



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **APR 01 2013**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Michael T. Kelly*  
Ron Rosenberg

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director 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 be denied.

On the Form I-129 visa petition, the petitioner describes itself as a software consulting company established in 2010. In order to employ the beneficiary in what it designates as a websphere administrator position,<sup>1</sup> 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner failed to demonstrate that the beneficiary qualifies for exemption from the Fiscal Year 2013 H-1B cap pursuant to section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as one who, in the words of the Act, "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))."

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

The 2013 fiscal year numerical cap for the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), was reached on June 11, 2012. Although the instant petition was filed on May 7, 2012, before the numerical cap was reached, the petition was accepted and adjudicated as a cap-exempt case because the petitioner claimed on the Form I-129 that the beneficiary is an alien who 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)), as described at section 214(g)(5)(C) of the Act.

The director denied the petition on June 28, 2012. In that decision, the director found that the beneficiary's master's degree failed to satisfy section 214(g)(5)(C) of the Act because it was issued by the [REDACTED] which is not an accredited institution.<sup>2</sup>

<sup>1</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 15-1142, the associated Occupational Classification of "Network and Computer Systems Administrators," and a Level I (entry-level) prevailing wage rate.

<sup>2</sup> Although not cited directly by the director, the AAO notes that section 101(a)(5) of the Higher Education Act of 1965, 20 U.S.C. § 1001(a)(5), specifically states that "[f]or purposes of this chapter . . . the term 'institution of higher education' means an educational institution in any State that . . . 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. . . ."

Counsel makes two arguments on appeal. Counsel first argues that the beneficiary's master's degree from the [REDACTED] satisfies the requirements of section 214(g)(5)(C) of the Act. Counsel then argues, alternatively, that the petition should be adjudicated, and subsequently approved, as one which is not subject to the Fiscal Year 2013 numerical cap, because the petition was filed before the cap was reached. Neither argument is persuasive.

The documents submitted by counsel with regard to the accreditation status of [REDACTED] do not establish that the institution is accredited. To the contrary, the printout that counsel submits from the website of the State Council of Higher Education [REDACTED] specifically describes [REDACTED] status as "non-accredited." Although counsel notes correctly that the language of section 101(a)(5) of the Higher Education Act of 1965 allows for a master's degree from an unaccredited institution of higher education to satisfy the cap exemption described at section 214(g)(5)(C) of the Act if that institution has been granted pre-accreditation status, he submits no information to establish that [REDACTED] has been granted such status.<sup>3</sup> As such, counsel's first argument fails. The beneficiary is subject to the 2013 numerical cap.

Having made that determination, the AAO turns next to counsel's argument that the petition should not have been adjudicated as a cap-exempt case since it was filed before the Fiscal Year 2013 numerical cap was reached in spite of the fact that the petitioner sought such exemption on the Form I-129. According to counsel, the director possessed evidence that the beneficiary qualified for an H-B visa, on the basis of his undergraduate education, prior to the date on which the cap was reached, and that "the fact that [the petition] was not adjudicated until after the cap closed should not prejudice the petitioner or the beneficiary."

The AAO disagrees. As noted by the director, the regulation at 8 C.F.R. § 214.2(h)(8)(B) specifically states, in part, the following:

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.

Counsel does not address 8 C.F.R. § 214.2(h)(8)(B) on appeal. As noted above, although the petitioner indicated on the Form I-129 that it is exempt, the AAO has determined that the beneficiary is in fact subject to the 2013 numerical cap. Accordingly, 8 C.F.R. § 214.2(h)(8)(B) mandates denial of the petition. Counsel's second argument, therefore, also fails.

As set forth above, the petitioner has failed to demonstrate that the beneficiary qualifies for exemption from the Fiscal Year 2013 numerical limitation as claimed by the petitioner on the Form I-129, and 8 C.F.R. § 214.2(h)(8)(B) otherwise mandates denial of the petition.

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

<sup>3</sup> Counsel's statement that [REDACTED] is "certified to operate" does not address this issue; he submits no evidence indicating that the terms "certified to operate" and "pre-accreditation status" are synonymous.

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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. Here, that burden has not been met.

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