



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAR 20 2015** OFFICE: CALIFORNIA 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 (hereinafter "director") revoked the previously approved nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 2000-employee "Financial services provider" established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Front End Development Specialist" position, 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 revoked approval of the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) after a subsequent review of the record.

After issuance of a Notice of Intent to Revoke (NOIR) and upon review of the petitioner's submissions in response to the NOIR, the director revoked approval of the petition on July 11, 2014. The director determined that the petitioner had not overcome the grounds of revocation in that the petitioner had not submitted evidence that the beneficiary was eligible for an exception to the numerical limitation for the 2014 fiscal year based on a master's or higher degree from a United States institution of higher education.

The record of proceeding before this office contains: (1) the Form I-129 and supporting documentation; (2) the director's initial approval of the petition; (3) the director's NOIR; (4) the petitioner's response to the NOIR; (5) the director's notice of revocation (NOR); and (6) the Form I-290B, Notice of Appeal or Motion, the appeal brief, and previously submitted documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

#### I. GROUNDS FOR REVOCATION

We turn first to the basis for the director's revocation, and whether this basis provided the director with sufficient grounds for revoking the H-1B petition on notice under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A).

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or

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

- (2) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

We find that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B). As will be discussed below, we further find that the director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding, and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOR. Accordingly, we shall not disturb the director's decision to revoke approval of the petition.

## II. ELIGIBILITY BASED ON THE U.S. MASTER'S DEGREE OR HIGHER CAP

The primary issue before this office is whether the petitioner provided sufficient evidence to establish that the beneficiary qualifies for an exemption from the Fiscal Year 2014 (FY14) H-1B cap pursuant to section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C).

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, 2013. As FY14 extends from October 1, 2013 through September 30, 2014, the instant petition is subject to the FY14 H-1B Cap, unless exempt.

On April 5, 2013, 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 FY14 as of that date. Therefore, April 5, 2013 is the FY14 "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, 2013, four days prior to the final receipt date.

A. The Law

Section 214(g) of the Act provides in pertinent part the following:

(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-

(A) under section 101(a)(15)(H)(i)(b), may not exceed—

\* \* \*

(vii) 65,000 in each succeeding fiscal year . . . .

In general, section 214(g)(5) of the Act provides that:

The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) 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.

Pursuant to section 101(a) of the Higher Education Act of 1965, the term "institution of higher education" is defined as follows:

[A]n 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.

#### B. Facts and Procedural History

The petitioner filed the Form I-129 on April 1, 2013 requesting an employment start date of October 1, 2013. The Form I-129 H-1B Data Collection and Filing Fee Supplement (hereinafter, "H-1B Supplement"), at Part C, Numerical Limitation Information, reads as follows:

1. Specify how this petition should be counted against the H-1B numerical limitation (a.k.a. the H-1B "Cap"). (*Check one*):
  - a. CAP H-1B Bachelor's Degree
  - b. CAP H-1B U.S. Master's Degree or Higher
  - c. CAP H-1B1 Chile/Singapore
  - d. CAP Exempt

As noted above, by requesting an employment start date of October 1, 2013, the instant petition is subject to the FY 2014 limitation on H-1B beneficiaries. The petitioner checked box b at Part C, question 1, indicating that the beneficiary has a U.S. master's degree or higher, and thereby claimed an exemption from the numerical limitation contained in section 214(g)(1)(A)(vii) of the Act pursuant to section 214(g)(5)(C) of the Act.

The numerical limitation for both the regular and the "advanced degree" cap exemption was reached on April 5, 2013. See "USCIS Reaches Fiscal Year 2014 H-1B Cap," available on the USCIS

Internet site at <http://www.uscis.gov/news/alerts/uscis-reaches-fy-2014-h-1b-cap> (last visited Mar. 11, 2015). A subsequent USCIS press release issued on April 8, 2013 stated the following:

For the first time since 2008, U.S. Citizenship and Immigration Services (USCIS) has reached the statutory H-1B cap of 65,000 for fiscal year (FY) 2014 within the first week of the filing period. USCIS has also received more than 20,000 H-1B petitions filed on behalf of persons exempt from the cap under the advanced degree exemption.

