U.S. Department of Homeland Security
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PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 07 142 51581 Office: VERMONT SERVICE CENTER Date AUG 0 1 2008

IN RE: Petitioner: [redacted]
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:

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.

for 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 consulting business that 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 12, 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))." As stated by the director, the cap of 20,000 under this provision for aliens who had earned master's degrees was reached on May 1, 2007.

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 12, 2007, the beneficiary had not received his master's degree or completed all the requirements prior to filing.

On appeal, the petitioner 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 that the beneficiary had completed all the requirements for graduation at the time of filing the petition. The petitioner submits the following as supporting documentation:

- A letter dated August 20, 2007, from the graduate program director of the College of Management at the University of Massachusetts Boston, stating, in part :

  > While [the beneficiary's] coursework was only **officially** complete with the submission of grades on 25 May 2007, at the time of his submission in April he had already completed the outstanding work for each of the two classes . . . for which he was enrolled. I have spoken with the faculty members concerned, who have assured me that, if they had been able to do so, they could have already submitted [the beneficiary's] grade for the Spring 2007 semester at the time of his application for the H-1B visa. I hope that this clarifies [the beneficiary's] situation. Please let me know if I can provide any additional information concerning [the beneficiary].

- A copy of the beneficiary's Master of Business Administration degree conferred by the University of Massachusetts on June 1, 2007, and corresponding transcript.

The record also contains an undated letter submitted at the time of filing from the same graduate program director of the College of Management at the University of Massachusetts Boston, certifying that the beneficiary "will complete all requirements for the MBA degree as of May 2007 and will receive his actual diploma at the June 1st, 2007 Commencement Ceremony."

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)(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 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." As stated by the graduate program director of the College of Management at the University of Massachusetts Boston, the beneficiary graduated with a master's degree on June 1, 2007, upon completion of all the required degree requirements. The evidence presented by the petitioner does not establish that the beneficiary earned a master's degree from the University of Massachusetts Boston 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.