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FILE: WAC 08 142 52553 Office: CALIFORNIA SERVICE CENTER Date: **JAN 11 2010**

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 company with six employees. It seeks to employ the beneficiary as a systems analyst 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 concluding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's Notice of Intent to Deny (NOID); (5) the petitioner's response to the NOID; (6) the director's denial letter; and (7) Form I-290B with counsel's brief and supporting documents. The AAO reviewed the record in its entirety before reaching its decision.

The first issue that the AAO will consider on appeal is whether the beneficiary was qualified to perform in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C) at the time the petition was filed.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for

training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty; or

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petition was submitted on April 14, 2008, along with a copy of a letter dated March 27, 2008, from [REDACTED] a professor at Wayne State University, who stated that the beneficiary completed all his Master's degree program requirements and successfully defended his Master's thesis on March 26, 2008. The letter goes on to state, "I expect him to officially complete the final requirement for the degree of Master of Science without any deficiency within the month of March, 2008 barring any administrative matters." Also submitted with the petition was a copy of a letter addressed to the beneficiary and dated March 3, 2008, from [REDACTED] in the Department of Computer Science at Wayne State University, which states, "Upon successful completion of your thesis defense, and after the degree audit through the Computer Science Department and the Graduate Office, you will be able to receive your Master of Science degree in Computer Science from Wayne State University." The petitioner did not provide copies of the beneficiary's transcripts or degree from Wayne State University with the petition.

On May 19, 2008, the director issued an RFE requesting evidence that the beneficiary had earned a Master's degree at the time the petition was filed. In addition, the RFE requested documents evidencing that a specialty occupation exists for the beneficiary and that there was a bona fide job offer at the time of filing the petition.

Counsel for the petitioner submitted a copy of the beneficiary's diploma and original transcripts, which indicated that the beneficiary was awarded a Master of Science degree in Computer Science on April 29, 2008, nearly one month after the petition was filed. Counsel also submitted a letter from the petitioner and an itinerary, which stated that the beneficiary would be employed at the petitioner's offices in Shawnee, KS, on an internal project, along with an employment agreement between the petitioner and the beneficiary.

The director issued a NOID on July 24, 2008, stating that the evidence submitted indicated that the beneficiary received the Master's degree after the petition was filed. Counsel resubmitted the copies of the letters from Wayne State University and the beneficiary's final transcript.

The director denied the petition stating that the petition did not establish that the beneficiary is qualified in a specialty occupation by virtue of possessing a baccalaureate degree or equivalent in a specific field of study which is clearly related to the position being offered at the time of filing.

With the appeal, counsel for the petitioner has submitted an original transcript for the beneficiary, indicating that the Master of Science degree in Computer Science was awarded on April 29, 2008, along with a certified letter from [REDACTED] at Wayne State University, which states, "This letter is to certify that the documents you have received from [REDACTED] and [REDACTED] are authentic. These documents contain true and accurate information concerning the above named individual which only these two individuals have the authorization to provide."

On appeal, counsel cites to 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). This section 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."

Counsel goes on to state:

The beneficiary earned his Master's Degree in Computer Science from Wayne State University by completing all of the degree requirements prior to the filing of the instant petition. The date of the ceremony honoring new graduates, when the Beneficiary's diploma was actually handed to him, is irrelevant in determining when the degree requirements were met. Moreover, the applicable regulation only states that a beneficiary must have earned a Master's degree prior to the date of filing. A degree is earned when all of the degree requirements are met irrespective of when the degree was conferred or physically received by the Beneficiary.

In its denial, the Service states that the beneficiary "did not *hold* a master's degree from a United States college or university or its equivalent at the time of filing." (Emphasis added). However, the applicable statute requires the "earning" of the degree and does not stipulate that the degree must have been conferred, or held, by the beneficiary at the time of filing, only earned. A primary rule of statutory interpretation indicates that every word that is used in a regulation was specifically chosen for the meaning of that word. An additional rule of statutory interpretation states that if a word is not defined in the statute the plain meaning of the word is to be used. As "earned" is not defined in the statute, the plain meaning of the word must be used."

Counsel then provides a definition of the word "earned" from Webster's Revised Unabridged Dictionary as "to merit or deserve, as by labor or service; to do that which entitles one to (a reward, whether the reward is received or not)," and states:

To require that the Beneficiary *hold* a Master's degree does not adhere to the spirit of the regulation. If Congress had intended that a beneficiary would not qualify under the Master's cap unless he *held* the degree prior to the time of filing, then Congress would have stated this in the regulation quoted above. However, Congress chose to state that a beneficiary would qualify under the Master's cap if he had *earned* a Master's Degree prior to the time of filing.

