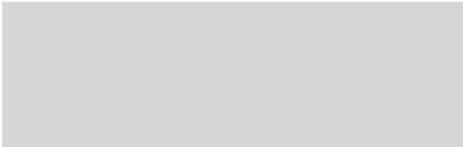




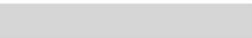
U.S. Citizenship
and Immigration
Services

(b)(6)



JUN 17 2015

DATE:

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,

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

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 on appeal. The appeal will be dismissed. The petition will be denied.

I. APPLICABLE LAW

The petitioner filed a Petition for a Nonimmigrant Worker (Form I-129), seeking to extend classification under 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), for an individual to perform services in a specialty occupation (hereinafter referred to as an "H-1B visa").

In general, H-1B visas are numerically capped by statute. Under section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), the total number of H-1B visas issued per fiscal year may not exceed 65,000 (hereinafter referred to as the "H-1B Cap"). Section 214(g)(5)(C) of the Act provides an exemption to the H-1B Cap that allocates up to an additional 20,000 visas to individuals who have "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))" (hereinafter referred to as the "Master's Cap").

Section 101(a) of the Higher Education Act of 1965, Pub. Law 89-329, 79 Stat. 1219, as amended by the Higher Education Amendments of 1998, P.L. 105-244, 112 Stat. 1585, 20 U.S.C. § 1001(a) (2012) (Higher Education Act), defines the term "institution of higher education" as a public or nonprofit educational institution in any state that, inter alia: "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. . . ."

Lastly, the regulations prescribe the procedures by which these numerical caps are managed. Relevant to the handling of petitions determined *not* to be eligible for the Master's Cap, 8 C.F.R. § 214.2(h)(8)(ii)(B) provides in pertinent part: "Petitions indicating that they are exempt from the numerical limitation but that are determined by [U.S. Citizenship and Immigration Services (USCIS)] after the final receipt date to be subject to the numerical limit will be denied"

II. FACTUAL BACKGROUND

In the instant case, when the H-1B petition was filed, the annual fiscal-year cap on the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, had been reached. The petition was accepted for adjudication despite the cap limitation, however, because the petitioner indicated on the Form I-129 that it was requesting an amendment to or an extension of stay for the beneficiary's current H-1B classification and the beneficiary was, therefore, exempt from the annual fiscal-year cap on the issuance of H-1B visas. The record indicates that the prior H-1B petition was approved under the U.S. Master's Degree or Higher Cap for FY13 based on the petitioner's contention that the beneficiary possessed a U.S. Master's Degree. The petitioner stated, and the record corroborates, that the beneficiary earned a Master of Science degree from [REDACTED]

California, on December 31, 2010.

After reviewing the instant petition, the director issued a Notice of Intent to Deny (NOID) the petition to the petitioner, noting that the record did not establish that [REDACTED] was accredited at the time the beneficiary's master's degree was conferred. The Director stated that, based on this fact, the beneficiary had not previously qualified under the H-1B Master's Cap and, thus, was now subject to the H-1B cap for FY13, which had been reached on June 11, 2012.

The petitioner responded to the NOID and asserted that the director had no legal basis to deny the extension petition because the beneficiary had previously been counted toward the H-1B cap for FY13. The petitioner claimed that, pursuant to section 214(g)(7) of the Act, the instant petition should be approved since the beneficiary had previously been counted toward the numerical limits within the past six years. In the alternative, the petitioner asserted that [REDACTED] was in pre-accreditation status when the initial H-1B petition, which this petition seeks to extend, was filed on June 12, 2012.¹ The petitioner concluded that [REDACTED] therefore met the definition of a qualifying institution at the time the initial H-1B petition was filed.

The Director denied the Form I-129 on the basis that the beneficiary did not earn a master's or higher degree from a U.S. institution of higher education and, therefore, did not qualify for the claimed H-1B Cap exemption. Noting that the previously-approved petition, which was filed and approved under the H-1B Master's Degree or Higher Cap, involved gross error, the Director concluded that the instant petition was subject to the numerical limitations for Fiscal Year 2013 (FY13). On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and that the petitioner satisfied all evidentiary requirements.²

III. INTERPRETATION

The primary question presented is whether, for purposes of demonstrating eligibility for a Master's Cap exemption, the relevant "United States institution of higher education" must be qualified as

¹ [REDACTED] was preaccredited on June 24, 2011. Although the petitioner correctly asserts that [REDACTED] was in preaccreditation status at the time the prior H-1B petition was filed in June 2012, it must be noted that [REDACTED] was not preaccredited at the time the beneficiary's degree was conferred in December 2010. [REDACTED] accreditation status can be verified on the [REDACTED] website at [REDACTED] (last visited June 11, 2015).

² The "preponderance of the evidence" standard requires that the evidence demonstrate that the petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, we must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

such (1) at the time the prospective beneficiary's degree is conferred or (2) at the time a Master's Cap exemption is claimed in a nonimmigrant visa petition.

We give the statutory language conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 710 (D.C. Cir. 1987) (citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980)). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

Section 214(g)(5)(C) of the Act affords the Master's Cap exemption to an individual who "*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)) . . .*" (emphasis added). We conclude that the plain language of this provision requires that the relevant degree have been earned, at the time the degree is awarded, from a United States institution of higher education. The statute is clear and unambiguous in requiring, for the purpose of qualifying for an exemption from the Master's Cap, that the beneficiary must have earned a master's or higher degree from an accredited or preaccredited institution. If the U.S. institution was not so accredited or preaccredited at the time that the degree was earned, then the degree would not constitute a master's or higher degree from such an institution.

