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U.S. Department of Homeland Security
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U.S. Citizenship
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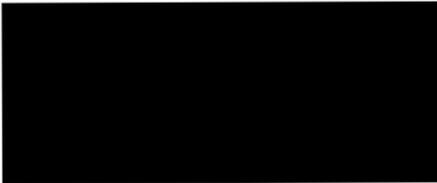
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FILE: EAC 07 141 52781 Office: VERMONT SERVICE CENTER Date: **NOV 24 2014**

IN RE: Petitioner: 
Beneficiary: 

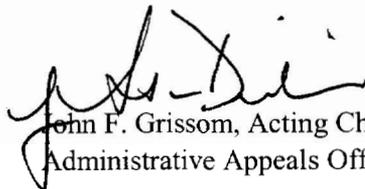
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act.

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.


John F. Grissom, Acting 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. The petition will be denied.

The petitioner is an IT consulting and software development firm. It seeks to employ the beneficiary as a computer programmer and endeavors to classify him 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 director denied the petition stating that the beneficiary had not earned his master's degree prior to the filing of the petition, and thus, the beneficiary was not exempt from cap limitations for fiscal year 2008. On appeal, the petitioner states that the beneficiary had completed all requirements for his master's degree when the Form I-129 was filed, and that he was exempt from cap requirements.

The petitioner filed the Form I-129 petition on April 5, 2007. As of that date, 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) had been reached. The petition was accepted and adjudicated despite the cap limitation, however, because the petitioner indicated on the Form I-129 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, section 101(a), 20 U.S.C. section 1001(a), and was, therefore, exempt from the annual fiscal-year cap on the issuance of H-1B visas under 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(c).

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), 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 petitioner submitted the following documentation in support of its assertion that the beneficiary had completed all requirements for his master's degree prior to the filing of the Form I-129:

- An undated memo from [REDACTED], Geophysical Institute, University of Alaska Fairbanks, which states that the beneficiary completed all requirements for a master's degree in electrical engineering. The memo further states that the beneficiary defended his thesis on March 21, 2007, the committee signed the completed copy of the thesis on March 27, and the beneficiary was then simply waiting for the university to confer the degree; and
- A letter dated August 13, 2007 from [REDACTED] Interim Dean of the Graduate School, University of Alaska Fairbanks, which states that the beneficiary completed all requirements for his master's degree prior to April 1, 2007. The letter further states that because the university only confers degrees at the end of the semester, the beneficiary's degree was not posted to his transcript until May of 2007, and that the beneficiary successfully defended his thesis on March

27, 2007, with his research and course requirements deemed complete at that time.

As previously noted, the Form I-129 was filed on April 5, 2007. The record clearly establishes that the beneficiary was awarded his master's degree sometime in May of 2007. The petitioner did not submit a copy of his diploma or official transcripts to establish the date the degree was actually conferred. The awarding of the degree is conclusive proof that the beneficiary has completed all academic and administrative requirements for the degree, and that the university finds all conditions precedent to the awarding of the degree met.

Once again, 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), 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 does not establish that the beneficiary had earned his degree until it was actually conferred. The degree was conferred subsequent to the filing of the Form I-129. Thus, he is not exempt from the H-1B visa cap, and the AAO shall not disturb the director's denial of the petition.

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).

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.