Counsel misunderstands the basis for the director's denial. The director did not deny the petition under section 214(g)(5)(C) of the Act. Instead, the director denied the petition under 8 C.F.R. § 214.2(h)(4)(iii)(C), which uses the word "hold" and not "earn" for the first criteria, requiring that the beneficiary "[h]old a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university."¹

¹ Nevertheless, the wording under section 214(g)(5)(C) of the Act requires that the degree must have been

The evidence presented by the petitioner does not establish that the beneficiary held a Master's degree from Wayne State University before the Form I-129 petition was filed. When the petition was filed, the beneficiary had yet to earn a Master's degree. 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 the beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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.

conferred at the time of filing in order for the beneficiary to benefit under this provision. Counsel does not provide any objective evidence that the reason the statute includes the word "earns" instead of "holds" in section 214(g)(5)(C) of the Act is to enable beneficiaries who have fulfilled the coursework requirements, but not yet obtained a master's degree, to benefit from this exemption to the numerical cap. Moreover, according to *Webster's New College Dictionary*, 3d ed. (2008), to earn means "[t]o gain esp. for the performance of service or work" or "[t]o acquire as a result of effort or action." Under this definition, to earn a degree means to gain or acquire a degree. It would be incorrect for the petitioner to assert that the beneficiary gained or acquired the master's degree prior to the date the degree was actually conferred on April 29, 2008. The petitioner has not produced any document from the university demonstrating that the beneficiary gained or acquired the master's degree prior to April 29, 2008. Therefore, the beneficiary did not earn the Master's degree prior to filing the petition and would not have qualified for a cap exemption under section 214(g)(5)(C).

As the director states in the denial, "the fact that the alien beneficiary may at some time in the future be fully qualified prior to actually obtaining status as an H-1B, does not exempt him or her from being eligible for the classification at the time of filing. To do otherwise would be contrary to the fairness provision of the Act which limits the number of eligible H-1B aliens to 65,000 per year and requires that the visas shall be issued in the order in which petitions are filed."

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.

As referenced above, 8 C.F.R. § 103.2(b)(1) requires that the beneficiary must be eligible for the requested benefit "*at the time of filing the application or petition.*" [Emphasis added.] Moreover, 8 C.F.R. § 214.2(h)(4)(iii)(B) requires that: "The petitioner *shall* submit the following with an H-1B petition involving a specialty occupation: . . . (3) Evidence that the alien qualifies to perform services in the specialty occupation as described in paragraph (h)(4)(iii)(A) of this section." [Emphasis added.] Therefore, the Form I-129 filing requirements imposed by regulation are clear that the petitioner must submit evidence that the beneficiary is qualified to perform services in the specialty occupation *at the time of filing*, and not subsequent to filing, irrespective of the petition's requested start date.

As noted above, the letter from [REDACTED] states, "I expect him to officially complete the final requirement for the degree of Master of Science without any deficiency within the month of March, 2008 *barring any administrative matters.*" (Emphasis added.) In fact, the beneficiary did not receive his master's degree in March 2008, as Professor Jamil anticipated, but instead received it at the end of April 2008, after the petition was filed. As the beneficiary did not hold a U.S. degree in computer science or a related field at the time the petition was filed, he is not qualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1).

The AAO will next consider whether the beneficiary is qualified to perform services in a specialty occupation under the other provisions of 8 C.F.R. § 214.2(h)(4)(iii)(C). The petitioner submitted documents regarding the beneficiary's foreign education. However, the petitioner did not submit any foreign education evaluation that demonstrates the beneficiary's foreign education has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. Under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the beneficiary must have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States Bachelor's degree or higher in computer science or a related field, and have recognition of expertise in computer science through progressively responsible experience related to this specialty.

As stated above, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) where the beneficiary does not already have the requisite degree, equivalence to completion of a United States baccalaureate or higher degree must be determined by either: (1) an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university with a program for granting such credit; (2) the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI); (3) evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty; or (4) a determination by USCIS that the equivalent of the degree required by the specialty

occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The petitioner has not provided any credential evaluations, results of college-level equivalency examinations, or evidence of certification or registration from a nationally-recognized professional association or society. Therefore, the only way that the beneficiary would qualify under 8 C.F.R. § 214.2 (h)(4)(iii)(C)(4) is if USCIS makes a determination that the beneficiary had the equivalent of the bachelor's degree in computer science or a related field through a combination of education, specialized training, and/or work experience at the time the petition was filed.

As referenced above, under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. The petitioner submitted one letter of experience documenting six months of work, but it does not state whether this work was full-time or part-time and is not sufficiently detailed with respect to the work performed by the beneficiary. Moreover, the documentation is not sufficient to establish how much, if any, college-level training the alien lacks, so that the AAO is unable to determine how many years of experience would be required to make up any deficit. Therefore, the AAO concludes that the beneficiary did not have the requisite experience at the time the petition was filed.

In order for USCIS to make a determination under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the petitioner must also clearly demonstrate that the beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the beneficiary's experience was gained while working with people who have a degree or its equivalent in the specialty occupation; and that the beneficiary has recognition of expertise in the specialty evidenced by at least one type of documentation as referenced above. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Counsel and the petitioner did not provide any such evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, the AAO cannot conclude that the equivalent of the degree required by the specialty occupation was acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty at the time the petition was filed and that the beneficiary achieved recognition of expertise in the specialty occupation as a result of such training and experience. The evidence does not establish that the beneficiary is qualified to perform a specialty occupation. Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

For the reasons related in the preceding discussion, the AAO affirms the director's decision that the beneficiary is not qualified to perform the duties of a specialty occupation. Accordingly, the AAO shall 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.