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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **NOV 26 2014** 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:

[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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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 two-employee "Retail Pharmacy" established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Regulatory & Compliance Analyst" 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 the sole basis that the petitioner failed to demonstrate that the beneficiary qualifies for exemption from the Fiscal Year 2014 (FY14) H-1B cap pursuant to section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as someone who has earned a master's or higher degree from an accredited 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 us 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, we find 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.

I. THE H-1B AND U.S. MASTER'S DEGREE OR HIGHER CAPS

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A) (2012), the total number of H-1B visas issued per fiscal year may not exceed 65,000 (hereinafter referred to as the "H-1B Cap"). In addition, the maximum number of H-1B visas that may be issued per fiscal year pursuant to the U.S. Master's Degree or Higher Cap exemption may not exceed 20,000 (hereinafter referred to as the "U.S. Master's Degree or Higher Cap"). The instant petition was filed for an employment period to commence October 1, 2013. As FY14 extends from October 1, 2013 through September 30, 2014, the instant petition is subject to the FY14 H-1B Cap, unless exempt.

On April 5, 2013, U.S. Citizenship and Immigration Services (USCIS) issued a notice that it had received sufficient numbers of H-1B petitions to reach both the H-1B Cap and the U.S. Master's Degree or Higher Cap for FY14 as of that date. Therefore, April 5, 2013 is the FY14 "final receipt date," as described at 8 C.F.R. § 214.2(h)(8)(ii)(B), for acceptance of both cap subject and limited cap exempt H-1B petitions.

Section 214(g)(5) of the Act states, in pertinent part:

The [H-1B] numerical limitations . . . shall not apply to any nonimmigrant alien issued a[n H-1B] visa or otherwise provided [H-1B status] who –

- (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), 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 during such year exceeds 20,000.

The Code of Federal Regulations at 8 C.F.R. § 214.2(h)(8)(ii)(B) reads in pertinent part as follows:

When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed. . . . Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. **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** (emphasis added). If the final receipt date is any of the first five business days on which petitions subject to the applicable numerical limit may be received (i.e., if the numerical limit is reached on any one of the first five business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those five business days, conducting the random selection among the petitions subject to the exemption under section 214(g)(5)(C) of the Act first.

Furthermore, Section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-32), 20 U.S.C. § 1001(a) (2012), defines an institution of higher education as follows:

- (a) Institution of higher education

For purposes of this chapter, other than subchapter IV, the term "institution of higher education" means an 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 [U.S. Secretary of Education];
- (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 [U.S. Secretary of Education] for the granting of preaccreditation status, and the [U.S. Secretary of Education] 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.

II. PROCEDURAL AND FACTUAL BACKGROUND

As noted above, the petitioner describes itself as a "Retail Pharmacy." It filed the instant petition seeking to employ the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012).

At Part C of the Form I-129 H-1B Data Collection Supplement, the petitioner indicated that the beneficiary was eligible for one of the U.S. Master's Degree or Higher Cap exemptions. Specifically, item "1" of that section requests that the petitioner "[s]pecify how this petition should be counted against the H-1B numerical limitations (a.k.a. the H-1B 'Cap')." The petitioner checked box "b," indicating, "Cap H-1B U.S. Master's Degree or Higher." At item "2" of that section, which requests information regarding the name of the U.S. institution of higher education as defined in 20 U.S.C. § 1001(a) from which the beneficiary received her master's or higher degree, the petitioner stated that the beneficiary received a master's degree from [REDACTED] California, on December 18, 2011. Evidence in the record confirms that [REDACTED]

awarded the beneficiary a Master's of Health Care Management Degree on December 18, 2011.

The director issued a request for evidence (RFE) requesting, *inter alia*, verification from the U.S. Department of Education that held accreditation at the time the beneficiary's degree was issued.

In response to the RFE, the petitioner acknowledged the director's concern about not being an accredited institute, but asserted that the beneficiary is nevertheless qualified for the proffered position. Specifically, the petitioner stated that the beneficiary's issued master's degree "was an added qualification" and "regardless of the accreditation level of the Beneficiary was hired by [the petitioner] and qualifies as a Regulatory & Compliance Analyst based on her Bachelor's degree in Pharmacy." The petitioner submitted an evaluation report indicating that the beneficiary possesses the foreign equivalent to a "Bachelor of Science degree in Pharmaceutical Science, from an accredited institution of higher education in the United States."

