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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 07 142 51360 Office: VERMONT SERVICE CENTER Date: SEP 30 2008

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.

*for Michael T. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director 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 information technology and consulting company that seeks to employ the beneficiary as a software quality assurance 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 record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The 2008 fiscal year numerical 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 petition on April 17, 2007, it 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, however, denied the petition on the basis of his determination 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 is therefore subject to the fiscal year 2008 numerical cap.

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<sup>1</sup> (AC-21), 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."

Although the petitioner stated in its April 10, 2007 letter of support that the beneficiary possessed a master's degree in computer science, it also submitted a letter from [REDACTED] academic coordinator of the computer science program at the University of Texas, indicating that the degree would not be awarded until May 5, 2007. On appeal, the petitioner submits evidence indicating that that beneficiary earned a master's degree in computer science from the University of Texas on May 5, 2007.

Although counsel states on appeal that the beneficiary had "completed all the required coursework" and that "there were no remaining requirements to be fulfilled," the record is clear that the beneficiary did not have a master's degree until May 5, 2007. Nor is counsel's assertion that the director should have issued a request for additional evidence (RFE) persuasive. When there is evidence of ineligibility in the record, 8 C.F.R. § 103.2(b)(8) requires the director to deny the petition, and there is no requirement to issue an RFE. The evidence before the director indicated that the beneficiary would not receive the master's degree until May 5, 2007. This constituted evidence of ineligibility in the record (i.e., that the

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<sup>1</sup> American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

beneficiary did not possess a master's degree on the date the petition was filed), and there was no need for the director to issue an RFE. The director was therefore correct to deny the petition without issuing the RFE.

The evidence of record does not establish that the beneficiary had earned a master's degree at the time the petition was filed on April 17, 2007. 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 fiscal year 2008 numerical 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 sustained that burden.

**ORDER:** The appeal is dismissed. The petition is denied.