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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: **JUN 02 2014** OFFICE: CALIFORNIA 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 California Service Center on April 3, 2013. On the Form I-129 visa petition, the petitioner describes itself as an electronics components manufacturer established in 1972. In order to employ the beneficiary in what it designates as a "controller" 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 on October 2, 2013, finding that the petitioner failed to establish eligibility for the benefit sought. 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 the AAO 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. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees 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. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner submitted a Form I-129 to the California Service Center on April 3, 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. On the Form I-129 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."¹ Under Part C, Question 2, the petitioner indicated that the beneficiary was awarded a master's degree from [REDACTED] on June 6, 2008.

Among the materials submitted in support of the Form I-129 petition, the petitioner provided a copy of a diploma and transcript from [REDACTED] indicating that the beneficiary was awarded a Master of Science in International Business on June 6, 2008. The petitioner also

¹ 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)[.]"

provided copies of foreign academic documents in the beneficiary's name.²

The director found the initial evidence insufficient to establish eligibility, and issued an RFE on May 23, 2013. In the RFE, among other issues, the director notified the petitioner that the beneficiary's master's degree did not appear to qualify the petition for exemption from the numerical limitation on H-1B visas. The petitioner was asked to submit probative evidence that the beneficiary was granted a U.S. master's degree from a qualifying college or university.

On August 13, 2013, counsel responded to the RFE by submitting a letter and additional evidence. With respect to the beneficiary's master degree, counsel provided a letter from the [REDACTED]. The letter, dated January 14, 2010, indicates that [REDACTED] had state approval to operate through December 31, 2011. Counsel also provided an "Approved/Registered Program List" issued by the [REDACTED]'s predecessor organization indicating that [REDACTED] International Business program was approved as a degree program on January 1, 1991 by the state agency.

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. The director denied the petition on October 2, 2013.

Counsel submitted an appeal of the denial of the H-1B petition. On appeal, counsel indicates that [REDACTED] applied for accreditation in 2011 from the Accrediting Council for Independent Colleges and Schools (ACICS), and that a decision would be published on or about January 16, 2014. In support of this assertion, counsel submitted the following documents:

- A letter from [REDACTED] director of [REDACTED] dated October 16, 2013, which states that the ACICS evaluation team visited the university in May 2013, and that [REDACTED] was awaiting the final decision on accreditation.
- An e-mail from [REDACTED] administrative coordinator of ACICS, which states that the ACICS will render a decision by December 16, 2013, and the decision will be published on its website by January 16, 2014.
- A copy of an ACICS document entitled "Summary of ACICS Council Actions, August 2013), which indicates that the decision on initial accreditation for [REDACTED] was deferred until December 2013.

Counsel does not allege that [REDACTED] was accredited at the time that the beneficiary received his degree.

² Further, the petitioner provided a copy of a Form I-20 indicating that the beneficiary intended to pursue studies in a certificate program at [REDACTED]. Neither the petitioner nor counsel asserts that the beneficiary was awarded a master's or higher degree from [REDACTED].

The AAO takes administrative notice that a document entitled "Summary of ACICS Council Actions, December 2013," publicly available on the ACICS webpage, indicates that ACICS denied accreditation of [REDACTED] effective December 13, 2013.⁴

II. DISCUSSION

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish eligibility for the petition to be counted against the "U.S. master's or higher" cap. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the petition is eligible for the "U.S. master's or higher" cap.

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 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:

⁴ Although the petitioner bears the burden to establish eligibility for the benefit sought, U.S. Citizenship and Immigration Services (USCIS) has the right to verify information submitted to meet that burden. *See generally* sections 103, 204, 205, 214, 291 of the Act; 8 U.S.C. §§ 1103, 1154, 1155, 1184, 1361; 8 C.F.R. § 103.2(b)(7); Form I-129 Instructions (10/07/11) Y Page 23 (incorporated into the regulations by 8 C.F.R. § 103.2(a)(1)), available at <http://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf>. Agency verification methods may include but are not limited to: review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews. *Id.* The AAO hereby incorporates into the record of proceeding a printout from the publicly available ACICS website of the document entitled "Summary of ACICS Council Actions, December 2013."

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.

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).

[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).

Here, the beneficiary was conferred a master's degree from [REDACTED] in June 2008. 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.

Counsel and the petitioner have provided evidence regarding [REDACTED]'s authorization to provide post-secondary education in the state of California. However, the petitioner has not established that [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. Moreover, the record does not reflect that [REDACTED]

[REDACTED] has ever been accredited or held preaccreditation status by a nationally recognized accrediting agency. The AAO finds that the evidence of record does not establish that the petition is exempt from the numerical limitation on H-1B visas.

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.⁷ Accordingly, the director's denial of the petition will not be disturbed.

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.

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