USCIS received approximately 124,000 H-1B petitions during the filing period, including petitions filed for the advanced degree exemption. On April 7, 2013, USCIS used a computer-generated random selection process (commonly known as a "lottery") to select a sufficient number of petitions needed to meet the caps of 65,000 for the general category and 20,000 under the advanced degree exemption limit.

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The agency conducted the selection process for advanced degree exemption petitions first. All advanced degree petitions not selected were part of the random selection process for the 65,000 limit.

See <http://www.uscis.gov/news/uscis-reaches-fy-2014-h-1b-cap> (last visited Mar. 11, 2015).

Under Part C, question 2, the petitioner indicated that the beneficiary was awarded a "Master of Fine Arts" on December 18, 2010, from the [REDACTED] located in [REDACTED] California. The petitioner further claimed in its support letter, dated March 8, 2013, that the beneficiary "was awarded a Master of Fine Arts degree in Web Design & New Media from the [REDACTED] in [REDACTED], California." The petitioner also submitted copies of the beneficiary's transcript for her master's degree as well as a copy of her diploma granting her a Master of Fine Arts in Web Design & New Media.

The director approved the petition on May 2, 2013.

Upon further review of the record and the institution issuing the master's degree, the director notified the petitioner in the NOIR that the [REDACTED] is a for-profit, private corporation and therefore does not qualify as an institution of higher education as set out in section 101(a) of the Higher Education Act of 1965.

In response to the NOIR, the petitioner asserted that the beneficiary has already been counted toward the FY14 H-1B cap and actually qualifies under the bachelor's cap. The petitioner contended that the beneficiary "possesses a bachelor's degree from a foreign university that has been evaluated to be the equivalent to U.S. Bachelor of Science in Computer Information Systems." The petitioner provided an academic equivalency evaluation, dated May 14, 2014, stating that the beneficiary's foreign degree is equivalent to a bachelor's degree in computer information systems.

The petitioner contended further that the approval of the instant petition did not constitute "gross error" for the following reasons:

- [The beneficiary] should not be disqualified as an H-1B visa holder because the master's degree conferring institution appears, to any outsider reviewing the institution, to qualify as an institution of higher education.
- [The petitioner] filed the petition in good faith.
- [The petitioner] and [the beneficiary] should not be punished as they are not at fault.
- It is impossible to ascertain whether the approved petition was selected in the H-1B lottery under [section] 214(g)(5)(C) (master's cap) or whether it was selected in the H-1B lottery under [section] 214(g)(5)(A) (bachelor's cap).
- Application of 20 U.S.C. § 1001(a) does not appear to be uniformly applied and targeting [the petitioner] and [the beneficiary] raises disparate treatment and due process issues.

Upon review of the petitioner's claims and underlying assertions, the director found that the petitioner had not submitted evidence establishing that the beneficiary is eligible for the U.S. Master's Degree or Higher Cap and thus had not overcome the grounds for revocation.

On appeal, the petitioner asserts that it has met its burden establishing that the beneficiary qualifies for an H-1B visa. The petitioner contends that USCIS seeks to revoke approval of the petition "based on its own procedural error as the beneficiary was placed for processing in the master's cap," but that the beneficiary is also in possession of a bachelor's degree related to the proposed occupation and thus she meets the Congressionally imposed criteria for the H-1B visa category. The petitioner repeats its assertions and arguments on why the approval of the petition does not constitute gross error and is not a violation of section 101(a)(15)(H) of the Act or paragraph (h) of this section.

### C. Analysis

The petitioner's assertions regarding its good faith in filing the petition and what it perceives as punishment are equitable claims and thus outside the jurisdiction of this office. This office, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of USCIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of this office is limited to that authority specifically granted to it by the Secretary of the U.S. Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of this office is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, we have no authority to address the petitioner's equitable claim. Similarly, we have no authority to entertain constitutional due process challenges to a lawful USCIS action. *Cf. Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002) (collecting cases).