While an unaccredited institution may subsequently make changes to the institution and its degree programs to achieve accreditation or preaccreditation status, those subsequent changes would not alter the fact that degrees awarded prior to the institution achieving such status would not be considered to be from an "institution of higher education" as that term is defined in section 101(a) of the Higher Education Act. Thus, to qualify for a Master's Cap exemption, the post-secondary education institution must have been a "United States institution of higher education" at the time the prospective beneficiary's U.S. master's or higher degree is earned.

The petitioner's proffered interpretation – assessing the institution's qualifications at some later time when an immigration benefit is requested for one of the institution's graduates – could result in an individual qualifying for the Master's Cap exemption even though the degree, when earned, was not actually from an institution of higher education as that term is defined in section 101(a) of the Higher Education Act. Such interpretation would result in an outcome clearly at odds with the plain language of the statute. It may also result in great uncertainty for graduates seeking immigration benefits over time.

That is, under the petitioner's proffered interpretation, an individual's eligibility for the Master's Cap exemption could change along with the accreditation or preaccreditation status of the college or university from which he or she graduated. Based on our interpretation here, however, if at the time the individual earns a U.S. master's or higher degree the institution of higher education awarding the degree is accredited or preaccredited, he or she will continue to qualify for the Master's Cap

exemption regardless of whether the institution from which the degree was earned ceases to exist or subsequently loses its accreditation or preaccreditation status.

IV. ANALYSIS

In this matter, the prior petition was counted against the Master's Cap for FY13 on the basis that the beneficiary earned a master's degree from [REDACTED]. The record, however, does not contain evidence that, on the date the beneficiary earned the Master of Science degree from [REDACTED] i.e., December 31, 2010, [REDACTED] was (1) accredited by a nationally recognized accrediting agency or association, or (2) granted preaccreditation status by such an agency or association that has been recognized for the granting of preaccreditation status by the U.S. Secretary of Education.

Rather, the record indicates that [REDACTED] was not preaccredited by [REDACTED] until 2011.³ Therefore, we conclude that the beneficiary did not earn a U.S. master's or higher degree from an "institution of higher education" as required by section 214(g)(5)(C) of the Act and defined in section 101(a) of the Higher Education Act. Absent evidence that [REDACTED] was accredited or had been granted preaccreditation status by any recognized accrediting agency at the time the relevant degree was earned, the beneficiary is ineligible for the Master's Cap exemption based on his master's degree awarded by that institution.

Although the petitioner objects to this finding, it simultaneously asserts that, regardless of whether the original Master's Cap petition was approved in error, the beneficiary in this matter nevertheless was already counted against the numerical cap for FY13 under that previously-approved petition. The petitioner avers that the beneficiary had already been granted an H-1B visa subject to the cap. We disagree.

The relevant regulations do not permit H-1B petitioners to claim eligibility under alternative grounds. The regulation at 8 C.F.R. § 214.2(h)(8)(ii)(B) provides in pertinent 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 . . ." (emphasis added). This regulation was designed to ensure a fair and orderly selection process, provide aliens subject to one or both caps an equal chance of being selected, and ensure limited agency resources are not wasted since USCIS must adjudicate the claim to determine whether the beneficiary is subject to the numerical cap. *See* 73 Fed. Reg. 15,389, 15,391-92 (Mar. 24, 2008).

Accordingly, 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

³ [REDACTED] is recognized by the U.S. Secretary of Education as a reliable authority "concerning the quality of education or training offered by the institutions of higher education or higher education programs [it] accredit[s]" and appears on the U.S. Department of Education's list of Regional and National Institutional Accrediting Agencies. U.S. Dep't of Education, Regional and National Institutional Accrediting Agencies, http://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html (last visited June 11, 2015).

determination is articulated by USCIS in a decision properly served upon a petitioner. *See* 8 C.F.R. §§ 103.2(b)(19), 103.3(a)(1)(i), and 103.8(a)(1).

Here, the petitioner claimed that the extension petition was cap exempt based on the prior petition's approval under the Master's Cap exemption. The director issued an NOID on April 8, 2015 – after the April 5, 2013 final receipt date for FY14 and after the June 11, 2012 final receipt date for FY13 – asking the petitioner to demonstrate the beneficiary's eligibility for the exemption claimed. Therefore, at the time the NOID was issued, the director had not yet determined that the instant visa petition was subject to the standard H-1B numerical limitation at section 214(g)(1)(A) of the Act. Rather, the determination date for the beneficiary's ineligibility for the claimed Master's Cap exemption is May 20, 2014, the date the director's decision was mailed, finding, in part, that the petition was not exempt from the standard 65,000 numerical limitation. *See* 8 C.F.R. § 103.8(a)(1) (a decision is considered properly served when it is mailed). Because USCIS determined, after the April 5, 2013 final receipt date for FY14 and after the June 11, 2012 final receipt date for FY13, that the petition was not exempt from the standard 65,000 numerical limit, the petition will be denied under 8 C.F.R. § 214.2(h)(8)(ii)(B).

We conclude that: (1) the prior petition was approved in error based upon the petitioner's inaccurate statement that the beneficiary had earned a master's degree from a U.S. institution as defined in section 101(a) of the Higher Education Act of 1965⁴; (2) the instant petition was subject to the numerical cap limitation; and (3) the petition could not be approved because the cap for that fiscal year had been reached.

VI. 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

⁴ The prior approval does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).