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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: AUG 1 4 2015 PETITION RECEIPT #:

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:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

U.S. Citizenship and Immigration Services (USCIS) announced that it had received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year (FY) 2014 as allocated at section 214(g)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1184(g)(1)(A). Thereafter, the petitioner filed a Petition for a Nonimmigrant Worker (Form I-129) to classify the beneficiary as an H-1B temporary 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). The petitioner requested that the petition be approved for FY 2014.

The Director reviewed the submission and concluded: (1) the petition was subject to the numerical cap limitation, and (2) the petition could not be approved because the cap for that fiscal year had been reached. Accordingly, the Director denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. Upon *de novo* review, we conclude that the petitioner has not overcome the specified basis for denial of the petition.[1] The appeal will be dismissed.

II. LEGAL FRAMEWORK

Unless exempted, the total number of temporary workers who may be issued initial H-1B visas or otherwise provided H-1B nonimmigrant status in a fiscal year is 65,000 with an additional 20,000 provided to U.S. post-graduate degree holders. Section 214(g)(1)(A)(vii) and (5)(C) of the Act, 8 U.S.C. § 1184(g)(1)(A)(vii) and (5)(C). *See also*, 8 C.F.R. § 214.2(h)(8)(i)(A) and 8 C.F.R. § 214.2(h)(8)(ii)(A). The numerical limitation is known as "the cap."

According to section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7):

> Any alien who has already been counted within the 6 years prior to the approval of a petition . . . toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

Section 101(a)(13)(A) of the Act states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and

[1] We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

authorization by an immigration officer."

The regulations at 8 C.F.R. § 214.2(h)(8)(ii)(D) state the following:

> A petition received after the total numbers available in a fiscal year are used stating that a beneficiary is exempt from the numerical limitation will be denied and the filing fees will not be returned or refunded if USCIS later determines that the beneficiary is subject to the numerical limitation.

A petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services. 8 C.F.R. § 214.2(h)(9)(i)(B).

When an approved petition is not used because the beneficiary does not apply for admission to the United States, the petitioner shall notify the service center director who approved the petition that the number has not been used. 8 C.F.R. § 214.2(h)(8)(ii); Volume 9 of the Foreign Affairs Manual, 9 FAM 41.53 note 23. The petition shall be immediately and automatically revoked and USCIS will take into account the unused number during the appropriate fiscal year. 8 C.F.R. § 214.2(h)(8)(ii) and (11)(ii).

With regard to revocations, the regulations further state that the petitioner shall immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility. 8 C.F.R. § 214.2(h)(11)(i)(A). If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. *Id.*

III. DISCUSSION

In the instant case, the petitioner's Form I-129 was filed after USCIS's announcement that the H-1B cap had been reached for the relevant fiscal year. The petition was accepted for processing because the petitioner claimed that the petition was exempt from the numerical limitation. Specifically, on the Form I-129, the petitioner reported that the beneficiary was previously granted status as an H-1B nonimmigrant within the past six years.

With the petition, the petitioner submitted a USCIS notice issued to another employer, stating that an H-1B petition on behalf of the beneficiary had been approved for FY 2006 and that the appropriate consulate had been notified. The notice further reports, "If any of the worker(s) included in this petition do not actually enter the United States . . . the petitioner must notify this office so the allocated nonimmigrant visa numbers can be re-used." The petitioner also provided a copy of an H-1B visa issued to the beneficiary in December 2005. In a letter of support, the petitioner noted that the beneficiary had never entered the United States in H-1B classification and that "due to changes of circumstances, the beneficiary never started the employment or entered the U.S. in an H-1B capacity."

The petitioner claims that the beneficiary seeks to be re-admitted for the "remainder" of his authorized H-1B admission period and that he is not subject to the H-1B cap. In support of this

assertion the petitioner cites to a USCIS policy memorandum: Memorandum from Michael Aytes, Associate Director for Domestic Operations, CIS, Department of Homeland Security, *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year.* AFM Update 06-29 (Dec. 5, 2006). The scenario described in the memorandum can be distinguished from the instant case as it refers to individuals who have held H-1B status.[2]

The approval of an H-1B petition does not in itself grant any immigration status to a beneficiary and does not guarantee that a beneficiary will subsequently be eligible for a visa and for admission to the United States. Section 221(h) of the Act; 8 U.S.C. § 1201(h); section 235(a)(3) of the Act; 8 U.S.C. § 1225(a)(3). An immigration official did not inspect and make a determination that the beneficiary was qualified to be admitted to the United States in H-1B nonimmigrant status; therefore, the beneficiary did not ever hold H-1B status. Moreover, the beneficiary cannot apply for admission to the United States now based upon the previously approved H-1B petition as the validity of the petition expired over four years ago – and there is no indication that the prior petition supports an actual need for the beneficiary's services. For the beneficiary to be exempt from the numerical limitations at section 214(g)(7) of the Act, he must have held H-1B status.

While the previous employer claimed that it had an imminent need for the beneficiary's services, the documentation provided indicates that the beneficiary did not hold H-1B status and never worked in that offered position. The prior employer was required to immediately notify USCIS that (1) the beneficiary did not apply for admission to the United States; and (2) there were changes in the terms and conditions of employment – resulting in the petition being immediately and automatically revoked and the unused visa number being taken into account during the appropriate fiscal year. 8 C.F.R. § 214.2(h)(8)(ii) and (11); 9 FAM 41.53 note 23.

Moreover, while the petitioner claims that the instant H-1B petition is exempt from the cap under section 214(g)(7) of the Act, it must be noted that the prior petition on behalf of the beneficiary was approved for FY 2006. Thus, it was not counted toward the numerical limitation within the past six years.

Upon review of the totality of the evidence, we conclude that the petitioner has not shown by a preponderance of evidence that the instant petition is exempt from the numerical limitations. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) "[t]he 'preponderance of the evidence' standard requires that the evidence demonstrate that the applicant's claim is 'probably true,' where the

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[2] For example, the memorandum states that its purpose is to "[c]larif[y] how to determine the maximum period of admission in H-1B status for a beneficiary who was in the United States in valid H-1B status for less than the six-year maximum period of admission, but who has since been outside the United States for more than one year." Further, the memorandum explains that the burden of proof must be satisfied to establish that "[the beneficiary] held H-1B status in the past and is eligible to apply for admission for the H-1B remainder time. Petitions should be submitted with documentary evidence of previous H-1B status. . . ."

determination of 'truth' is made based on the factual circumstances of each individual case"). Therefore, the appeal will be dismissed.

IV. CONCLUSION

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.[3]

ORDER: The appeal is dismissed.

[3] The dismissal of the instant appeal does not preclude the petitioner from submitting a new H-1B petition, with the appropriate fee(s) and a valid Labor Condition Application, for USCIS to consider in accordance with the applicable statutory and regulatory provisions.