



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **APR 14 2015** 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,

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.

## I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a college<sup>1</sup> established in [REDACTED]. In order to employ the beneficiary in what it designates as an "Academic Advisor" position at a salary of \$40,000 per year,<sup>2</sup> 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 basis of her determination that the evidence of record did not demonstrate that the beneficiary qualifies for an exemption from the H-1B cap imposed by section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as claimed by the petitioner.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's notices of intent to deny (NOID) the petition; (3) the petitioner's responses to the NOIDs; (4) the director's letter denying the petition; and (5) Forms I-290B, Notice of Appeal or Motion, and supporting documentation.

## II. THE LAW

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 (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 H-1B cap exemption at section 214(g)(5)(C) of the Act may not exceed 20,000 (hereinafter referred to as the "U.S. Master's Degree or Higher Cap"). The petition was filed for an employment period to commence October 1, 2014. As the 2015 fiscal year ("FY15") extends from October 1, 2014 through September 30, 2015, the instant petition is subject to the FY15 H-1B Cap, unless exempt.

On April 7, 2014, 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

<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 611310, "Colleges, Universities, and Professional Schools" U.S. Dept of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=611310&search=2012> (last visited April 13, 2015).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Educational, Guidance, School, and Vocational Counselors" occupational classification, SOC (O\*NET/OES) Code 21-1012, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

Degree or Higher Cap for FY15 as of that date. Therefore, April 7, 2014 is the FY15 "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. The petitioner filed the instant visa petition requesting a U.S. Master's Degree or Higher Cap exemption on April 1, 2014.

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

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a 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 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 during such year exceeds 20,000.

Section 101(a) of the Higher Education Act of 1965,<sup>3</sup> 20 U.S.C. § 1001(a), 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

<sup>3</sup> Higher Education Act of 1965, § 101(a), Pub. L. 89-32, 79 Stat. 120 (1965).

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.

Notably, 8 C.F.R. § 214.2(h)(8)(ii)(B) states, in part:

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 and refunded.

### III. EVIDENCE

At Part C of the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, the petitioner made clear that it was applying for one of the U.S. Master's Degree or Higher Cap exemptions to be issued to 20,000 holders of master's or higher degrees from United States institutions of higher education, as defined in 20 U.S.C. § 1001(a). 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," stating "Cap H-1B U.S. Master's Degree or Higher." At item "2" of that section, which requested that the petitioner identify the beneficiary's advanced degree and the institution where the beneficiary received it, the petitioner stated that the beneficiary received a master's degree from [REDACTED] located in New York. Evidence in the record confirms that the beneficiary received a master's degree from that institution on April 14, 2011.

In the NOIDs issued on May 1 and June 16, 2014, the director requested evidence demonstrating that the petitioner obtained a master's degree from an institution as defined in 20 U.S.C. § 1001(a).

In response to the NOIDs, the petitioner submitted, *inter alia*, a letter dated May 30, 2014 in which it stated that "[REDACTED] – like its public and non-profit peers – is accredited by the [REDACTED] and [is] recognized as an institution of higher education by New York State." The petitioner stated that it employed the beneficiary during her master's degree

<sup>4</sup> [REDACTED] is also the petitioner of the instant petition.

program and paid all the legal and filing fees for this petition. Furthermore, the petitioner stated that the beneficiary's degree is not applicable in her home country; therefore, the experience she gained during her Optional Training Program will be lost. The petitioner requested a *nunc pro tunc* approval of the petition, either under the master's degree cap or the regular cap.

The director denied the visa petition on July 31, 2014, finding that the evidence of record of proceeding did not demonstrate that the beneficiary is eligible for the exemption from the cap for which the petitioner had applied.

On appeal, the petitioner submitted a letter, dated August 28, 2014, which was virtually identical to the one submitted below as well as evidence previously submitted. Neither of those letters, nor anything else provided, suggests that the petitioner is a public or other non-profit institution.

#### IV. ANALYSIS

Upon review of the record of proceeding, we find that the petitioner has not established that this petition is eligible for the U.S. master's degree cap exemption. Under section 214(g)(5)(C) of the Act, 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 as defined in section 101(a) of the Higher Education Act (HEA) of 1965. The fourth criterion of 101(a) defines the United States institution of higher education as a public or other nonprofit institution.

The petitioner claims an exemption based on the beneficiary's degree from [REDACTED] however, as noted by the director, [REDACTED] is a private, for profit institution.<sup>5</sup> The evidence of the record does not demonstrate that the petitioner is a public or other nonprofit institution and therefore does not establish that the beneficiary is exempt from the numerical cap. As previously noted, 8 C.F.R. 214.2(h)(8)(ii)(B) states that the petitions indicating that they are exempt from the numerical limitation but are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied. Since the petitioner has not established that the beneficiary is exempt from the H-1B cap and the numerical limit has been reached, this petition will be denied. Since this issue precludes approval of the petition, we will not address the petitioner's assertions regarding fairness, inconvenience, or the beneficiary's credentials.<sup>6</sup>

#### V. CONCLUSION

<sup>5</sup> According to the National Center for Education Statistics, which is located within the U.S. Department of Education and the Institute of Education Sciences and is the primarily federal entity for collecting and analyzing data related to education in the United States, [REDACTED] is a private, for-profit institution. For more information about [REDACTED] see [REDACTED] (last visited April 13, 2015).

<sup>6</sup> Likewise, we will not address any of the additional deficiencies we have identified on appeal.

(b)(6)

*NON-PRECEDENT DECISION*

Page 6

As discussed, we agree with the director's determination that the evidence of record does not establish the petitioner's eligibility for the benefit sought.

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.