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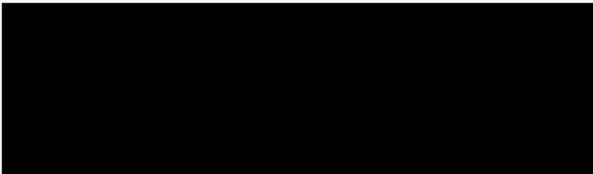
U.S. Department of Homeland Security
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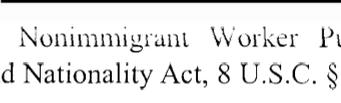
U.S. Citizenship
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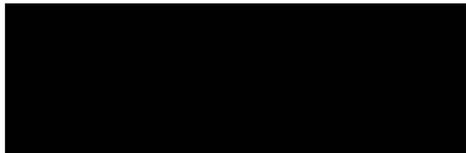


FILE: EAC 07 142 51280 Office: VERMONT SERVICE CENTER Date: **SEP 30 2008**

IN RE: Petitioner: 
Beneficiary: 

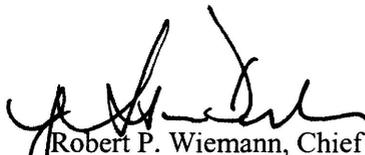
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


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 provides technology for broadband communications and Internet access. It seeks to employ the beneficiary as a digital signal processing 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 petitioner filed the Form I-129 petition on April 18, 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 basis 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. The director noted that the evidence of record did not show that the beneficiary had been awarded a master's or higher degree by a United States institute of higher learning when the petition was filed.

On appeal, counsel for the petitioner asserts that the director's decision is not supported by the statute or Citizenship and Immigration Services' (CIS) regulations, and is inherently unfair. Counsel contends that section 214(g) specifically focuses on "the total number of aliens who may be issued visas or otherwise provided nonimmigrant status"; thus the statutory cap exemption is on eligibility at the time that the nonimmigrant status is granted, not when the petition is filed. Similarly, counsel asserts that the regulations talk about numerical limits on aliens "provided nonimmigrant status", again indicating that the relevant event for determining eligibility under the cap is the date that the nonimmigrant status is provided. Counsel also references a May 12, 2005 memorandum authored by ██████████ Associate Director for Operations, CIS regarding a petition for a seventh-year H-1B extension and claims that the CIS expressly recognized that the relevant date for measuring procedural eligibility to file an H-1B petition is the date that the requested benefit will start. Counsel requests, based on the above, that the decision of the director be reversed and the petition **approved**. Counsel also attaches a September 6, 2007 letter from the Assistant Registrar and Assistant Director at the University of Illinois wherein the Registrar certifies that the beneficiary has completed all the requirements for a degree of Doctor of Philosophy in Electrical and Computer Engineering on October 15, 2007.

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) filed April 18, 2007 and the supporting documentation filed with it; (2) the director's July 23, 2007 request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's September 7, 2007 denial letter; and (5) the Form I-290B and supporting documentation.

The AAO disagrees with counsel's analysis of the issue. 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 the beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner and the beneficiary's expectation that the beneficiary will be awarded a master's or higher degree is speculative. Although counsel may believe adherence to the regulations and case law is "inherently unfair;" the AAO finds that to allow a petitioner that has not met the requirements for the exemption to the numerical cap to jump the line over those petitioners that have so complied, is not only unfair, but leads to inconsistencies and errors in decision-making.

For example, in this matter in response to the director's RFE, the petitioner provided a July 12, 2007 letter signed by ██████████ Associate Head for Administration and Instructional Affairs, Department of Electrical and Computer Engineering at the University of Illinois. ██████████ indicated that the beneficiary "deposited his thesis on July 3, 2007 and his degree should be officially conferred in August 2007." On appeal, counsel provides a September 6, 2007 letter signed by ██████████ Assistant Registrar and Assistant Director, Office of Admissions, University of Illinois. ██████████ states that the degree date of the beneficiary's Doctor of Philosophy in Electrical and Computer Engineering is October 15, 2007. The AAO observes that for whatever reason, the beneficiary did not obtain his master's or higher degree until later than the speculative date submitted by ██████████. In this instance as well, the petitioner's start date for the beneficiary's employment is October 1, 2007, a date prior to the date the beneficiary officially received his degree.

The AAO acknowledges counsel's reference to the May 12, 2005 Yates memorandum but finds the procedure established to file an H-1B seventh-year petition extension inapplicable to the numerical cap exemption determination.

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 evidence presented by the petitioner does not establish that the beneficiary had been issued a master's or higher degree from the University of Illinois when the Form I-129 petition was filed. In other words, when the petition was filed, the record did not contain evidence 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 yet earned a master's or higher degree from a United States institution of higher education at the time that the petition was filed. Accordingly, the AAO will not disturb the director's denial of the petition.

As always, 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.