The director denied the petition on December 5, 2013, concluding that the petitioner had not demonstrated that the beneficiary is eligible for the requested H-1B Cap exemption. Specifically, the director found that is not an officially accredited institution, and thus, does not meet the definition of a U.S. institution of higher education as described at 20 U.S.C. § 1001(a)(5). The director determined that, as the beneficiary did not qualify for the "CAP H-1B U.S. Master's Degree or Higher" exemption claimed by the petitioner, the petition is subject to the numerical limitations for FY14.

The petitioner subsequently filed an appeal. On appeal, counsel for the petitioner concedes that "the Beneficiary does not qualify toward the US Master's degree H-1B Cap since her US education institution is not from an officially accredited institution."¹ Nevertheless, counsel for the petitioner asserts that the director erred in denying the petition due to "the likelihood that the I-129 could have been counted and selected under the 65,000 H-1B limit, which in this case the Petitioner-Company is assuming." Counsel for the petitioner concludes that "it is clear that the USCIS could have been mistaken in its findings if the referenced I-129 petition was selected under the 65,000 H-1B limit."

III. ANALYSIS

To demonstrate that an exemption to the general H-1B Cap is available pursuant to the U.S. Master's Degree or Higher Cap, a petitioner must demonstrate that the beneficiary earned a master's or higher degree from a United States institution of higher education as defined in 20 U.S.C. § 1001(a). As is stated in that section, in order to qualify as such an institution, a school must be,

¹ The petitioner has never claimed that is an institution that has been granted preaccreditation status by a nationally recognized accrediting agency or association.

among meeting other qualifications, accredited by a nationally recognized accrediting agency or association.

Here, the petitioner indicated on the Form I-129 petition that it was eligible for one of the U.S. Master's Degree or Higher Cap exemptions. The director subsequently determined – and petitioner concedes - that [REDACTED] is not an accredited institution as defined in 20 U.S.C. § 1001(a). As such, the director correctly determined that the beneficiary does not qualify for the U.S. Master's degree H-1B cap exemption as described in section 214(g)(5)(C) of the Act based on her master's degree awarded by [REDACTED]. In this instance, 8 C.F.R. § 214.2(h)(8)(ii)(B) mandates the denial of the instant petition.

The regulation at 8 C.F.R. § 214.2(h)(8)(ii)(B) provides 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" For purposes of the regulation at 8 C.F.R. § 214.2(h)(8)(ii)(B), the determination date for a beneficiary's ineligibility for an exemption to the general H-1B Cap is the date on which that determination is first articulated by USCIS in a decision properly served upon a petitioner. Here, the determination date for the beneficiary's ineligibility for the claimed U.S. Master's Degree or Higher Cap exemption is the date the director issued his December 5, 2013 decision, finding in part that the petition is not exempt from the standard 65,000 numerical limitation.

As the petitioner in this matter claimed the beneficiary was eligible for the U.S. Master's Degree or Higher Cap exemption and the director subsequently made the determination that the petition is not exempt from the standard 65,000 numerical limitation after the April 5, 2013 final receipt date, the petition must be denied pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(B) and the appeal will be dismissed.²

² The petitioner's argument on appeal that the director erred in denying the petition based on the "likelihood that the I-129 could have been counted and selected under the 65,000 H-1B limit, which in this case the Petitioner-Company is assuming" is not persuasive.

To support this assertion, the petitioner appears to rely upon the last sentence in 8 C.F.R. § 214.2(h)(8)(ii)(B) stating that, if the numerical limit is reached within the first five business days, USCIS will "[conduct] the random selection among the petitions subject to the exemption under section 214(g)(5)(C) of the Act first." However, the petitioner's reliance upon the general manner in which USCIS counts towards the cap, as described in the last sentence of 8 C.F.R. § 214.2(h)(8)(ii)(B), is misplaced. Whether or how the instant petition could have been selected for and counted against the cap is irrelevant to the issue at hand. As discussed above, the specific issue presented here is that the petitioner indicated that it is exempt from the numerical limitation, but USCIS later (and correctly) determined after the final receipt date that the petition is subject to the numerical limit. Under these specific circumstances, 8 C.F.R. § 214.2(h)(8)(ii)(B) mandates that the instant petition be denied.

It is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met. We will affirm the decision of the service center director.³

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

³ As the identified ground of ineligibility is dispositive of the petitioner's appeal, we need not address any additional issues in the record of proceeding.