

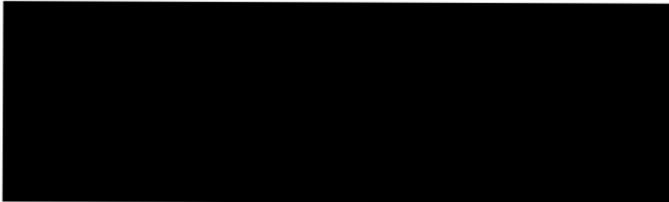
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: EAC 08 139 51184 Office: VERMONT SERVICE CENTER Date: NOV 10 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner indicates that it imports and trades in fabric, that it was established in 2003, that it employs 16 persons, and that it has a gross annual income of \$8,600,000 and a net annual income of \$60,000. It seeks to employ the beneficiary as a purchasing manager from October 1, 2008 to September 25, 2011. 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).

On May 30, 2008, the director denied the petition, determining that U. S. Citizenship and Immigration Services (USCIS) had received sufficient numbers of H-1B petitions to reach the 65,000 numerical limitation for fiscal year (FY) 2009 as of April 8, 2008 and that the petitioner had not established that the beneficiary was eligible for any of the exemptions to the numerical limitation set forth at section 214(g)(5) of the Act, 8 U.S.C. § 1184(g).

On appeal, counsel for the petitioner contends that the petitioner provided the necessary evidence to establish that the beneficiary qualified for an exemption to the numerical limitation based on completing all the requirements for her master's degree prior to the filing of the instant petition on April 2, 2008.

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 filed April 2, 2008 and the supporting documentation filed with it; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial decision; and (5) the Form I-290B and counsel's brief submitted in support of the appeal.

The issue in this matter is whether the beneficiary qualifies for an exemption from the numerical limitations set by the FY 2008 H-1B cap. In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act., the total number of H-1B visas issued per fiscal year may not exceed 65,000. On April 8, 2008, USCIS issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY09, which covers employment dates starting on October 1, 2008 through September 30, 2009. As observed above, the petitioner filed the instant Form I-129 on April 2, 2008 and requested a starting employment date of October 1, 2008. The petitioner also indicated on Part C to the H-1B Data Collection and Filing Fee Exemption Supplement, that the beneficiary had earned a numerical limitation exemption on the basis of her master's degree from a U.S. institution of higher learning.

The criteria for exemptions from the numerical limitations set for H-1B visas in section 214(g)(1)(a) of the Act, 8 U.S.C. § 1184(g) is codified at section 214(g)(5) of the Act, 8 U.S.C. § 1184(g). The law at section 214(g)(5) states:

The numerical limitations contained in paragraph (1)(a) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 1101(a)(15)((h)(i)(B) of this title who –

- (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity;
- (B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or
- (C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 1001(a) of Title 20), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

In the March 25, 2008 letter submitted in support of the petition, the petitioner stated that the beneficiary had “successfully completed all coursework, including the successful completion of a comprehensive exam, for the master degree in Management from Peter J. Tobin College of Business of St. John’s University.” The petitioner noted that the beneficiary was waiting on the conferral of her master degree in May 2008. The petitioner provided a March 27, 2008 letter signed by [REDACTED] and Associate Director of Academic Advisement, written on St. John’s University letterhead. The letter stated that the beneficiary had “completed all of the requirements for her MS degree in Management of Risk.” The letter-writer indicated that the beneficiary’s degree would be conferred on May 29, 2008.

In an RFE, dated April 26, 2008, the director indicated that “any letters by the school must be from the registrar’s office” and requested that the petitioner provide a letter from the school’s office of the registrar establishing: (1) the completion of all degree requirements toward the master’s degree, and (2) the date the degree requirements were completed.

In response to the RFE, the petitioner supplied a form letter dated May 14, 2008 indicating that the beneficiary had “satisfactorily completed the requirements for the master of science” and that the “degree will be conferred on June 2, 2008.” The letter is signed by the University Registrar and is on St. John’s University, Office of the Registrar letterhead.

On May 30, 2008, the director denied the petition observing that the form letter from the office of the registrar did not indicate that the beneficiary had met all the requirements for the master’s degree prior to the filing date of this instant petition. The director also noted that the record included the beneficiary’s transcripts but found that the transcripts, dated in January 15, 2008, also did not indicate that a master’s degree had been earned by the beneficiary.

On appeal, counsel asserts that the Assistant Dean and Associate Director of Academic Advisement, is a qualified representative of St. John’s University. Counsel contends that the Assistant Dean’s letter dated March 27, 2008, stating that the beneficiary had met all the requirements for her Master

of Science degree in Management Risk proves that the beneficiary had completed the degree requirements prior to April 2, 2008, the date of filing the petition. Counsel further contends that this letter should be given sufficient weight to establish the beneficiary's eligibility for her master's degree prior to filing the petition and questions the director's failure to give this letter any consideration. Counsel avers that the form letter signed by the Registrar, although not including the date that the beneficiary completed the requirements, when considered in conjunction with the March 27, 2008 letter signed by the Assistant Dean and Associate Director of Academic Advisement, leads to the reasonable conclusion that the beneficiary completed the degree requirements prior to April 2, 2008. Counsel also includes a June 17, 2008 letter signed by the Associate Registrar of St. John's University confirming that the beneficiary "has completed all coursework and all degree requirements, including the successful completion of a comprehensive exam for the Master of Science in Management of Risk from the Peter J. Tobin College of Business at St. John's University as of February 28, 2008."

The AAO interprets the term "earned" as used in section 214(g)(5)(C) of Act as the actual conferral of the degree from a United States institution of higher education. St. John's University conferred the master's degree upon the applicant on May 18, 2008, a date subsequent to the date the petition was filed. Thus, 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. 8 C.F.R. § 103.2(b)(1). 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. Here, the petitioner has not met its burden on the beneficiary's eligibility for an exemption from the numerical cap of 65,000 H-1B visas for FY'09.

ORDER: The appeal is dismissed.