



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **MAY 01 2014**

OFFICE: VERMONT 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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 a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 4, 2013. On the Form I-129 visa petition, the petitioner describes itself as an information technology (IT) staffing and consulting service established in 2004. In order to employ the beneficiary in what it designates as a programmer analyst position, 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on July 9, 2013, finding that its approval is barred by the numerical limitation, or "cap," on H-1B visa petitions. On appeal, counsel "requests that USCIS [U.S. Citizenship and Immigration Services] exercise favorable discretion" and approve the petition.

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.

I. Procedural and Factual Background

In this matter, the petitioner submitted a Form I-129 to the Vermont Service Center on April 4, 2013, 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 and Filing Fee Exemption 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 the [REDACTED] on June 27, 2011.

In its letter of support dated March 23, 2013, the petitioner stated that the beneficiary was "pursing a Master of Science degree in Computer Science from the [REDACTED]" The petitioner provided a copy of a diploma and transcript from the [REDACTED]

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)[.]"

indicating that the beneficiary was awarded a Master of Science degree in 2011. The petitioner also provided copies of foreign academic documents in the beneficiary's name.

The director found the initial evidence insufficient to establish eligibility, and issued an RFE on April 17, 2013. The petitioner was asked to submit probative evidence that the beneficiary was granted a U.S. master's degree from an accredited college or university. The director outlined the specific evidence to be submitted.

On June 27, 2013, the petitioner and counsel responded to the RFE by submitting a letter and additional evidence. Specifically, the petitioner submitted the following:

- An evaluation of the beneficiary's foreign credentials and professional experience prepared by [REDACTED]
- An evaluation of the beneficiary's foreign credentials and professional experience prepared by [REDACTED] of [REDACTED] located in Dominica; and
- A "Certificate to Operate an Institution of Postsecondary Education" issued by the [REDACTED] for Virginia to the [REDACTED]

The AAO observes that the petitioner did not provide evidence that the [REDACTED] is accredited or that the beneficiary was granted a U.S. master's degree from an accredited college or university.

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. The director denied the petition on July 9, 2013.

Counsel submitted an appeal of the denial of the H-1B petition. On appeal, counsel acknowledges that the [REDACTED] is not an accredited university and requests USCIS exercise its discretion, claiming that "[n]either statutes nor regulations provide any guidance regarding the adjudication of cases involving Beneficiaries who hold bona fide degrees from degree granting, albeit unaccredited, universities." Counsel asserts that the beneficiary "possesses a Master's degree within the spirit of the regulations" and requests that the director's decision be reversed.

II. Analysis

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 65,000.² The numerical 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."³

Thus, contrary to counsel's assertions, the statutory guidance on this issue is clear. 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 criteria delineated in section 101(a) of the Higher Education Act of 1965.

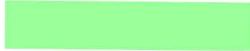
Here, the beneficiary has earned a master's degree from the [REDACTED]. To qualify for the "U.S. master's or higher" cap for H-1B visas, the petitioner must demonstrate that the beneficiary "has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. § 1001(a))." Section 214(g)(5)(C) of the Act. The petitioner has not provided any evidence to establish that the university meets the criteria delineated in section 101(a) of the Higher Education Act of 1965 to be properly considered an accredited United States institution of higher education. Moreover, counsel acknowledges that the [REDACTED] is not accredited. The AAO finds that the evidence of record does not establish that the beneficiary qualifies for the "U.S. master's or higher" H-1B visa cap.

The regulation at 8 C.F.R. § 214.2(h)(8)(ii)(B) states that "[p]etitions 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." Thus, as the instant Form I-129 indicated that it was exempt from the numerical limitation, and the director later determined that the petition was subject to the cap, the AAO finds that instant petition must be denied. Accordingly, the director's denial of the petition will not be disturbed.

III. Conclusion

² On the Form I-129 petition, the petitioner indicated that it seeks to employ the beneficiary for a three year period beginning October 1, 2013.

³ 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).



In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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