



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

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

In Re: 28600017

Date: OCT. 04, 2023

Appeal of Nebraska Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (H-1B)

The Petitioner seeks to employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both: (a) the theoretical and practical application of a body of highly specialized knowledge; and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the Nebraska Service Center denied the petition, concluding the record did not establish that the Petitioner and the Beneficiary were exempt from the H-1B numerical limitations contained at section 214(g)(5)(C) of the Act. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

The Petitioner seeks to employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* section 101(a)(15)(H)(i)(b) of the Act. H-1B visas are numerically limited, or “capped,” to 65,000 per fiscal year pursuant to section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A). An additional 20,000 visas are exempted from the regular 65,000 allotment for H-1B petitions filed on behalf of beneficiaries holding a U.S. master's degree. Section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C).¹

¹ The statute and regulations provide for other exemptions from the “cap” in limited circumstances. *See* section 214(g)(5) of the Act, 8 U.S.C. § 1184(g)(5); section 214(l) of the Act, 8 U.S.C. § 1184(l) (exempting physicians who have received a waiver of their home residency requirement under section 212(e) of the Act, 8 U.S.C. § 1182(e), upon a request by an interested federal or state agency); 8 C.F.R. § 214.2(h)(8)(ii)(A) (exempting beneficiaries already counted towards the “cap” from counting again for petition extensions and extension of stay).

For a beneficiary to be eligible for exemption under the master's cap, their degree must have been issued by a "United States institution of higher education." *Id.* Section 101(a) of the Higher Education ACT, 20 U.S.C. § 1001(a), states the following:

(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 person 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 20year program that is acceptable for full credit toward such a degree, or awards a degree that I 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 period of time.

II. ANALYSIS

The Petitioner did not assert, either in response to the Director's notice of intent to deny (NOID) or this appeal, that its petition was exempt from the H-1B numerical limitations under section 214(g) of the Act. The Petitioner essentially conceded that the Beneficiary's education would not have qualified its petition for one of the 20,000 visas exempted for individuals who have earned U.S. master or higher degrees.² The Petitioner also does not claim any other exemption from the H-1B numerical limitations. Instead the Petitioner's appeal, which is substantively identical to its response to the

² The [redacted] College of Technology and Commerce [redacted] conferred a U.S. master's or higher degree to the Beneficiary. [redacted] was not a "United States institution of higher education" under the applicable regulations because it was not a public or other nonprofit institution. [redacted] ceased operations in December 2017, the same year they conferred a U.S. master's or higher degree to the Beneficiary. Shortly before [redacted] terminated their operations, Accrediting Council for Independent Colleges and Schools (ACICS) had declined to continue [redacted] accreditation. The U.S. Department of Education (DOE) terminated recognition of ACICS' accreditation of independent colleges and schools on August 19, 2022.

Director's NOID, emphasizes equitable considerations to encourage us to continue "processing of this petition on a NUNC PRO TUNC basis." The Petitioner further contended that the discovery of the Petitioner and Beneficiary's ineligibility for cap exemption many years after the grossly erroneous approval of its initial H-1B petition forestalled it from any corrective action now and lost opportunities for corrective action in the past. The Petitioner does not cite to any statute, regulation, or policy which confers to us the authority to continue "processing of this petition on a NUNC PRO TUNC basis." Whilst the regulations do permit consideration of an exercise of discretion to extend a non-citizen's stay notwithstanding expiration of status, that is not the issue in this matter.³ The issue here is the Petitioner or Beneficiary's eligibility for an exemption from the H-1B category's numerical limitations. And, as stated earlier, the Petitioner has not demonstrated eligibility for any exemption from the H-1B category's numerical limitations. The sum of the Petitioner's assertions apparently demand that we continue to extend an immigration benefit despite clear statutory and regulatory ineligibility. We do not have the statutory or regulatory authority to do so.

There is also no time-bar to our discovery of prior ineligibility in the regulations. We have the authority to identify previous ineligibility and correct it through our decisions. *See* 8 C.F.R. § 214.2(h)(8)(ii)(C) ("[p]etitions received after the total numbers available in a fiscal year are used stating that the alien beneficiaries are exempt from the numerical limitation will be denied...if USCIS later determines that such beneficiaries are subject to the numerical limitation"). USCIS is not required to approve petitions where eligibility has not been demonstrated merely because of erroneous prior approvals. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988).

III. CONCLUSION

At the time the Petitioner filed the petition, USCIS had announced that the H-1B numerical limit for fiscal year 2022 had already been reached.⁴ So this petition would have to demonstrate exemption from the "cap" in order to be approvable. The Petitioner has not shown that any exemption from the "cap" applies to it or the Beneficiary.

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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ In any event, our authority to adjudicate appeals is delegated by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in the Secretary through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective Mar. 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The regulations limit our jurisdiction over petitions for temporary workers to those described under 8 C.F.R. §§ 214.2 and 214.6. There is no provision in the regulations for an appeal from a denial of an extension of stay request. *See* 8 CFR §§ 214.1(c)(5), 248.3(g).

⁴ USCIS Reaches FY 2022 H-1B Regular Cap, [https://www.uscis.gov/newsroom/alerts/uscis-reaches-fiscal-year-2022-h-1b-cap#:~:text=USCIS%20has%20received%20a%20sufficient,fiscal%20year%20\(FY\)%202022](https://www.uscis.gov/newsroom/alerts/uscis-reaches-fiscal-year-2022-h-1b-cap#:~:text=USCIS%20has%20received%20a%20sufficient,fiscal%20year%20(FY)%202022).