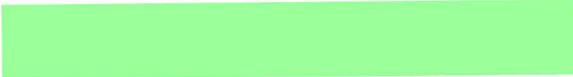


U.S. Citizenship
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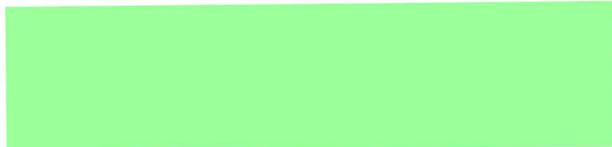


DATE: **JUL 15 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

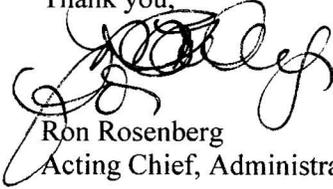


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

Enc.

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on June 5, 2012. On the Form I-129 visa petition, the petitioner describes itself as a rehab services business established in 2006. In order to employ the beneficiary in what it designates as a physical therapist position, the petitioner seeks to classify her 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 on October 15, 2012, finding that its approval is barred by the numerical limitation, or "cap," on H-1B visa petitions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

In this matter, the petitioner submitted a Form I-129 to the Vermont Service Center on June 5, 2012, seeking to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act. On the Form I-129 H-1B Data Collection Supplement (page 18), Part C, Question 1, the petitioner checked the box for option "d," to indicate that the petition is exempt from the "cap" [H-1B numerical limitation].¹ Under Part C, Question 3, the petitioner selected option "g." as the reason the petition is exempt from the cap.² Option "g." states the following:

The beneficiary of this petition: (1) was previously granted status as an H-1B

¹ On June 5, 2012, the petitioner submitted a duplicate copy of the Form I-129, LCA, and support letter. Notably, both of the Form I-129 H-1B Data Collection Supplements indicate that the petition is "d. CAP Exempt" because of option "g." The petitioner and the beneficiary are identified at the top of page 17 on both copies.

² The instructions for the Form I-129 H-1B Data Collection Supplement, Part C, Question 3 state the following: "If you answered question 1d 'CAP Exempt,' you must specify the reason(s) this petition is exempt from the numerical limitation for H-1B classification."

nonimmigrant in the past 6 years, (2) is applying from abroad to reclaim the remaining portion of the six years, or (3) is seeking a 7th year extension based upon AC21 and the beneficiary's previous H-1B petitioner/employer was not a CAP exempt organization as defined in a., b., and c.³

The director found the initial evidence insufficient to establish that the petition was exempt from the cap as described, and issued an RFE on September 29, 2012. The petitioner was asked to submit probative evidence that the petition is cap exempt as specified in the Form I-129. The director outlined the specific evidence to be submitted. The director also requested evidence to establish that the beneficiary is qualified to perform services in a specialty occupation position.

On October 2, 2012, counsel for the petitioner responded to the RFE by submitting a letter and an additional evidence. Specifically, counsel submitted the following: (1) a revised version of pages 17, 18, and 19 of the Form I-129, and (2) evidence pertaining to the beneficiary's qualifications.

In response to the director's RFE, in a letter dated October 2, 2012, counsel states the following regarding the "CAP Exempt" status of the petition:

- Please note that this is not CAP EXEMPT case, I have attached copies of I-129 part C, if your file states as exempt it must be a mistake, it is for change of status and was filed when this year's H-1B visa numbers were available. Please see page 18 of the petition it states CAP Bachelor's.

The AAO observes that on the new page 18, submitted in response to the RFE, under Part C, box "a." is checked for "CAP H-1B Bachelor's Degree." Nothing is checked under Part C, Question 3. The AAO notes that in addition to the change to Part C on page 18, the new page 17 submitted in response to the RFE lists a different annual rate of pay under Part A, question 4.⁴

The director reviewed the submission and denied the petition on October 15, 2012. Counsel submitted an appeal of the denial.

On the Form I-290B Notice of Appeal or Motion, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred in considering the petition filed as CAP exempt when it was received on June 5, 2012, and states that her copy of the original Form I-129 indicates that the petition was filed under the bachelor's cap. In support of the Form I-290B, counsel submitted additional evidence, including screen shots from her computer, information regarding the software she uses to prepare immigration forms for filing with USCIS, and a letter from the petitioner

³ A copy of the original Form I-129 submitted to U.S. Citizenship and Immigration Services is enclosed.

⁴ The AAO notes that on page 17 (Part A, Question 4) of the original Form I-129, submitted on June 5, 2012, the rate of pay is listed as "43701.00." On the new page 17, submitted in response to the RFE, and again on appeal, the rate of pay is listed as "53000." Copies of the new pages 17, 18, and 19, which were submitted with the RFE and on appeal, are also enclosed with this AAO decision.

attesting to having seen the "form I-129H on [counsel's] Westlaw Imm forms."

The AAO reviewed the entire record of proceeding before issuing this decision. The AAO finds that the original Form I-129 submitted to USCIS indicates that the petition was exempt from the cap. As previously noted, a copy of the original petition filed by the petitioner on June 5, 2012 is enclosed. The AAO observes that Part C on page 18 is checked as "d." for "CAP Exempt."⁵ Thus, the AAO finds that the director did not err in considering the petition as exempt from the cap, and requesting that the petitioner provide evidence to establish that the petition is exempt under option "g." as checked on the original page 19.

The AAO observes, as noted above, that the pages provided by counsel in response to the RFE, which request that the petition be considered under the bachelor's degree cap, are different than those originally submitted. Copies of these pages, first submitted to USCIS on October 2, 2012, are also enclosed. In the instant case, the petitioner initially indicated that the petition was exempt from the H-1B numerical limitation. Thereafter, the director correctly determined that the petition was subject to the numerical limitation.

The regulation at 8 C.F.R. § 214.2(h)(8)(ii)(B) states that "[p]etitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded." Thus, as the instant Form I-129 indicated that it was exempt from the numerical limitation, and the director later determined that the petition was subject to the cap, the AAO finds that instant petition was properly denied. Accordingly, the director's denial of the petition will not be disturbed.

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 denied.

⁵ On appeal, counsel has provided printouts of screen shots of computer software that she claims she uses to prepare USCIS forms prior to filing. The AAO observes that USCIS adjudicates only documents that are properly filed with USCIS pursuant to the applicable federal regulations. A copy of the original Form I-129 filed in the instant matter on June 5, 2012 is enclosed. Any discussion of why a different version of the form was not filed is strictly a matter between the petitioner and its counsel, and is not relevant to the adjudication of the forms that were actually filed with USCIS and appear in the record of proceeding.