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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
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FILE: EAC 07 144 53863 Office: VERMONT SERVICE CENTER

Date: **JAN 25 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:

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).

For 
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 is a software development and consulting company. It seeks to employ the beneficiary as a computer programmer and endeavors to classify him as a nonimmigrant worker 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 director denied the petition stating that the beneficiary had not earned his master's degree prior to the filing of the petition, and thus, the beneficiary was not exempt from cap limitations for Fiscal Year 2008 (FY08). *On appeal, the petitioner states that the beneficiary had completed all requirements for his master's degree when the Form I-129 was filed, and that he was exempt from cap requirements.*

The petitioner filed the Form I-129 petition on April 26, 2007. As of that date, the annual fiscal-year cap on the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), had been reached. 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. The petition was accepted and adjudicated despite the cap limitation, however, because the petitioner indicated on the Form I-129 that the beneficiary had earned a master's or higher degree from a U.S. institution of higher education, as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. § 1001(a), and was, therefore, exempt from the annual fiscal-year cap on the issuance of H-1B visas under § 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(c).

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 § 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 § 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 petitioner submitted the following documentation in the initial submission:

- A memo dated April 9, 2007 from [REDACTED], Wayne State University, which states that the beneficiary “will complete all the degree requirements for the Master of Science in Electrical Engineering in the Electrical and Computer Engineering Department at Wayne State University **in Winter 2007 semester ending in May 1, 2007.**” (emphasis added); and
- An unofficial copy of an academic transcript dated March 27, 2007, from Wayne State University, which does not indicate a degree was conferred and states the following for Winter 2007: “IN PROGRESS WORK.”

On appeal, for the first time the petitioner submits the following documentation in support of its assertion that the beneficiary had completed all requirements for his master's degree prior to the filing of the Form I-129:

- A memo dated May 7, 2007 from [REDACTED] at Wayne State University certifying that the beneficiary completed all degree requirements for a Master of Science in Electrical Engineering in the Electrical and Computer Engineering Department in May 2007;
- An official academic transcript dated August 6, 2007, from Wayne State University that states the beneficiary was awarded his MS on May 1, 2007;
- A copy of the beneficiary's diploma indicating that an MS degree was awarded from Wayne State University on May 1, 2007; and
- A copy of an undated letter from the Wayne State University registrar that does not mention the beneficiary by name.

As previously noted, the Form I-129 was filed on April 26, 2007. The record clearly establishes that the beneficiary was awarded his master's degree on May 1, 2007. Once again, 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 record does not establish that the beneficiary had earned his degree until it was actually conferred on May 1, 2007. The degree was conferred subsequent to the filing of the Form I-129. Thus, he is not exempt from the H-1B visa cap, and the AAO shall not disturb the director's denial of the petition.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

This decision shall not serve to bar the petitioner from re-filing a new petition, accompanied by evidence to show eligibility under the technical requirements at 8 C.F.R. § 214.2(h).

As stated previously, under § 291 of the Act, the burden of proof in these proceedings rests solely with the petitioner. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the petition will be denied.

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