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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 22 2015 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 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 an "Information Technology and [R]elated Services" firm. In order to employ the beneficiary in a position it designates as a "Programmer Analyst" position, the petitioner endeavors 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 (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 petitioner failed to 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.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

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 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 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.

Section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-32), 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 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.

III. EVIDENCE

At Part C of the Form I-129 H-1B Data Collection 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," indicating, "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 indicated that the beneficiary received a master's degree from Virginia. Evidence in the record confirms that the beneficiary received a master's degree from that institution on July 29, 2012.

An RFE issued on April 28, 2014 requested, *inter alia*, the following:

> [P]rovide evidence that Stratford University qualifies as institutions [sic] of higher education as defined . . . in section 101(a) of the Higher Education Act of 1965, (Pub. Law 89-329), 20 U.S.C. section 1001(a).

In response, counsel provided (1) a letter, dated May 19, 2014, from an assistant registrar at University; and (2) counsel's own letter, dated May 27, 2014.

The May 19, 2014 letter from states:

> is accredited by the Accrediting Council for Independent Colleges and Schools (ACICS) to award certificate, diploma, associate, bachelor, and master degrees. ACICS is recognized by the U.S. Department of Education and the Council for Higher Education Accreditation (CHEA).
>
> is exempt from certification by the State Council of Higher Education for Virginia (SCHEV) to operate campuses in Virginia as it has been properly accredited by an accrediting body recognized by the U.S. Department of Education in excess of ten years.

In his May 27, 2014 letter, counsel stated: "In view of the above explanation from the confirming its status as an institution of higher education, we request approval of the I-129 H1B petition of [the beneficiary]."

The director denied the visa petition on June 12, 2014, finding that the petitioner had not demonstrated that the beneficiary is eligible for the exemption from the cap for which the petitioner had applied. The director stated:

> [A]ccording to public records is a for-profit entity in VA., owned by the a closely held corporation. Therefore, it appears that may not be a public or other nonprofit institution as defined by the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a).

On appeal, counsel provided, *inter alia*, (1) a letter, dated July 1, 2014, from the petitioner's president; and (2) counsel's own letter, dated July 8, 2014. Neither of those letters, nor anything else provided, suggests that Stratford University is a public or other non-profit institution.[1]

IV. ANALYSIS

On the instant visa petition, the petitioner indicated that the visa petition was filed pursuant to the exemption from that cap provided for at section 214(g)(5)(C) of the Act. Approval of the proffered position requires that the petitioner demonstrate that the beneficiary is eligible for that exemption.

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 all five of the criteria delineated in section 101(a) of the Higher Education Act of 1965. The fourth criterion of 101(a) states that, to qualify as a United States institution of higher education pursuant to that definition, a school must be a public or other nonprofit institution. The petitioner has not demonstrated that is a public or other nonprofit institution, and has not demonstrated, therefore, that the beneficiary is exempt from the general cap. The appeal will be dismissed and the visa petition will be denied on this basis.

V. CONCLUSION

[1] The July 1, 2014 letter from the petitioner's president states:

> We understand that on June 10, 2014, the Vermont Service Center issue a notice confirming that they do not intend to deny a FY 2014 CAP Subject petition based on a Master's Cap Exemption, from a For Profit University.

The petitioner did not provide a copy of that notice. Further, if such a notice were demonstrated to exist, it would not overcome the clear statutory requirement that a qualifying institution of higher education must be a public or other nonprofit institution. Such a notice would not demonstrate, therefore, that the beneficiary is exempt from the cap imposed by section 214(g)(1)(A) of the Act.

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.