Next, we find that an Internet search on established college information websites reveals that the [REDACTED] is a four-year for profit institution. See e.g. [REDACTED] (last visited Mar. 11, 2015). The record does not contain evidence that the [REDACTED] is a public or other nonprofit institution. Accordingly, absent evidence to the contrary, the petitioner should have checked box "a" at Part C, section 1 of the H-1B Supplement, indicating that the beneficiary is subject to the numerical limitation contained in section 214(g)(1)(A) of the Act. As the [REDACTED] does not qualify under the cited definition, we are without authority to determine that the [REDACTED] renders the beneficiary eligible for an exception to the FY14 H-1B Cap based on a master's or higher degree from a United States institution of higher education even if the petitioner and the beneficiary were unaware of the school's for-profit status.

Finally, we will address the petitioner's claim that it is impossible to ascertain whether the approved petition was selected in the H-1B lottery for consideration as a master's cap petition or whether it was selected in the H-1B lottery for consideration as a bachelor's cap petition. Upon review, the petitioner filed the instant petition claiming the U.S. Master's Degree or Higher Cap exemption and USCIS records indicate that the instant petition was received by USCIS as a petition exempt from the numerical limitation based upon that claim. Therefore, we find that the evidence in the record does not support a finding that the instant petition was received by USCIS as a regular H-1B filing and assigned one of the remaining 65,000 visa numbers available in the lottery. As the beneficiary was ineligible for the exemption claimed, the director's review and determination of that fact requires the revocation of approval of the petition.

We now turn to the petitioner's contention that the instant visa petition was approvable pursuant to the general H-1B Cap. The Code of Federal Regulations at 8 C.F.R. § 214.2(h)(8)(ii)(B) reads in pertinent part as follows:

When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed . . . . Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. 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 or refunded . . . .

The actual determination date for the beneficiary's ineligibility for this claimed U.S. Master's Degree or Higher Cap exemption is the date the director revoked the approval of the instant petition, i.e., July 11, 2014. Again, the petitioner filed the instant petition claiming the U.S. Master's Degree or Higher Cap exemption and USCIS records indicate that the instant petition was received by USCIS as a petition exempt from the numerical limitation based upon that claim. As the petition was received as a FY14 U.S. Master's Degree or Higher Cap filing and as a determination that the

beneficiary was ineligible for that claimed exemption was made after April 5, 2013, the petition must be denied as there are no remaining FY14 H-1B visa numbers available to be assigned to the beneficiary.

The approval of a petition that is not eligible for the U.S. Master's Degree or Higher Cap exemption is gross error and requires revocation.<sup>2</sup> As determined above, the director properly gave notice of the error, provided the petitioner the opportunity to provide evidence to overcome the error, and when such evidence was not forthcoming, revoked approval of the petition. As a general FY14 H-1B cap number is no longer available to be assigned to the beneficiary, the approval of the petition must remain revoked.

### III. CONCLUSION AND ORDER

Based upon a complete review of the appeal and the record of proceeding, we find that the petitioner has failed to overcome the revocation grounds specified in the NOIR and the subsequent revocation decision. The petitioner has not established eligibility for the petition to be counted against the U.S. Master's Degree or Higher Cap. Accordingly, the appeal is dismissed. The approval of the petition remains revoked.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The approval of the petition remains revoked.

<sup>2</sup> The petitioner's assertion that USCIS seeks to revoke approval of the petition "based on its own procedural error as the beneficiary was placed for processing in the master's cap," is without merit. The petitioner in this matter affirmatively requested that the petition be considered under the master's cap and the petition was adjudicated under the master's cap exemption. When the director discovered that the beneficiary's degree did not meet the eligibility standards for a master's cap exemption, the director properly revoked approval of the petition on notice.