



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF G-M- INC.

DATE: MAR. 24, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a mobile game developer and publisher, seeks to temporarily employ the Beneficiary as a "UI/UX artist" under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish the Beneficiary's qualification for the Master's Cap exemption pursuant to section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C).

On appeal, the Petitioner asserts that the Director erred by not complying with the Plain Writing Act of 2010 and not providing the Petitioner with fair notice.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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. This numerical cap on H-1B visas is commonly referred to as the "H-1B Cap."

Section 214(g)(5)(C) of the Act exempts up to 20,000 H-1B nonimmigrants who have earned a U.S. master's or higher degree from being counted towards the H-1B Cap. This exemption is commonly referred to as the "Master's Cap exemption." More specifically, section 214(g)(5) of the Act states:

The [H-1B] numerical limitations . . . shall not apply to any nonimmigrant alien issued a[n H-1B] visa or otherwise provided [H-1B status] who –

- (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity.

- (B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or
- (C) 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.

An "institution of higher education" is defined as an 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 [U.S. Secretary of Education];
- (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 [U.S. Secretary of Education] for the granting of preaccreditation status, and the [U.S. Secretary of Education] 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.

20 U.S.C. § 1001(a) (2012) (originally enacted as the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219) ("Higher Education Act") (emphasis added).

The regulation at 8 C.F.R. § 214.2(h)(8)(ii)(B) states that petitions indicating that they are exempt from the H-1B Cap, but are later determined by U.S. Citizenship and Immigration Services (USCIS) after the final receipt date to be subject to the H-1B Cap, will be denied and filing fees will not be returned or refunded.

II. PROCEDURAL HISTORY

The Petitioner filed this petition on April 1, 2016, seeking to employ the Beneficiary in fiscal year 2017 (FY17) commencing on October 1, 2016.¹ On the Form I-129 H-1B Data Collection Supplement (Form I-129 Supplement), the Petitioner marked that the Beneficiary qualified for the Master's Cap exemption and was therefore eligible for the Master's Cap exemption. The Petitioner stated, and the record corroborates, that the Beneficiary earned a master of science degree in game design from [REDACTED] in Florida in 2015.

The Director determined that the Beneficiary was not qualified for the Master's Cap exemption under section 214(g)(5)(C) of the Act because [REDACTED] is a for-profit institution. Because [REDACTED] is a for-profit school, the Director determined that it does not meet the definition of a United States "institution of higher education."

On appeal, the Petitioner asserts that the Director's decision is contrary to the Plain Writing Act. Characterizing the law and USCIS guidance on the Master's Cap exemption as "unclear," "misleading," and "inconsistent," the Petitioner posits that an "average reader" would not understand the implications of an institution's for-profit status under the Higher Education Act and section 214(g)(5)(C) of the Act. The Petitioner's position is that it "cannot be faulted for not having been aware of the technical requirements that are not presented in an appropriate manner, particularly in view of federal laws that require proper and easy-to-understand presentation of information by government agencies." The Petitioner asserts that the cross-references to the Higher Education Act found in section 214(g)(5)(C) of the Act and the Form I-129 Supplement amount to "failure to provide clear notice of the Master's Cap Requirements." The Petitioner further asserts that, in denying its petition, the Director violated the due process doctrine.

III. ANALYSIS

Upon review of the record in its entirety, we find that the Petitioner has not demonstrated the Beneficiary's qualification for the Master's Cap exemption.

The Petitioner claims the Beneficiary is eligible for the Master's Cap exemption by virtue of his U.S. master's degree from [REDACTED]. However, as found by the Director and corroborated by publicly available information, [REDACTED] is a private, for-profit school.² Accordingly, we

¹ We withdraw the Director's finding that this petition was filed on April 13, 2016, after the date on which USCIS ceased to accept new H-1B petitions for FY17, i.e., the "final receipt date." The [REDACTED] shipping label mailing preserved in the record reflects that this petition was filed on April 1, 2016, which is prior to FY17's "final receipt date" of April 7, 2016. See <https://www.uscis.gov/news/news-releases/uscis-reaches-fy-2017-h-1b-cap> (last visited Mar. 22, 2017).

² The Department of Education's National Center for Education Statistics provides publicly available information on educational institutions in the United States. For more information about [REDACTED] see the Department of Education's National Center for Education Statistics "College Navigator" tool, <https://nces.ed.gov/collegenavigator/> [REDACTED] (last visited Mar. 22, 2017).

find that [REDACTED] does not meet the definition of a United States “institution of higher education,” in order to qualify the Beneficiary for the Master’s Cap exemption under section 214(g)(5)(C) of the Act.

