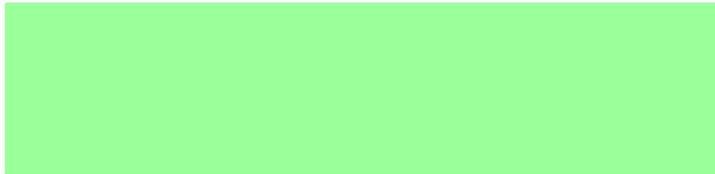
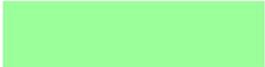


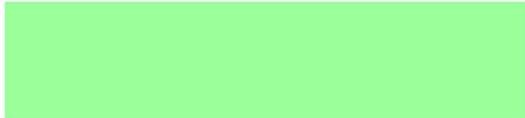
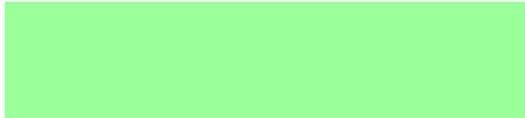


U.S. Citizenship  
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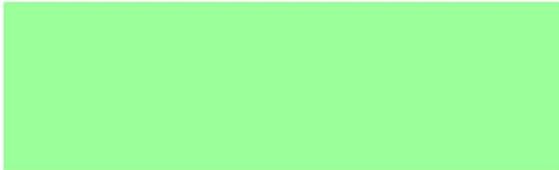


DATE: **FEB 22 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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:

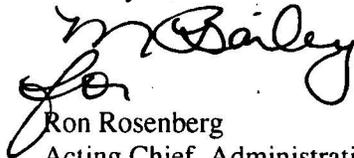


INSTRUCTIONS:

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 California Service Center on January 26, 2012. In the Form I-129 visa petition, the petitioner describes itself as a not-for-profit childcare and education facility established in 1982. In order to employ the beneficiary in what it designates as a teacher 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on May 7, 2012, finding that the instant petition was filed after the H-1B yearly numerical limitation had been reached for the 2012 fiscal year and that the beneficiary was subject to the numerical limitations. On appeal, counsel acknowledges that he made several errors on the Form I-129 petition and supporting documents. He asserts that, nevertheless, the petitioner and beneficiary are eligible for the benefit sought. In support of this assertion, counsel submitted a brief.

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 response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. 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, and the petition will be denied.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a teacher to work on a full-time basis. With the Form I-129 petition, the petitioner provided a letter of support dated January 17, 2012, which provided information about its programs and outlined the duties and requirements for the proffered position.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on February 3, 2012. The director noted that the petitioner indicated in the Form I-129 that it is a cap exempt organization, in other words an institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965, or a related or affiliated nonprofit entity. However, the director found the evidence submitted in support of the petition was insufficient to establish that the beneficiary qualifies for exemption to the numerical cap on H-1B nonimmigrants based on the petitioner's relation to or affiliation with an institution of higher education. The director outlined the evidence to be submitted. Further, the director requested the petitioner submit probative evidence to establish eligibility for the benefit sought with regard to several additional issues.

Counsel for the petitioner responded to the RFE by submitting a letter and additional evidence. In the letter dated April 26, 2012, counsel stated that he made several errors in the H-1B submission.

Counsel claimed that the petitioner did not qualify as a cap-exempt entity and requested that he be permitted to amend the petition. Counsel asserted that the petition was exempt from the cap on the basis that the "petitioner is requesting an amendment or extension of stay for the beneficiary's current H-1B classification."

On May 7, 2012, the director denied the petition stating that the cap for fiscal year 2012 had been reached and the petitioner failed to establish that the beneficiary is exempt from the numerical limitation. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

Based upon a complete review of the record of proceeding, the AAO finds that the director was correct in the determination that the beneficiary is now subject to the numerical limitation.

Under section 214(g)(1) of the Act, the total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992) is limited. Specifically, section 214(g)(1) of the Act provides the following:

(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-

(A) under section 101(a)(15)(H)(i)(b), may not exceed-

- (i) 65,000 in each fiscal year before fiscal year 1999;
- (ii) 115,000 in fiscal year 1999
- (iii) 115,000 in fiscal year 2000
- (iv) 195,000 in fiscal year 2001;
- (v) 195,000 in fiscal year 2002;
- (vi) 195,000 in fiscal year 2003; and
- (vii) 65,000 in each succeeding fiscal year; or

(B) under section 101(a)(15)(H)(ii)(b) may not exceed 66,000.

Further, the regulation at 8 C.F.R. 214.2(h)(8)(ii) states the following:

(E) If the total numbers available in the fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year.

Section 214(g)(5) of the Act provides for an exemption of these yearly limitations for certain employers as follows:

The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who

- (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), 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 such year exceeds 20,000.

Notably, section 214(g)(6) of the Act states the following:

(6) Any alien who ceases to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 101(a)(15)(H)(i)(b), who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5).

As mentioned above, the petitioner filed the instant petition on January 26, 2012. However, the H-1B cap for the fiscal year 2012 was reached on November 22, 2011. *See* news release, *USCIS Reaches Fiscal year 2012 H-1B Cap* available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f0a78614e90d3310VgnVCM100000082ca60aRCRD> (February 6, 2013).

In the news release announcing the cap, USCIS stated that it will "continue to accept and process petitions that are otherwise exempt from the cap" and "petitions filed on behalf of current H-1B workers who have been counted previous against the cap will not be counted toward the FY 2012 H-1B cap." *Id.*

In the instant case, counsel acknowledges that the petitioner is not a cap exempt organization. On appeal, counsel asserts that the beneficiary was previously counted toward the numerical limitations. Specifically, counsel states that "having verified the beneficiary's H-1B history, it is fortunate that her initial H-1B petition by [the previous employer] was under a regular cap" and previously counted towards the cap.

Upon examination of the record, the AAO observes that the beneficiary's initial H-1B petition with the receipt number [REDACTED] was filed on July 13, 2007 with a start date of August 1, 2007. The AAO finds that this petition was filed after the cap had been reached. *See* news release, *USCIS Reaches FY 2007 H-1B Cap*, available at [http://www.uscis.gov/files/pressrelease/FY07H1Bcap\\_060106PR.pdf](http://www.uscis.gov/files/pressrelease/FY07H1Bcap_060106PR.pdf) and news release, *USCIS Reaches FY 2008 H-1B Cap*, available at

<http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf> (last visited February 6, 2013). The fact that the beneficiary's initial H-1B petition was filed after the cap had been reached, but was processed and eventually approved, demonstrates that the beneficiary's initial petition with the receipt number [REDACTED] was not counted towards the cap.

The evidence presented indicates that the beneficiary has not previously been counted toward the numerical limitations. Further, counsel acknowledges that the petitioner is not a cap exempt organization. In addition, there is no evidence in the record that the beneficiary has master's or higher degree from a United States institution of higher education. Therefore, since the beneficiary's initial petition was not counted towards the cap, and neither the petitioner nor the beneficiary meets an exemption under section 214(g)(5) of the Act, the beneficiary is subject to the numerical limitation. As the petition was submitted after the congressionally mandated cap for the fiscal year was reached, the petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.<sup>1</sup> 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.

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<sup>1</sup> As previously discussed, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the appeal is dismissed for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceeding.