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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



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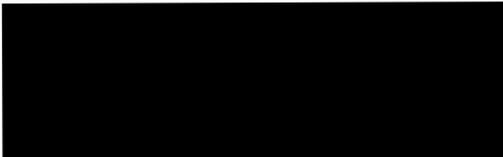


FILE: EAC 07 147 53971 Office: VERMONT SERVICE CENTER Date: SEP 21 2009

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)

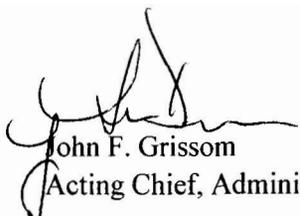
ON BEHALF OF PETITIONER:



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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. Upon further review, the director determined that the approval was in error, and he issued a notice of intent to revoke the petition's approval. The approval of the petition was ultimately revoked and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will be revoked.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it is an information technology firm, that it was established in 1999, employs 400+ persons, and has an estimated gross annual income of \$37,000,000. It seeks to employ the beneficiary as a computer programmer from October 1, 2007 to September 30, 2010. Accordingly, the petitioner 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 as of April 2, 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 initially approved the petition on November 15, 2007. Upon further review of the beneficiary's credentials, the director recognized that the beneficiary had not earned his master's degree when the petition was filed. Because the beneficiary did not have a master's degree when the petition was filed, the director issued a notice of intent to revoke (NOIR) the petition on April 10, 2008. The director specifically noted that the beneficiary had not met 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 for the petitioner asserts that at the time of filing the Form I-129 petition, the beneficiary had substantially completed his U.S. Master of Science Degree at the University of Illinois and thus was eligible for the cap exemption. Counsel and the beneficiary note that the beneficiary: had completed 28 credit hours toward his master's degree when the petition was filed; had begun work on his master's thesis in the fall semester of 2005 and in the summer of 2007 was granted "graduate research credit" toward the final completion of his thesis; and was awarded a Master of Science degree on July 28, 2007. Counsel acknowledges that the beneficiary had not earned a master's degree when the petition was filed but avers that the beneficiary's substantial completion of his work toward the master's degree when the petition was filed and the director's approval on November 15, 2007, a date after the beneficiary had obtained his master's degree should qualify the beneficiary as eligible for the cap exemption.

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 the supporting documentation filed with it; (2) the director's initial erroneous approval; (3) the director's NOIR; (4) the director's denial letter; and (3) the Form I-290B, counsel's brief and supporting documentation.

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."

Although both counsel and the beneficiary acknowledge that the beneficiary had not completed his master's degree when the petition was filed, counsel asserts that the substantial completion of the degree and the erroneous approval issued after the beneficiary had received the degree should suffice for an exemption from the numerical limitations for the issuance of H-1B visas. The AAO disagrees. The director's erroneous approval decision is not a substitute for the beneficiary's actual eligibility to benefit from the cap exemption for those individuals who have earned a master's degree.

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. *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 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 revocation of the approval 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 approval of the petition is revoked.