



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF I-, INC.

DATE: OCT. 6, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a software development and information technology solutions business, seeks to employ the Beneficiary as a software engineer/.net developer and to classify him as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 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, California Service Center, initially approved the petition. Upon subsequent review of the record, the Director issued a notice of intent to revoke (NOIR) the approval of the petition, and ultimately revoked the approval of the petition. The matter is now before us on appeal. The appeal will be dismissed and the approval of the petition will remain revoked.

The Director revoked the approval of the petition, finding 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 Notice of Intent to Revoke (NOIR); (3) the Petitioner's response to the NOIR; (4) the Director's decision; and (5) the Form I-290B, Notice of Appeal or Motion 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 approval of the petition will remain revoked.

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

I. 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:

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;

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- (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. Request by the Petitioner

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 received a master's degree from the [REDACTED] in Arizona. In support, the Petitioner submitted a copy of the Beneficiary's diploma which indicates that he received a master's degree from the [REDACTED] on April 13, 2010. The Petitioner marked its April 10, 2012, letter of support "Attn: FY13 H1B Cap Case-U.S. MASTER'S CAP EXEMPTION" and reported in the letter that "[the Beneficiary] is eligible for the FY13 U.S. Master's Cap Exemption."

C. Analysis

Upon review of the record of proceeding, we find that the Petitioner has not established that this petition is eligible for the U.S. master's degree cap exemption. Under section 214(g)(5)(C) of the Act, 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 as defined in section 101(a) of the Higher Education Act (HEA) of 1965. The fourth criterion of 101(a) defines the United States institution of higher education as a public or other nonprofit institution.

The Petitioner claimed an exemption based on the Beneficiary's degree from the [REDACTED] however, as noted by the Director, the [REDACTED]

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is a private, for profit institution.² On appeal, the Petitioner claims that if this petition is found ineligible, it should be counted towards the regular cap and not the master's cap. However, this petition was filed on April 16, 2012 requesting a U.S. master's degree or higher cap exemption. On June 12, 2012, 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 fiscal year (FY) 2013 as of that date.³ Further, the regulations address this scenario and specifically state that 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. 8 C.F.R. 214.2(h)(8)(ii)(B).

The Petitioner suggests that the Director's revocation of the petition was unfair; however, the approval was granted contrary to the requirements stated in the law, thus, the revocation was proper. Moreover, within the H-1B petition and supporting documents, the Petitioner provided inaccurate statements which the Director relied upon in adjudicating the H-1B petition. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).

Since the Petitioner has not established that the Beneficiary is exempt from the H-1B cap and the numerical limit has been reached, the approval of this petition will remain revoked.

II. CONCLUSION AND ORDER

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 Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met. We will affirm the decision of the Director. The petition's approval is revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), (A)(3), and (A)(4).

ORDER: The appeal is dismissed.

Cite as *Matter of I-, Inc.*, ID# 13938 (AAO Oct. 6, 2015)

² According to the National Center for Education Statistics, which is located within the U.S. Department of Education and the Institute of Education Sciences and is the primarily federal entity for collecting and analyzing data related to education in the United States, the [REDACTED] is a private, for-profit institution. For more information about the [REDACTED] see [https://nces.ed.gov/globallocator/index.asp?search=1&State=AZ&city=\[REDACTED\]&zipcode=&miles=&itemname=\[REDACTED\]&sortby=name&School=1&PrivSchool=1&College=1&CS=286ED6F8](https://nces.ed.gov/globallocator/index.asp?search=1&State=AZ&city=[REDACTED]&zipcode=&miles=&itemname=[REDACTED]&sortby=name&School=1&PrivSchool=1&College=1&CS=286ED6F8) (last visited October 2, 2015).

³ For more information, see <http://www.uscis.gov/news/uscis-reaches-fiscal-year-2013-h-1b-cap> (last visited October 2, 2015).