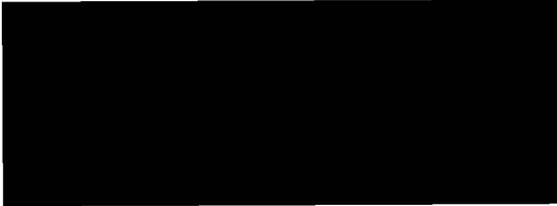


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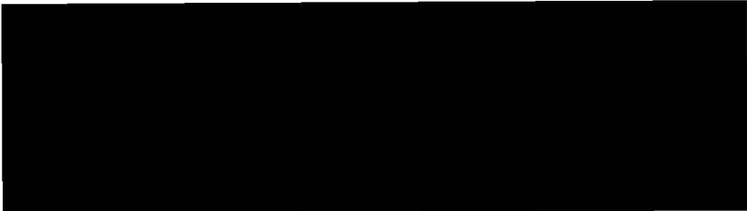
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FILE: EAC 06 198 50480 Office: VERMONT SERVICE CENTER Date: JAN 16 2008

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:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 a manufacturer for water and wastewater treatment products. It seeks to employ the beneficiary as a mechanical design 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 2007 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 May 26, 2006. The 2007 fiscal-year cap for new H-1B nonimmigrant workers who earned a United States Master's degree or higher from a United States institution of higher education was reached on July 26, 2006. Although the petitioner filed the Form I-129 petition on June 22, 2006, 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)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as a beneficiary who, in the words of the Act, "has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))."

The director denied the petition on the ground that the beneficiary did not meet the requirements specified in section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), and thus the petition in this matter is subject to the annual cap.

On appeal, counsel for the petitioner asserts that the beneficiary completed all of the requirements for a master's of science degree in mechanical engineering by the date of filing the petition, except for a special project to be completed by July 31, 2006. Counsel also contends that if the director had properly issued a Notice of Intent to Deny (NOID), before denying the matter, the petitioner would have been able to demonstrate that the beneficiary had the master's degree within the time allowed for a response to the NOID. Counsel asserts that the beneficiary received his master's degree on August 4, 2006.¹

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 filed June 22, 2006 and the supporting documentation filed with it; (2) the director's December 6, 2006 denial letter; and (3) the Form I-290B, and supporting documentation.

¹ The record on appeal does not contain documentary evidence of the beneficiary's master's degree. 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).

Section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who "has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000."

The initial record contains a June 16, 2006 letter from [REDACTED] Ph.D., Assistant Professor, University of Missouri, Mechanical and Aerospace Engineering Department. [REDACTED] states:

[The beneficiary] has fulfilled all the requirements for a Master of Science degree in Mechanical Engineering at the University of Missouri-Columbia except for his special project. [The beneficiary] has started the special project and will complete and present his project by or before July 31, 2006.

The professor's statement confirms that the beneficiary had not earned a master's degree when the petition was filed on June 22, 2006. The exemption criterion at section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), requires that the beneficiary earn a "master's or higher degree from a United States institution of higher learning." The evidence presented by the petitioner does not establish that the beneficiary had earned a master's degree from the University of Missouri when the petition was filed. Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The AAO acknowledges counsel's contention that if the director had issued the required NOID, the beneficiary would have received his master's degree prior to the date of the response. The AAO does not find that the director is required to issue a NOID when the evidence of record precludes a finding of eligibility. In this matter as determined above, the beneficiary did not have a master's degree when the petition was filed and thus could not establish that the beneficiary was exempt from the 2007 fiscal-year cap.

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)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), because the beneficiary had not earned a master's degree at the time that the petition was filed. 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.