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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
Services

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FILE: EAC 07 141 52756 Office: VERMONT SERVICE CENTER Date: **SEP 30 2008**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

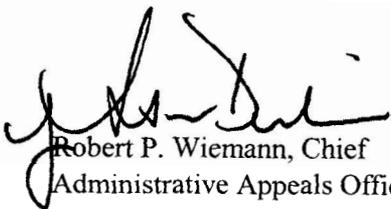
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

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, 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 information technology solutions. It seeks to employ the beneficiary as a business 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 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 or higher degree by a United States institute of higher learning or had completed all the program requirements when the petition was filed. The director referenced the April 2, 2007 letter signed by [REDACTED] Director of Advising at Salem International University, wherein [REDACTED] stated that the beneficiary upon completion of her final class this term will graduate from Salem International University on April 29, 2007.

On appeal, the petitioner asserts that the beneficiary earned her master's degree and that this petition was pending prior to the 2008 fiscal-year cap for the issuance of H-1B visas for individuals with master's degrees from United States universities had been reached.¹ The petitioner attaches a copy of the beneficiary's Master of Business degree awarded to the beneficiary on April 29, 2007 by Salem International University. The petitioner contends that the director's adjudication of the petition without confirming that the beneficiary was exempt from the numerical limitation is error.

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 July 31, 2007 denial letter; and (3) the Form I-290B and supporting documentation.

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

¹ Citizenship and Immigration Services received sufficient numbers of H-1B petitions to reach the additional 20,000 "US master's degree" numerical limitation on May 1, 2007.

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 would be awarded a master's or higher degree is speculative. The AAO observes that the Salem International University representative noted in her April 2, 2007 letter that the beneficiary had not yet completed her final class(es). The petitioner must demonstrate that the beneficiary is eligible to receive the benefit when the petition is filed.

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 Salem International University when the Form I-129 petition was filed on April 5, 2007. 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.