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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



DATE: **MAY 01 2015**

PETITION RECEIPT #: [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)

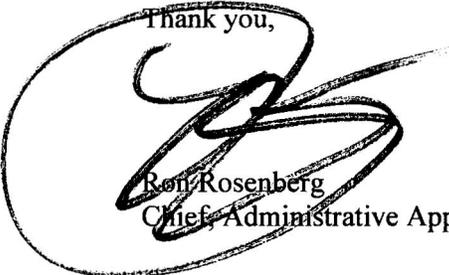
ON BEHALF OF PETITIONER:



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, Vermont Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition, the petitioner describes itself as a public accountant firm that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a staff accountant position, the petitioner seeks 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 reviewed the information and determined that the petitioner did not establish eligibility for the benefit sought. Specifically, the Director concluded that the petitioner did not establish that the beneficiary has earned a master's or higher degree from a U.S. institution of higher education as defined by 20 U.S.C. § 1001(a), and is exempt from the H-1B numerical limitations under section 214(g)(5)(C) of the Act. Thereafter, the petitioner filed an appeal.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the Director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's decision; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the Director that the petitioner has not established eligibility for the benefit sought. Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

II. H-1B MASTER'S CAP EXEMPTION

A. Legal Framework

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 ("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 ("U.S. Master's Degree or Higher Cap").

Section 214(g)(5) of the Act states, in pertinent part:

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

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.

Notably, 8 C.F.R. § 214.2(h)(8)(ii)(B) states, in 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 and filing fees will not be returned and refunded.

B. Analysis

In the Form I-129 H-1B Data Collection Supplement, Part C, the petitioner marked the item "1b" to indicate that it was applying for the "U.S. Master's Degree or Higher" cap exemption. In the same section, at item "2," the petitioner further stated that the beneficiary is expected to receive a master's degree on August 20, 2014 (approximately four months after the H-1B petition filing) from [REDACTED] University in [REDACTED]. In support, the petitioner submitted a copy of the beneficiary's transcript and a letter from [REDACTED] University, which stated that "[p]roviding [the beneficiary] successfully completes his spring 2014 classes ([REDACTED]) and his summer 2014 class ([REDACTED]), he will be eligible for degree conferral in August 2014."

Upon review of the record of proceeding, we conclude that the petitioner has not established that this petition is eligible for the U.S. master's degree cap exemption. Here, the beneficiary did not possess a master's degree at the time of filing the H-1B petition. To qualify for the "U.S. Master's Degree or Higher Cap" for H-1B visas, the petitioner must demonstrate that the beneficiary "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))." Section 214(g)(5)(C) of the Act.

We note that in response to the Director's RFE, the petitioner submitted a second letter from Seton Hall University, which indicated that the beneficiary became eligible for degree conferral as of June 24, 2014. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In response to the RFE, the petitioner further claimed that the beneficiary is qualified for the "U.S. Master's Degree or Higher Cap" as a combination of his education and work experience is equivalent to a U.S. master's degree. The petitioner submitted a credential evaluation from [REDACTED] College, the City University of [REDACTED]. As discussed, section 214(g)(5)(C) of the Act indicates that the beneficiary must possess 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))" in order to qualify for the U.S. master's cap exemption.

As previously noted, 8 C.F.R. 214.2(h)(8)(ii)(B) states that the petitions indicating that they are exempt from the numerical limitation but are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied. The petitioner has not established that the beneficiary is exempt from the H-1B cap and the numerical limit has been reached.² Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed and the petition denied.

III. CONCLUSION AND ORDER

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.

² USCIS announced that the H-1B cap for fiscal year 2015 was reached on April 7, 2014.

³ As the ground discussed above is dispositive for the dismissal of the appeal, we will not address and will instead reserve our determination on the additional issues in the record of proceeding with regard to the submission.