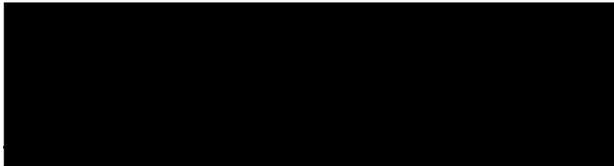




U.S. Citizenship
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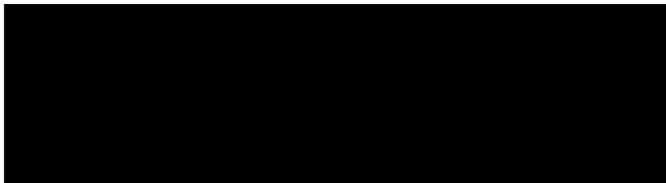
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FILE: EAC 06 210 51528 Office: VERMONT SERVICE CENTER Date: **DEC 26 2007**

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.

James Blinzinger, for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal shall be summarily dismissed.

The petitioner is a software quality assurance and technology provider that seeks to employ the beneficiary as a software quality assurance analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 director denied the petition on the basis that it is subject to the numerical limitations for fiscal year 2007, as 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).

The annual fiscal-year cap on 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 May 26, 2006. Although the petitioner filed the Form I-129 petition on July 10, 2006, 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))."

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

On appeal, counsel asserts, in part, as follows:

Petition was denied without a request for additional evidence in contravention of well established service policy.

The Service erred in seeking a Master's Degree as of July 10, 2006 therefore setting an artificial deadline. Beneficiary completed her Master's Degree on July 24, 2006, two days prior to when the 20,000 Advance Degree Cap was reached for FY 2007 – July 26, 2006.

Counsel's assertion on appeal is noted. As discussed in the director's decision, however, the petition would have been rejected based on numerical limitation had the petitioner not provided incorrect information on the petition. Specifically, in Part C of the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, the petitioner incorrectly indicated that the beneficiary had earned a master's or higher degree from a U.S. institution of higher education, as defined in the Higher Education Act of 1965, § 101(a), 20 U.S.C. § 1001(a). 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." As

discussed by the director in her decision, the beneficiary had not earned a master's degree at the time of filing the instant petition on July 10, 2006, and therefore is ineligible for the expanded numerical limitation. The AAO finds that the evidence of record does not establish that the beneficiary is subject to the expanded 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. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

On the Form I-290B, counsel fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. As neither the petitioner nor counsel presents additional evidence on appeal to overcome the decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.