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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

U.S. Citizenship  
and Immigration  
Services

DATE: JUL 01 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

*Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the California Service Center denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office. The appeal will be dismissed. The petition will be denied.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, with the California Service Center on April 1, 2013. On the Form I-129, the petitioner describes itself as a charitable/educational foundation established in 2008. In order to employ the beneficiary in a position to which it assigned "Accountant" as the title, the petitioner seeks to classify her 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 director denied the petition on August 21, 2013, having concluded that the evidence in the record of proceeding did not establish the proffered position as a specialty occupation. On appeal, counsel for the petitioner asserts that the director's basis for the denial was erroneous and that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us on appeal contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We have reviewed the record in its entirety before issuing this decision.

The AAO conducts appellate review on a *de novo* basis - *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). While conducting our *de novo* review of the record of proceeding, we noticed a material error in information provided in the petition that requires that the petition be denied. Accordingly, the appeal will be dismissed, and the petition will remain denied.

#### I. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner filed the petition for an H-1B nonimmigrant temporary worker in a specialty occupation on April 1, 2013. Question 1 of Part C (Numerical Limitation Information) at page 18 of the Form I-129 H-1B Data Collection Supplement, requires the petitioner to "[s]pecify how this petition should counted against the H-1B [annual] numerical limitation (a.k.a. the H-1B 'Cap')." The question requires the petitioner to select the appropriate CAP by checking one of four boxes, which are lettered "a" through "d." The boxes are arrayed as follows:

- ☐ a. CAP H-1B Bachelor's Degree
- ☐ b. CAP H-1B U.S Master's Degree or Higher
- ☐ c. CAP H-1B Chile/Singapore
- ☐ d. CAP Exempt

The petitioner checked box "b," thereby specifying that the petition should be counted against the H-1B Cap for persons with a U.S. Master's Degree or Higher.

At question 2a of the same part C of the Form I-129 H-1B Data Collection Supplement, the petitioner entered "Maharishi University of Management" as the name of the U.S. institution of higher education where the beneficiary had earned his master's degree.<sup>1</sup>

At question 2b of Part C, for "Date Degree Awarded" the petitioner entered a future date, "12/21/2013."

Thus, in filing the petition, in April 2013, the petitioner indicated that the beneficiary had not yet earned a master's degree from [REDACTED] but would do so on December 21, 2013.

Among the materials submitted in support of the Form I-129 petition, the petitioner provided a March 7, 2013 "Enrollment Verification" document from the Registrar at [REDACTED]. It states that the beneficiary was then "Enrolled" in a "Master of Business Admin." program at the university. An explanatory note near the bottom of the document states:

This document certifies that [the beneficiary] has completed her academic requirements for the Accounting MBA program in the Fall 2012 semester and is eligible to graduate. She is currently enrolled in an MBA elective extension.

Thus, as of the date of the petition's filing, the beneficiary was still enrolled in her master's program and had not yet been awarded the master's degree which the petitioner was using to qualify the petition for consideration under the H-1B Cap for persons with a U.S. master's or higher degree. (The record does not contain any evidence of the beneficiary's undergraduate studies or degree.)

## II. DISCUSSION

This threshold issue that concerns us is whether the petitioner has provided sufficient evidence to establish eligibility for the petition to be counted against the "U.S. Master's Degree or Higher" Cap. Based upon a complete review of the record of proceeding, we must answer "no."

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000.<sup>2</sup> The numerical limitation does not apply to a 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 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

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<sup>1</sup> The instructions for Form I-129 H-1B Data Collection Supplement, Part C, Question 2 state the following: "If you answered question 1b 'CAP H-1B U.S. Master's Degree or Higher,' provide the following information regarding the master's or higher degree the beneficiary has earned from a U.S. institution as defined in 20 U.S.C. 1001(a).]"

<sup>2</sup> On the Form I-129 petition, the petitioner indicated that it seeks to employ the beneficiary for a three-year period beginning October 1, 2013.



during such year exceeds 20,000." 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).<sup>3</sup>

Thus, section 214(g)(5)(C) of the Act indicates that the general H-1B cap does not apply to a nonimmigrant alien that holds a master's degree or higher from a United States institution of higher education. Here, the beneficiary did not hold a master's degree at the time of filing. See 8 C.F.R. § 103.2(b)(1), petitioner must establish they are eligible for immigration benefits at the time of filing. The petitioner was still enrolled and taking academic instruction in her master's program and was scheduled to maintain enrollment for nearly eight months after the petition was filed.

Section 214(g)(5) of the Act states that the numerical limitation does not apply to an alien "who has earned a master's or higher degree." The Act does not provide this benefit to beneficiaries who are "earning" a degree or "enrolled" in such a degree program.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(8)(ii)(B), petitions indicating that they are exempt from the numerical limitation but that are determined by U.S. Citizenship and Immigration Services after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded.<sup>4</sup> Accordingly, the director's denial of the petition will not be disturbed.

We shall not address the issues raised on appeal, because, by regulation, the material filing error discussed above precludes approval of this petition, and, therefore, renders those issues moot. Even a favorable resolution of those issues could not result in approval of this petition.

### III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition is denied.

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<sup>3</sup> To implement the H-1B Visa Reform Act of 2004, USCIS had to consider the plain language of the statute which specifically limited the new exemption to aliens who have earned a U.S. master's degree or higher. USCIS has determined that it is a reasonable interpretation of the H-1B Visa Reform Act of 2004 to make available 20,000 new H-1B numbers [beginning] in FY 2005, limited to H-1B nonimmigrant aliens who possess a U.S. earned master's or higher degree. 70 Fed. Reg. 23775 (May 5, 2005).

<sup>4</sup> USCIS announced that the H-1B cap for fiscal year 2014 was reached on April 7, 2013.