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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



U.S. Citizenship
and Immigration
Services

D2



FILE: EAC 08 142 54412 Office: VERMONT SERVICE CENTER

Date:

AUG 03 2010

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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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 filed this nonimmigrant petition seeking to employ the beneficiary in the position of a Data Analyst as an H-1B nonimmigrant 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 petitioner is a software development, IT consulting and clinical research support services firm.

The petition was denied due to the petitioner's failure to show that the beneficiary qualifies for an exemption from the general Fiscal Year 2009 (FY09) H-1B cap pursuant to § 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C).

As of April 7, 2008, U.S. Citizenship and Immigration Services (USCIS) had received sufficient numbers of H-1B petitions to reach the general H-1B cap for FY09, which covers employment dates starting on October 1, 2008 through September 30, 2009. In general, H-1B visas are numerically capped by statute. Pursuant to § 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. On the Form I-129, the petitioner requested a starting employment date of October 1, 2008. Because the petitioner indicated on the Form I-129 Supplement that the beneficiary was awarded a U.S. Master of Science Degree from the University of Florida and thus was exempt from the general FY09 H-1B cap pursuant to § 214(g)(5)(C) of the Act, the petition was adjudicated by the director as a cap exempt case, even though the petition was filed prior to April 7, 2008.

The petitioner filed the Form I-129 on April 1, 2008 and requested a starting employment date of October 1, 2008. Because the petitioner indicated on the Form I-129 that the beneficiary has a U.S. Master of Science Degree, the petition was adjudicated as an H-1B cap exempt case when it was initially received by the service center. The director issued an RFE on July 7, 2008 requesting evidence that the beneficiary received her U.S. Master of Science degree prior to the date the petition was filed. In response, the petitioner submitted documentation indicating that the beneficiary's U.S. Master of Science degree was awarded on May 6, 2008. On September 2, 2008, the director denied the petition on the basis that the beneficiary did not have a U.S. Master's Degree at the time the petition was filed and therefore was not H-1B cap exempt at the time the petition was filed. On appeal, the petitioner argues that because the beneficiary finished her course requirements towards her U.S. Master of Science degree as of November 12, 2007, that the beneficiary is H-1B cap-exempt pursuant to § 214(g)(5) of the Act, even though her Master's degree was not actually awarded until May 6, 2008.

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 RFE; (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, and supporting documentation.

The AAO will examine, as counsel asserts, whether the beneficiary qualifies for an exemption from the Fiscal Year 2009 (FY09) H-1B cap pursuant to § 214(g)(5)(C) of the Act.

Section 214(g)(5)(C) of the Act states, in relevant part, that the H-1B cap shall not apply to any alien who has earned a Master's or higher degree from a United States institution of higher education, until the number of aliens who are exempted from such numerical limitation in a given fiscal year exceeds 20,000. The issue, therefore, is whether the beneficiary earned a U.S. Master's degree as of the date the petition was filed.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

On appeal, the petitioner submits a letter, dated March 7, 2008, from the Coordinator of Graduate Student Records at the University of Florida. This letter states as follows:

[The beneficiary] has applied to graduate in Spring 2008 with the degree Master of Science with a major in Interdisciplinary Ecology. The student has completed all course requirements, passed the final examination on November 12, 2007, and has made final submission of an acceptable thesis. Since this student is in a "cleared prior" status, no further registration is allowed. . . . This letter, which is official notification by the College of Agricultural and Life Sciences and the Graduate School *expects that the degree will be awarded on May 6, 2008*, when all University degrees for this term are officially certified. . . .

[Emphasis added.]

This letter, which is not from the Dean or the Registrar's Office, does not indicate as of what date all course requirements were completed nor the date that final submission of an acceptable thesis was made. More

importantly, however, the letter states that the school expects that the degree will be awarded on May 6, 2008, which indicates that the beneficiary's U.S. Master's degree had not been awarded by the date the petition had been filed and, additionally, that there is no guarantee that the beneficiary will actually receive the degree by May 6, 2008, only an expectation that the degree will be awarded by that date.

Section 214(g)(5)(C) of the INA is clear that this H-1B cap exemption only applies to those who have "earned" a Master's or higher degree from a United States institution of higher education. Even if the petitioner had demonstrated, which it did not do, that the beneficiary had completed all of her degree requirements by the time the petition was filed, there is currently no provision in the law enabling people who have completed all the requirements for their U.S. Master's degree, but have not yet been awarded the degree, to benefit from this exemption. The petitioner did not submit any documentation evidencing that the beneficiary actually earned her U.S. Master's degree as of the date the petition was filed. Therefore, the beneficiary was not eligible at the time the petition was filed for an exemption under section 214(g)(5)(C). As the beneficiary is H-1B cap subject and was not properly filed as such, the petition must be denied.

Upon review, the petitioner has not established that it is exempt from the FY09 H-1B cap pursuant to § 214(g)(5)(C) of the Act. Accordingly, the petition must be denied.¹ The AAO notes, however, that this decision shall not serve to bar the petitioner from filing a new petition, accompanied by evidence to show current eligibility under the technical requirements at 8 C.F.R. § 214.2(h).

The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.

¹ A review of a petitioner's exemption claim is considered to be an adjudication for purposes of determining eligibility for the benefit sought. *See generally* USCIS Adj. Field Manual 31.3(g)(13)(2009).