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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 02 2014** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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:

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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 1, 2013. On the Form I-129 visa petition, the petitioner describes itself as an information technology solutions business, with two employees, that was established in 2006. In order to employ the beneficiary in what it designates as a "Cognos Report Writer/Developer" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation 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).

The director denied the petition, finding that the petitioner failed to demonstrate that the beneficiary qualifies for an exemption from the Fiscal Year 2014 (FY14) H-1B cap pursuant to section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as claimed by the petitioner.¹ On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the notice of decision; (5) the Form I-290B and supporting materials; (6) our RFE; and (7) counsel's response to our RFE.² We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

I. PROCEDURAL AND FACTURAL BACKGROUND

In this matter, the petitioner submitted a Form I-129 to the Vermont Service Center on April 1, 2013, seeking 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.³ On the Form I-129

¹ USCIS monitors the number of H-1B petitions received and notifies the public of the date that it has received the necessary number of petitions (the "final receipt date"). See 214.2(h)(8)(ii)(B).

² Upon review of the documentation, we found that the petitioning business was not an active business in good standing and issued a request for evidence (RFE) on May 1, 2014. Counsel responded to the RFE on June 4, 2014.

³ It must be noted for the record that the petitioner has provided inconsistent information regarding the beneficiary's rate of pay. For instance, in the Form I-129 (page 5) and in the March 27, 2013 letter of support, the petitioner indicated that the beneficiary would be paid \$60,000 per year. However, on page 17 of the Form I-129, in the LCA, and in the offer of employment letter, the petitioner indicated the beneficiary's salary as \$52,000 per year. No explanation for the variance was provided by the petitioner.

H-1B Data Collection Supplement (page 18), Part C, Question 1, the petitioner checked the box for option "b," to request that the petition be counted against the cap pertaining to "U.S. Master's Degree or Higher."⁴ Under Part C, Question 2, the petitioner indicated that the beneficiary was awarded a master's degree from the [REDACTED] on June 30, 2012.

Among the materials submitted in support of the Form I-129 petition, the petitioner provided a copy of a diploma and transcript from the [REDACTED], indicating that the beneficiary was awarded a Master of Science in Computer Science on June 30, 2012. The petitioner also provided copies of foreign academic documents in the beneficiary's name.

The director found the initial evidence insufficient to establish eligibility, and issued an RFE on April 16, 2013. Thereafter, counsel responded to the RFE by submitting a brief and additional evidence. With respect to the beneficiary's master degree, counsel provided a letter from the [REDACTED]. The letter, dated June 19, 2013, indicates that "[t]he [REDACTED] was accredited by the [REDACTED] from April, 2003 to August 31, 2008." Further, the letter indicates that "[c]urrently, the [REDACTED] is not accredited but is working diligently towards reacquiring accreditation."

Although the petitioner requested that the petition be counted against the H-1B cap reserved for petitions with beneficiaries who hold a "U.S. master's [degree] or higher," the director determined that the petition was not eligible for the "U.S. master's or higher" cap, and was therefore subject to the general numerical limitations for H-1B petitions, which had already been reached for Fiscal Year (FY) 2014. The director denied the petition on July 17, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the brief, counsel resubmitted the letter from the University of Northern Virginia that was provided in response to the director's RFE.

II. PREPONDERANCE OF THE EVIDENCE STANDARD

In the brief, counsel references the preponderance of the evidence standard. We note that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

⁴ 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)[.]"

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in accordance with this standard, U.S. Citizenship and Immigration Services (USCIS) examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 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; see e.g., *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

III. DISCUSSION

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 65,000.⁵ 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

⁵ 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).⁶

Pursuant to section 101(a) of the Higher Education Act of 1965, the term "institution of higher education" is defined as follows:

[A]n educational institution in any State that--

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate; or persons who meet the requirements of section 1091(d) of this title;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

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 meeting the five criteria delineated in section 101(a) of the Higher Education Act of 1965, as described above. The fifth criterion requires that the educational institution be "accredited by a nationally recognized accrediting agency or association," or hold "preaccreditation status by such an agency or association" with an additional determination that the institution will meet the accreditation standards within a reasonable amount of time. 20 U.S.C. § 1001(a)(5).

⁶ 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).

Here, the beneficiary was conferred a master's degree from the [REDACTED] in June 2012. To qualify for the "U.S. master's or higher" cap for H-1B visas, the petitioner must demonstrate that the beneficiary "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))." Section 214(g)(5)(C) of the Act.

In the instant case, counsel and the petitioner provided a letter from the [REDACTED] which indicates that it was no longer accredited after August 31, 2008. Thus, the petitioner has not established that the [REDACTED] met the fifth criterion of section 101(a) of the Higher Education Act of 1965: that the University was accredited by a nationally recognized accrediting agency, or held preaccreditation status from such an agency, at the time the beneficiary received his degree in June 2012. We find that the evidence of record does not establish that the petition was exempt from the numerical limitation under the master's degree exemption. Furthermore, we note that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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'r 1978).

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 USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded.⁷ Accordingly, the director's decision will not be disturbed. The appeal will be dismissed and the petition denied.

IV. 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.⁸

ORDER: The appeal is dismissed

⁷ USCIS announced that the H-1B cap for fiscal year 2014 was reached on April 8, 2013.

⁸ As the ground discussed above is dispositive for the dismissal of the appeal, we will not address and will instead reserve our determination on the additional issues in the record of proceeding with regard to the submission.