

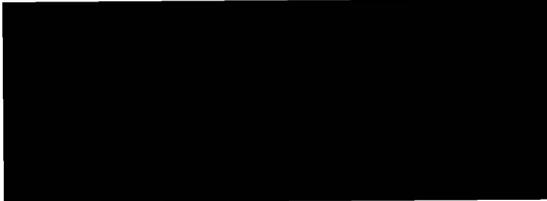
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U.S. Department of Homeland Security  
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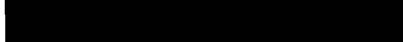
U.S. Citizenship  
and Immigration  
Services

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*Dr*

FILE: EAC 07 142 50349 Office: VERMONT SERVICE CENTER Date: **SEP 30 2008**

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)

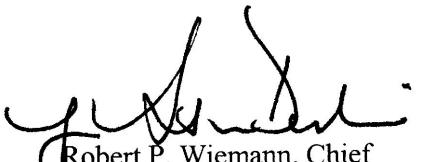
ON BEHALF OF PETITIONER:



(The G-28 is signed by the attorney- in-fact and is on the non record side) I have another Techorbit case where the G-28 is signed by the attorney in fact and the Service Center accepted it.

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.

  
Robert P. Wiemann, 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 provides software design, development, and project management. 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 2, 2007. Although the petitioner filed the Form I-129 petition on April 11, 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 basis 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. The director noted that the evidence of record did not show that the beneficiary possessed a master's or higher degree by a United States institute of higher learning when the petition was filed. The director referenced an April 9, 2007 letter signed by [REDACTED] Professor and Director of Graduate Studies at the University of Kentucky, wherein [REDACTED] stated that the beneficiary would "complete all the course work by the end of this term and will defend the Masters Project, which is the very last requirement towards MS degree, at the end of this month."

On appeal, the petitioner submits an August 24, 2007 letter signed by [REDACTED] Professor and Gartner Group Endowed Chair in Networking, Department of Computer Science, at the University of Kentucky, who states that the beneficiary "completed all the coursework and successfully defended his MS thesis as of April 27, 2007" and the degree was awarded on May 6, 2007.

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) filed April 11, 2007 and the supporting documentation filed with it; (2) the director's July 31, 2007 denial letter; and (3) the Form I-290B and supporting documentation.

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 the beneficiary becomes eligible under a

new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner and the beneficiary's expectation that the beneficiary would be awarded a master's or higher degree in the future is speculative. The AAO observes that as of April 11, 2007, the beneficiary had not yet completed all his coursework and defended his master's thesis. Thus, the petitioner had not established the beneficiary's eligibility for this exemption when the petition was filed.

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 evidence presented by the petitioner does not establish that the beneficiary had been issued a master's or higher degree from the University of Kentucky when the Form I-129 petition was filed on April 11, 2007. In other words, when the petition was filed, the record did not contain evidence 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 yet earned a master's or higher degree from a United States institution of higher education at the time that the petition was filed. Accordingly, the AAO will not disturb the director's denial of the petition.

As always, 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.