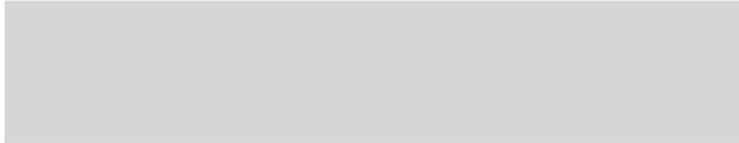




U.S. Citizenship
and Immigration
Services

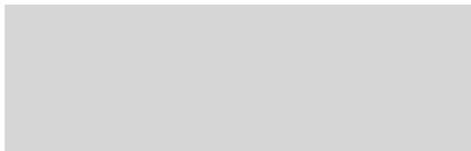
(b)(6)



DATE: **JUN 09 2015**

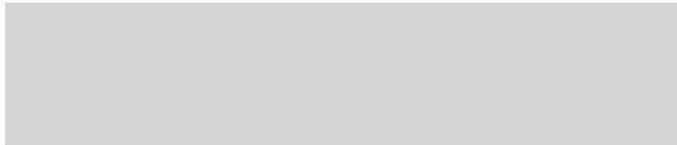
PETITION RECEIPT #: 

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) 2015 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 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 us 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 authorization by an immigration officer."

¹ We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Each beneficiary shall be counted against the cap unless he/she is exempt from the numerical limitation. 8 C.F.R. § 214.2(h)(8)(ii)(A). When calculating the numerical limitations or the number of exemptions for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed and make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. 8 C.F.R. § 214.2(h)(8)(ii)(B). If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year. 8 C.F.R. § 214.2(h)(8)(ii)(D). 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. *Id.*

The regulations further specify that 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 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 cap had been reached for the relevant fiscal year. The petitioner stated that the petition was filed for "new employment" with a request that the U.S. Consulate in Manila be notified. 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. However, upon review, we note that the beneficiary never held H-1B status.

That is, prior to the instant filing another employer, [REDACTED] submitted an H-1B petition on behalf of the beneficiary for FY 2015. The petition was approved for employment commencing on October 1, 2014. Prior to the start date, [REDACTED] notified the Director that it would not be employing the beneficiary and requested that the H-1B petition be withdrawn. The petition was immediately and automatically revoked so that the unused visa number could be taken into account during the appropriate fiscal year. 8 C.F.R. § 214.2(h)(8)(ii) and (11). We note that despite the

petitioner's suggestion to the contrary, neither the statute nor the regulations permit a petitioner to substitute itself for another employer for the use of a cap number.

Moreover, the petitioner states that the Director's adjudication of the instant petition was unfair. The petitioner has not demonstrated, however, any error by the director in conducting a review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

The petitioner further suggests that the beneficiary is eligible for employment under the portability provisions at 214(n) of the Act. The H-1B portability provisions, however, are not applicable here as, *inter alia*, the beneficiary never held H-1B status and was not lawfully admitted to the United States. Further, the petitioner did not file the instant petition prior to the date of expiration of the period of the beneficiary's authorized stay. Moreover, the availability of a cap number, where required, is a prerequisite to proper filing of an H-1B petition.

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

V. 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.

ORDER: The appeal is dismissed.