

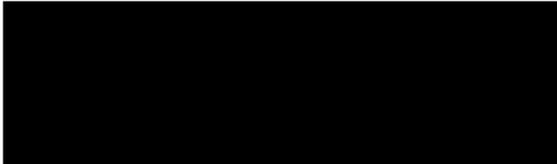
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FILE: WAC 07 138 51371 Office: CALIFORNIA SERVICE CENTER Date: **NOV 30 2007**

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:

SELF-REPRESENTED

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, 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 a software development and project management corporation that seeks to employ the beneficiary as a programmer analyst. 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 1, 2007. Although the petitioner filed the Form I-129 petition on April 3, 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)(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 beneficiary was subject to the annual cap.

On appeal, the petitioner argues that the beneficiary completed all of the requirements for a master's degree in information systems by March 15, 2007, except for the defense of her thesis. The petitioner argues that a thesis defense is merely a formality and states that the beneficiary marched during the Virginia Polytechnic Institute and University (Virginia Tech) graduation ceremony on May 13, 2007. The petitioner contends that the beneficiary is exempt from the H-1B visa cap pursuant to 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C).

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)(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."

On appeal, the petitioner submitted letters from Virginia Tech. The first letter included the salutation "Dear Graduate," but did not identify the beneficiary in any way. The second letter was from Professor and Program

[REDACTED] and states that the beneficiary completed all the requirements for a master's degree in information systems by March 15, 2007, except for the defense of her thesis. The professor refers to the defense of the thesis as a "formality." In addition the petitioner included a program from the May 11 – 13 commencement for Virginia Tech and pictures of the beneficiary marching during the Virginia Tech graduation ceremony. The petitioner did not include a copy of the beneficiary's diploma or a transcript stating a date of graduation.

Although the professor refers to the thesis defense as a formality, the master's degree was not awarded by Virginia Tech on or before March 14, 2007 despite his statement that the beneficiary completed all of the other requirements for the master's degree. 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 earned a master's degree from Virginia Tech before the Form I-129 petition was filed.

On October 29, 2007, the beneficiary submitted a letter from the Associate Dean of the Graduate School of Virginia Tech, [REDACTED], stating that the beneficiary's degree will be officially conferred on December 13, 2007. Therefore, the beneficiary has yet to earn a master's degree from Virginia Tech. 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 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.