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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: WAC 07 154 51790 Office: CALIFORNIA SERVICE CENTER

Date:

MAY 12 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.

Per Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the 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 development business that seeks to employ the beneficiary as a computer programmer/software developer. 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 1, 2007. Although the petitioner filed the Form I-129 petition on April 27, 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. Specifically, the director found that as of the petition's filing date of April 27, 2007, the beneficiary had not received his master's degree or completed all the requirements prior to filing.

On appeal, counsel 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), and states, in part:

Although we understand that the regulations state the Beneficiary must have earned a Master's degree . . . the Service has in the past accepted and **APPROVED** the H-1B Petition on the submission of the letter as evidence from the School/University for a future graduation date, as long as the graduation occurred before the commencement of the H-1B employment. . . . Absent the clear and concise guidance from the Service, and reliance on past approved petition [sic] by the Service based on the Letter from School for a future graduation date, and the fact that the Employers were forced to file the Petition considering the numerical limitations, it would only be fair to approve the said Petition. (Emphasis added.)

The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief.

Section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) 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 record contains the following documentation pertaining to the beneficiary’s qualifications:

- A copy of the Master of Information Technology and Management degree conferred upon the beneficiary by the Illinois Institute of Technology on May 12, 2007;
- An official transcript from the Illinois Institute of Technology reflecting that the beneficiary was awarded a Master of Information Technology and Management degree on May 12, 2007;
- A letter dated April 13, 2007, from the assistant dean of the Office of Academic Affairs Graduate College of the Illinois Institute of Technology, verifying that the beneficiary had applied for graduation for the spring semester and had completed 24 hours of the 30 hour program for the Master of Information Technology and Management degree, which would be awarded on May 13, 2007, pending successful completion of coursework in progress; and
- A letter dated June 11, 2007, from the assistant dean of the Office of Academic Affairs Graduate College of the Illinois Institute of Technology, verifying that the beneficiary had completed the requirements for the Master of Information Technology and Management degree, which was awarded on May 12, 2007.

Counsel assertion on appeal that Citizenship and Immigration Services (CIS) has approved other, similar petitions in the past, is noted. This record of proceeding does not, however, contain all of the supporting evidence submitted to CIS in the prior cases. In the absence of all of the corroborating evidence contained in other records of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

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.” The evidence presented by the petitioner does not establish that the beneficiary earned a master’s degree from the Illinois Institute of Technology before the Form I-129 petition was filed. 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.