Despite the Petitioner’s reliance on the Plain Writing Act, a copy of which was submitted for the record, this Act plainly states that “[n]o provision of this Act shall be construed to create any right or benefit, substantive or procedural, enforceable by any administrative or judicial action.” The Petitioner has not cited to any legal authority to support its position that a violation of the Plain Writing Act, even if demonstrated (which has not been here), would compel USCIS to grant the Petitioner’s requested immigration benefit in these administrative proceedings.

We are also not persuaded by the Petitioner’s assertions regarding the law’s lack of clarity. Section 214(g)(5)(C) of the Act unambiguously states that the Beneficiary must have earned a U.S. master’s (or higher) degree from an “institution of higher education,” as that term is defined in the Higher Education Act. The term “institution of higher education” is unambiguously defined as an educational institution that, among other factors, “is a public or other nonprofit institution.” The fact that section 214(g)(5)(C) of the Act cross-references the Higher Education Act, instead of recites it, does not make the law any less clear with respect to the requirement that the conferring educational institution be “public” or “nonprofit.”³

Similarly, the instructions on the Form I-129 Supplement, which are incorporated into USCIS regulation,⁴ clearly state that if claiming eligibility for the Master’s Cap exemption, the petitioner must “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)*” (emphasis added). These instructions confirm the statutory requirement at section 214(g)(5)(C) of the Act, i.e., that the conferring institution of higher education must meet the definition in the Higher Education Act. It is not true that “[n]either the Form I-129 nor its instructions contains a description or explanation of the U.S. Master’s Cap exemption,” as the Petitioner claims. The Form I-129 Supplement’s explicit reference to 20 U.S.C. § 1001(a) is sufficient to put a petitioner on notice.

Nor are we persuaded by the Petitioner’s suggestion that USCIS “policy,” as gleaned primarily from the USCIS website, somehow negates the statutory and regulatory requirement for the U.S. Master’s Cap exemption. In this respect, the Petitioner states that it “cannot be faulted for not having been aware of the technical requirements” because the USCIS website does not fully explain the requirements of the Higher Education Act when discussing the Master’s Cap exemption.

³ The Petitioner asserts that the term “public” found in the Higher Education Act is ambiguous. But the Petitioner does not assert, nor do we find, that the term “nonprofit” is ambiguous. The Petitioner does not contest [REDACTED] status as a for-profit institution.

⁴ The regulation at 8 C.F.R. § 103.2(a)(1) incorporates form instructions into the regulations requiring the form’s submission.

However, we do not agree with the Petitioner's interpretation of what constitutes USCIS "policy." General information found on the USCIS website does not constitute "policy." Such information from the USCIS website, even if incomplete, cannot be relied upon in lieu of the relevant statute and regulation.

Moreover, USCIS' revocation of a few select cases, and our dismissal of appeals affirming those revocations,⁵ do not demonstrate "a shift in adjudications policy" as the Petitioner asserts. To the contrary, those revocations confirm that the prior approvals were granted in error. See 8 C.F.R. § 214.2(h)(11)(iii)(A)(5). An acknowledgement of error is not the same as a "shift" in "policy." As the court stated in *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), it would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent," or in this case, as official "policy."

The Petitioner has not demonstrated that either the law or USCIS policy on the Master's Cap exemption has been "unclear," "misleading," and "inconsistent." Therefore, the Petitioner's reasoning that it "cannot be faulted for not having been aware of the technical requirements" of the law does not hold weight. We also question the Petitioner's view that "[d]ue to the complexity of how immigration laws are structured, most members of the public will not consult the INA to prepare H-1B filings." The perceived complexity of the law does not relieve the Petitioner (including legal counsel who prepared and filed the instant petition and appeal on the Petitioner's behalf) of its burden to demonstrate eligibility under the law. Section 291 of the Act, 8 U.S.C. § 1361.

Finally, we have no authority to entertain the Petitioner's due process challenge. Like the Board of Immigration Appeals, this office cannot rule on the constitutionality of laws enacted by Congress. Cf. *Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002) (BIA lacks authority to rule on constitutionality of statutes it administers). Our jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii), and does not provide for authority to apply any forms of equitable relief. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-39 (BIA 1991). In any event, we again reiterate that the cross-references to the Higher Education Act found in section 214(g)(5)(C) of the Act and the Form I-129 Supplement (which are incorporated into the regulation), among other sources, were sufficient to notify the Petitioner of the Master's Cap exemption requirements.

IV. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's qualification for the Master's Cap exemption.

⁵ The Petitioner submitted two sample decisions in which our office affirmed the Director's revocations based on ineligibility for the Master's Cap exemption.

Matter of G-M- Inc.

ORDER: The appeal is dismissed.

Cite as *Matter of G-M- Inc.*, ID# 181481 (AAO Mar. 24, 2017)