U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

Dn

FILE: WAC 08 043 50543 Office: CALIFORNIA SERVICE CENTER Date: MAR 03 2009

IN RE: Petitioner: [redacted]
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:

[redacted]

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).

for

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 is an organization rendering engineering design services to major aerospace customers throughout the world. It seeks to employ the beneficiary as a lead engineer. The petitioner, therefore, endeavors to classify the beneficiary 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 2008 fiscal-year cap for the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), was reached on April 2, 2007. Although the Form I-129 petition was received on November 27, 2007, the petition was accepted and adjudicated because the petitioner indicated on the Form I-129 that the beneficiary met the cap exemption criterion at section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7) because the beneficiary had previously been granted status as an H-1B nonimmigrant in the past six years and not left the United States for more than one year after attaining such status.

The director denied the petition on the grounds that the beneficiary did not meet the requirements specified in section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), and thus the beneficiary was subject to the annual cap.

On appeal, counsel argues that the director's decision was erroneous, and contends that because the beneficiary did not exhaust his maximum period of stay in H-1B status, he should be accorded H-1B status pursuant to a policy memorandum by then [redacted] addressing "remainder" time.

Upon review of the record of proceeding, the AAO concurs with the director's conclusions. 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.

Section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), provides in relevant part:

> Any alien who has already been counted, *within the six years prior to the approval of a petition described in subsection (c),* 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 six years of authorized admission at the time the petition was filed.

(Emphasis added).

Additionally, counsel relies on a policy memorandum dated December 5, 2006 by [redacted], Associate Director of Domestic Operations, entitled *Guidance on Determining Periods of Adjustment for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission Beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year.* Specifically, counsel claims the director erred by not considering this memorandum, and relies specifically on the following excerpt:

> There have been instances where an alien who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the "remainder" of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. Pending the AC21 regulations, USCIS for now will allow an alien in the situation described above to elect either (1) to be re-admitted for the remainder of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a "new" H-1B alien subject to the H-1B cap.

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 beneficiary did not hold H-1B status within the last six years as required by the Act to be considered already counted towards the H-1B numerical limitations.

The record contains a copy of the beneficiary's H-1B approval notice, demonstrating that H-1B status was granted for a three-year period from March 22, 1996 to February 14, 1999. It is further noted that the beneficiary's status was granted as a lead engineer for a private company, thereby indicating that he would have been counted toward the annual limitations at that time since he was not employed by a cap exempt company. Again, however, the issue overlooked by counsel on appeal is the fact that the beneficiary did not hold H-1B status within the six years prior to the filing of the instant petition.

On appeal, counsel contends that "[the beneficiary] was previously in the United States in H-1B status from *April 24, 2006* to September 3, 1997." (Emphasis added). The beneficiary's visa clearly shows that the beneficiary's date of first entry to the United States was April 24, 1996, not April 24, 2006 as contended by counsel. It appears that counsel's assertions are based primarily upon a typographical error which would indicate that the beneficiary had in fact held H-1B status within the required period. However, the evidence of record confirms that the beneficiary's H-1B status commenced in 1996 and not 2006 as contended by the petitioner. Since the petition in this matter was filed approximately ten years after the beneficiary's departure from the United States in H-1B status, the petitioner has failed to establish eligibility in this matter.

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 section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), because the beneficiary was not in H-1B status and counted toward the cap within the six years prior to the filing of the petition, as required by that section of the Act. Accordingly, the AAO will not disturb the director's denial of the petition

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 met that burden.

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