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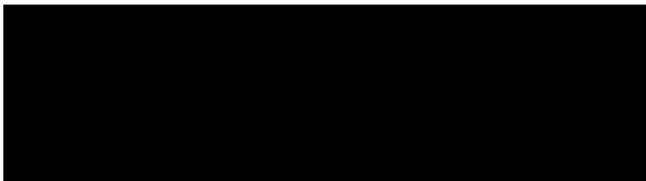
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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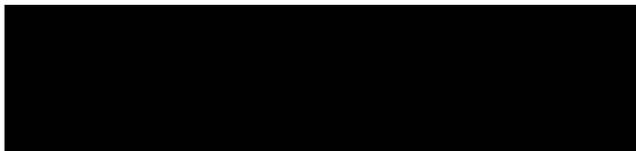
FILE: EAC 07 162 51522 Office: VERMONT SERVICE CENTER Date: **OCT 02 2008**

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 contract research organization in clinical management, data management, and biostatistics for clinical trial projects. It seeks to employ the beneficiary as an applied statistician and endeavors to classify him 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 19, 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 asserts that the director erred in not issuing a request for evidence prior to denying the petition. The petitioner further asserts that the beneficiary had completed all academic requirements of a master's degree in mathematics at the University of South Florida as of December 16, 2005, even though he did not request and receive his master's degree certificate until May of 2007. The petitioner requests that the director's decision be reversed and the petition approved. In support of its appeal, the petitioner submitted a letter dated November 13, 2007 signed by the following University of South Florida officials: [REDACTED], Major Professor; [REDACTED], Associate Dean, College of Arts and Sciences; [REDACTED], Chair of the Department of Mathematics and Statistics; and [REDACTED], Registrar. That letter states that the beneficiary completed all academic requirements for a master's degree in mathematics at the University of South Florida as of December 16, 2005, and that the degree was conferred on May 5, 2007. The petitioner submitted a copy of the diploma on appeal and 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).

Counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

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)(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 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." Despite the letter from the aforementioned University of South Florida officials indicating that the beneficiary had completed all academic requirements for a master's degree in mathematics as of December 16, 2005, and the petitioner's statement to that affect, the degree was not earned until it was actually conferred by the university which provides conclusive proof that the beneficiary had complied with all academic and administrative requirements for issuance of the degree. The evidence presented by the petitioner does not establish that the beneficiary earned a master's degree from the University of South Florida before the Form I-129 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 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.