

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

**PUBLIC COPY**

D2

[Redacted]

MARKSVILLE, LA 71351

JAN 24 2012

Date: 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:

[Redacted]

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California 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 remain denied.

The petitioner is a public school with 850 employees. On the Form I-129, Petition for Nonimmigrant Worker, Part 2, the petitioner checked the box indicating that the petition was for a change of employer and that it wished to extend the stay of the beneficiary as she now held this (H-1B) status. The petitioner indicated the proffered position was for a teacher, 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 determining that the petitioner had failed to establish that the beneficiary qualifies for exemption to the numerical cap because of the petitioner's affiliation with an institution of higher education.

In general, although there are some exemptions, 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. As of April 7 2008, U.S. Citizenship and Immigration Services (USCIS) had received sufficient numbers of H-1B petitions to reach the general H-1B cap for FY09, which covers employment dates starting on October 1, 2008 through September 30, 2009.

On appeal, counsel for the petitioner acknowledges that the petitioner is not affiliated with an institution of higher learning but asserts that the beneficiary in this matter has already been counted against the numerical cap. Counsel explains that the beneficiary in this matter was approved for H-1B status pursuant to a petition filed by [REDACTED]. The validity of the original H-1B petition was from August 13, 2008 until August 12, 2009. The beneficiary did not enter into the United States until May 30, 2009 at which time [REDACTED] Schools informed the beneficiary that her services were no longer needed. On July 14, 2009, more than one month after the beneficiary's arrival in the United States, the petitioner filed the instant H-1B petition. Counsel asserts that the beneficiary entered the United States in H-1B status and the applicable law allows the petitioner in this matter to petition for the beneficiary as she was an alien previously issued an H-1B visa. Counsel cites section 214(n)(1) of the Act in support of her assertion. Counsel also contends that the beneficiary was not cap exempt as the previous employer, [REDACTED] Schools was not a cap exempt entity, and thus, the beneficiary was subject to and counted under the cap pursuant to the original petition filed by [REDACTED] Schools. Counsel avers that as the beneficiary had been granted an H-1B visa subject to the cap and "within 30 days of her entry 'ported' that H-1B number with her to her new petitioning employment," approval of the change of employer and extension of stay should be granted.

Upon review of the approval of the beneficiary's initial H-1B status pursuant to the petition filed by [REDACTED] Schools petitioned for the beneficiary as a cap exempt organization. The [REDACTED]' petition for the beneficiary was approved on this basis. Thus, the beneficiary in this matter was not counted against the cap. Whether the approval of the [REDACTED] petition as a cap exempt entity was erroneous or not is not relevant to this matter. As the beneficiary has not been counted against the cap and the petitioner in this matter is not a cap exempt entity, the beneficiary is subject to the cap. As

observed above, USCIS had received sufficient numbers of H-1B petitions to reach the general H-1B cap for FY09 by April 7, 2008. As the petition in this matter was filed on July 14, 2009 with a requested start date of June 30, 2009 a time period within FY09, and the petitioner is not cap exempt, the petition may not be approved.

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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