



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

(b)(6)

DATE: **APR 29 2013**

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 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,

Ron Rosenberg
Acting 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 Nonimmigrant Worker (Form I-129) to the Vermont Service Center on June 11, 2012. On the Form I-129 visa petition, the petitioner describes itself as a general contractor business established in 2006. In order to employ the beneficiary in what it designates as an architect position, the petitioner seeks to classify her 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 September 14, 2012, finding that its approval is barred by the numerical limitation, or "cap," on H-1B visa petitions. 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.

In this matter, the petitioner submitted a Form I-129 to the Vermont Service Center on June 11, 2012, 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 1, 2005.²

In its letter of support dated May 31, 2012, the petitioner stated that the beneficiary "was awarded a Master degree in Architecture/Project & Construction Management from [REDACTED] in 2005." The petitioner also provided academic credentials in the beneficiary's name

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 of 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)[.]"

² The petitioner listed the address of [REDACTED] as [REDACTED]

from [REDACTED] and an evaluation of the beneficiary's credentials from Evaluation Service, Inc. The evaluation states that the beneficiary holds "the academic equivalent of a bachelor's degree with a major in architecture and a master of architecture from a regionally accredited institution in the United States."

The director found the initial evidence insufficient to establish eligibility under the U.S. master's degree or higher cap, and issued an RFE on August 3, 2012. The petitioner was asked to submit probative evidence that the beneficiary was granted a U.S. master's degree prior to the filing of the petition. The director outlined the specific evidence to be submitted.

On August 14, 2012, counsel for the petitioner responded to the RFE by submitting a letter and an additional evidence. Specifically, counsel submitted the following: (1) a copy of a diploma from [REDACTED] in the name of the beneficiary (along with an English translation); (2) a transcript from [REDACTED] in the name of the beneficiary; (3) and an evaluation of the beneficiary's credentials from Evaluation Service, Inc., which indicates that the beneficiary holds "the academic equivalent of a bachelor's degree with a major in architecture and a master of architecture from a regionally accredited institution in the United States." The AAO observes that the evidence submitted in response to the RFE was previously provided with the initial Form I-129 petition.

In the letter provided in response to the RFE, counsel stated that "[t]he Beneficiary received her degree of Master of Science in Architecture from [REDACTED] in Turkey in 2005." Counsel further stated that the degree is the "equivalent of a master of architecture at a regionally accredited institution in [the] United States."

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. Finding that United States Citizenship and Immigration Services had already received a sufficient number of petitions to reach the Fiscal Year (FY) 2013 cap, the director denied the petition on September 14, 2012. Counsel submitted an appeal of the denial of the H-1B petition. In support of the Form I-290B, counsel submitted additional evidence.

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 65,000.³ The numerical

³ On the Form I-129 petition, the petitioner indicated that it seeks to employ the beneficiary for a three year period beginning October 1, 2012.

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).⁴

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

⁴ 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).

1965, as described above.

In the instant case, the petitioner has represented that the beneficiary holds a degree from [REDACTED]. Counsel for the petitioner asserts on appeal that this degree is "EQUIVALENT to a master degree from a United States Institution," and that the petitioner should be exempt from the general H-1B cap. The language of section 214(g)(5)(C) of the Act does not make any allowance for "equivalent" degrees. Rather, it exempts from the general H-1B cap only those individuals that hold a master's degree or higher from a "United States institution of higher education as defined in § 101(a) of the Higher Education Act of 1965 (20 U.S.C. § 1001(a))."

The petitioner has not provided any evidence to establish that [REDACTED] meets the five criteria delineated in section 101(a) of the Higher Education Act of 1965 to be properly considered a "United States institution of higher education." Further, in characterizing the beneficiary's degree as "equivalent" to a degree from a U.S. institution, counsel acknowledges that the beneficiary's degree is not a degree from a U.S. institution. The AAO thus finds that the evidence of record does not establish that the beneficiary is exempt from the H-1B visa cap. Accordingly, the director's denial of the petition will not be disturbed.

On appeal, counsel requests a refund of the fees paid by the petitioner with the original Form I-129 submission in the event that the director's decision is upheld. Pursuant to the regulation at 8 C.F.R. § 214.2(h)(8)(ii), a petition indicating that it is exempt from the numerical limitation but that is 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.

The AAO notes that when a petitioner pays a filing fee for an application or petition, it is seeking a decision from USCIS regarding eligibility for the benefit(s) being sought. In general, USCIS does not refund a fee regardless of the decision on the application or petition. There are only a few exceptions to this rule, such as when an incorrect fee was collected or when USCIS made an error which resulted in the application or petition being filed inappropriately. Here, an error was made by the petitioner when it applied under a cap for which it could not establish eligibility. Counsel has thus not demonstrated that the petitioner is entitled to a refund of the fee(s).

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.