

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

FILE: EAC 07 144 53954 Office: VERMONT SERVICE CENTER Date: **NOV 24 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.

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.


John F. Grissom, Acting 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 software consulting and development firm. It 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 petitioner filed the Form I-129 petition on April 25, 2007. As of that date, the annual fiscal-year cap on the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A) had been reached. The petition was accepted and adjudicated despite the cap limitation, however, because the petitioner indicated on the Form I-129 that the beneficiary had earned a master's or higher degree from a U.S. institution of higher education, as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a), and was, therefore, exempt from the annual fiscal-year cap on the issuance of H-1B visas under 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(c). The director subsequently denied the petition, however, determining that the petition was subject to the cap limitation as the beneficiary had not earned a master's or higher degree prior to filing the Form I-129. On appeal, counsel states that the beneficiary had completed all requirements for a master's degree as of the Form I-129 filing date.

Section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C) 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." In support of the petitioner's assertion that the beneficiary had earned a master's degree prior to the filing of the Form I-129, the following documentation was submitted:

- An affidavit from the beneficiary wherein the beneficiary stated that he had completed all requirements towards a master's degree as of the Form I-129 filing date;
- A letter from [REDACTED] College Recorder, State University of New York, New Paltz, dated April 4, 2007, wherein [REDACTED] stated that the beneficiary "applied for graduation for May 20, 2007." [REDACTED] further stated that upon review of the beneficiary's record and successful completion of all university requirements, it is anticipated that the beneficiary will be awarded a Master of Science degree in Computer Science;
- A letter from [REDACTED] College Recorder, State University of New York, New Paltz, dated August 24, 2007, wherein [REDACTED] stated that the beneficiary submitted an application for graduation on November 27, 2006. [REDACTED] further stated that a final review of the beneficiary's record indicates the successful completion of all university requirements, and that the beneficiary was awarded a Master of Science Degree in Computer Science.

- A photocopy of the beneficiary's educational transcript dated April 4, 2007 which indicates that the beneficiary had completed 24 hours of university credit towards a university degree;

An unofficial transcript dated July 6, 2007 from the State University of New York, New Paltz, which indicates that the beneficiary was awarded a master's degree on May 20, 2007. The transcript further indicates that the beneficiary completed the final six hours of university credit toward the 30 hours of university credit required for a master's degree in the spring semester of 2007; and

- A copy of the beneficiary's diploma from the State University of New York, New Paltz, indicating that the beneficiary was awarded a Master of Science degree on May 20, 2007.

None of the evidence submitted establishes that a master's degree or higher had been conferred upon the beneficiary until May 20, 2007, subsequent to the filing of the Form I-129.

As previously noted, Section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C) 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 awarding of the beneficiary's master's degree on May 20, 2007 provides conclusive proof that the beneficiary had completed all administrative and academic requirements for the degree. The beneficiary had not earned his master's degree, and the degree had not been conferred, when the Form I-129 was filed (April 25, 2007). Thus, the beneficiary is not exempt from the H-1B visa cap, and the AAO shall not disturb the director's denial of the petition.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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 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.