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



U.S. Citizenship
and Immigration
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FILE: EAC 07 141 52466 Office: VERMONT SERVICE CENTER Date: SEP 30 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

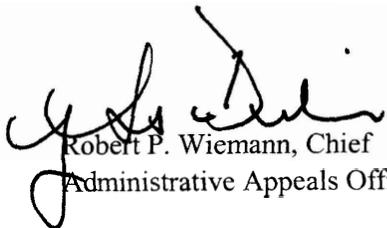
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 software consulting firm. It seeks to employ the beneficiary as a software 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 5, 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 degree by a United States institute of higher learning or that the beneficiary had completed all the program requirements when the petition was filed.

On appeal, counsel for the petitioner asserts that the issue in this matter is whether the beneficiary is qualified for H-1B classification, not whether the beneficiary graduated with a degree on April 5, 2007, the date the petition was filed. Counsel notes that although the petition was filed April 5, 2007, the effective date for the beneficiary's services was October 1, 2007. Counsel does not dispute that the beneficiary had not completed the course requirements for a master's degree by April 5, 2007 or that the beneficiary was issued his master's degree diploma in May 2007 after the petition was filed.

The AAO disagrees with counsel's analysis of the issue. The issue in this matter is whether the petition filed was exempt from the annual cap (met on April 2, 2007) based on the beneficiary's earning a master's or higher degree from a United States institution of higher learning. In this matter it is not. 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 5, 2007 and the supporting documentation filed with it; (2) the director's August 1, 2007 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 evidence presented by the petitioner does not establish that the beneficiary had been issued a master's degree from the New York Institute of Technology when the Form I-129 petition was filed. In other words, when the petition was filed, the beneficiary had not completed all the required coursework and had yet to earn a master's degree. 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 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 yet 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.

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.