U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 07 147 51709 Office: VERMONT SERVICE CENTER Date: **NOV 17 2009**

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:

[redacted]

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 or reopen, 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 dismissed a subsequent motion to reopen and/or reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner describes itself as a software development and consulting business[1] and indicates that it currently employs 135 persons. It seeks to employ the beneficiary as a programmer 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 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.

On appeal, counsel argues that "even though the degree was awarded on May 12, 2007, the beneficiary had completed all the courses for his Master's degree." Counsel submits a copy of a transcript reflecting that the beneficiary received a Master of Science degree in Computer Engineering from the University of Bridgeport in Bridgeport, Connecticut on May 12, 2007. Counsel also submits a copy of the beneficiary's Master of Science degree that was conferred on May 12, 2007. 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).

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 supporting documentation; (2) the director's denial letter; (3) the Form I-290B (Notice of Motion) and the supporting documentation filed with it; (4) the director's decision affirming his denial of the petition; and (5) the Form I-290B (Notice of Appeal), and the supporting documentation filed with it.

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),

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[1] Information at the petitioner's website at http://www.delasoft.com/ reflects that the petitioner is based in Delaware and Illinois. The website for the State of Illinois at http://www.ilsos.gov/corporatellc/CorporateLlcController reports the petitioner's status as "not good standing."

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."

On appeal, the petitioner submits previously submitted documentation, including a copy of the beneficiary's transcript from the University of Bridgeport for his master's degree, stamped "CONFIDENTIAL RECORD FOR YOUR EXCLUSIVE USE NOT TO BE GIVEN TO APPLICANT UNDER ANY CIRCUMSTANCES," which indicates that the degree was conferred on May 12, 2007; and a copy of the beneficiary's Master of Science degree that was conferred on May 12, 2007. The record also contains a letter dated April 18, 2007, from the Associate Dean for Graduate Programs at the University of Bridgeport, who states, in part, that the beneficiary "will complete his degree requirements by May 11, 2007."

The AAO acknowledges counsel's argument that "the beneficiary had completed his courses for his Master's degree and thus [is] eligible for an H-1B visa." 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 Bridgeport University before the Form I-129 petition was filed. U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. 103.2(b)(1). 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.