U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21186988

Date: APR. 11, 2022

Appeal of Vermont Service Center Decision

Form I-129, Petition for 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 Vermont Service Center Director approved then revoked the approval of the Form I-129, Petition for a Nonimmigrant Worker concluding that the Petitioner submitted multiple registrations for the Beneficiary in fiscal year 2022, thus invalidating all registrations they filed for that foreign worker in that fiscal year. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See 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. LEGAL FRAMEWORK

Before filing an H-1B cap-subject petition on behalf of a beneficiary subject to section 214(g)(1)(A) of the Act ("H-1B cap") or exempt under section 214(g)(5)(C) of the Act, a petitioner must first register with the U.S. Citizenship and Immigration Services (USCIS) website as described at 8 C.F.R. § 214.2(h)(8)(iii)(A)(*1*). The registration must be properly submitted in accordance with 8 C.F.R. § 103.2(a)(1), 8 C.F.R. § 214.2(h)(8)(iii), and the form instructions. A petitioner may file the H-1B petition only after its registration for that beneficiary has been selected. 8 C.F.R. § 214.2(h)(8)(iii)(A)(*1*).

In addition, 8 C.F.R. § 214.2(h)(8)(iii)(A)(*2*) specifies that a petitioner may submit only one registration per beneficiary per fiscal year, and if a petitioner submits more than one registration per beneficiary per fiscal year, all registrations filed by that petitioner relating to that beneficiary for that fiscal year will be considered invalid.

II. ANALYSIS

On March 15, 2021, the Petitioner created an online account and registered the Beneficiary for the fiscal year 2022 H-1B cap. Approximately one week later, the Petitioner's former counsel also registered the same foreign worker on the petitioning organization's behalf and this second registration was selected for the fiscal year 2022 H-1B cap. Approximately one week later, the Petitioner submitted the H-1B petition, which the Director approved on June 7, 2021. However, the Director discovered that the Beneficiary was registered two times for this Petitioner for fiscal year 2022, and they issued a Notice of Intent to Revoke (NOIR) the petition's approval. After considering the Petitioner's response to the NOIR, the Director revoked the approval.

On appeal, the Petitioner presents the following arguments:

1. It did not receive effective assistance from its former counsel;
2. The regulations do not allow for legal representatives to register foreign workers for the H-1B cap;
3. Alternatively, even though employers cannot submit more than one registration for the same beneficiary in the same fiscal year, USCIS does not prohibit legal representatives or other third parties from performing this same action;
4. A built-in mechanism that USCIS employs should have identified the duplicate registration and warned the entity that performed the second registration; and
5. The Director's decision to revoke the approval violated the Administrative Procedure Act (APA).

On appeal, the Petitioner does not contest the correctness of the registration record that reflects two registrations for the Beneficiary during fiscal year 2022.

First, even though the Petitioner claims that their former counsel ignored their efforts to correspond with the law office and essentially left the employer in the dark regarding this process, they have not satisfied all the requirements to properly assert an ineffective assistance of counsel claim as described in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Therefore, we cannot consider whether former counsel's assistance was so deficient that the petitioning organization was prejudiced by the performance.

Turning to the Petitioner's second appellate claim relating to legal representatives' capability to register foreign workers for the H-1B on behalf of employers, a petitioning entity's signature on a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, confirms consent to representation and the release of information to the attorney or accredited representative. *See* Instructions for Notice of Entry of Appearance as Attorney or Accredited Representative at 4. Additionally, both the registration process Notice of Proposed Rulemaking and the Final Rule allowed for both a petitioner or their authorized representative to submit an electronic registration on behalf of U.S. employers. *See* Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens, 85 Fed. Reg. 1176, 1176–77 (Jan. 9, 2020); Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888, 934, 934 n.104 and n.105 (Jan. 31, 2019).

A mismanagement or miscommunication between an employer and their legal representative does not sufficiently mitigate the fact that two registrations were submitted for the same beneficiary in the same fiscal year in violation of the regulation. Absent demonstrable claims of ineffective assistance of counsel, we conclude that the reasons the Petitioner presents on appeal are not sufficient to overcome the Director's decision to revoke the petition's approval.

The Petitioner's third argument posits that the regulation only prohibits employers from submitting two registrations for the same foreign worker during the same fiscal year. We observe that under all regulatory circumstances, if an employer is allowed to perform (or prohibited from performing) some procedural act, their legal representative named on a Form G-28 operates under those same parameters. In our view, the regulation governing H-1B registrations should operate under those same principals.

This follows the regulatory construction principal that a provision that may seem ambiguous in isolation (e.g., that petitioners may register beneficiaries and that legal representatives are not prohibited from registering a beneficiary more than one time for the same employer) is often clarified by the remainder of the regulatory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the rule. *Matter of Cisneros-Gonzalez*, 23 I&N Dec. 668, 675 (BIA 2004) (citing *Matter of Masri*, 22 I&N Dec. 1145, 1148 (BIA 1999)). When construing regulations and drafting attendant policies, the agency is expected to abide by the canons of construction that generally apply to the interpretation of statutory texts. *See Matter of F-P-R-*, 24 I&N Dec. 681, 683 (BIA 2008).

An absurd outcome would result from interpreting the regulation to prohibit petitioning employers from registering the same beneficiary more than one time in the same fiscal year, but permitting their legal representative to act on their behalf to perform that same prohibited act. When applying a regulation's plain meaning, we do not adhere to its strict text when doing so would lead to absurd results such as permitting a legal representative to perform a strictly prohibited act on behalf of another party that would be precluded from doing so. *Matter of Briones*, 24 I&N Dec. 355, 361 (BIA 2007) (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190–91 (1991) and permitting the agency to look beyond the text where strict adherence to the text would lead to an absurd or bizarre result that is demonstrably at odds with the intentions of its drafters).

Next, the Petitioner's fourth appellate argument relates to the concept that there is supposed to be a built-in mechanism that ensures duplicate H-1B registrations do not occur. The Petitioner states that such a mechanism should have flagged the second registration. However, such measures can be overcome if two entries present a beneficiary's name in different formats or with different names. That is what happened in this case as both registrations arranged the Beneficiary's first and last names in a different format. That inconsistency unintentionally defeated the measures USCIS put in place to reduce the likelihood of duplicate registrations. Additionally, the Petitioner did not demonstrate that USCIS implemented this mechanism or duplicate checker prior during the 2022 fiscal year cap season as opposed to fiscal year 2023. At any rate, the burden to only register a foreign worker one time in a fiscal year rests with the petitioning organization.

As it relates to the Petitioner's final argument, federal courts have evaluated the H-1B registration Final Rule and determined that it generally complied with the APA. *Liu v. Mayorkas*, No. 1:21-CV-01725 (TNM), 2022 WL 612712, at *8 (D.D.C. Mar. 1, 2022); *ADTRAV Corp. v. USCIS*, No. 2:20-

CV-01890-MHH, 2022 WL 801509, at *6 (N.D. Ala. Mar. 15, 2022). Contained within the H-1B registration Final Rule are the elements described above relating to attorney's and legal representatives. In essence, in response to the argument that the regulation specifically states that a petitioner may only submit one registration for a single beneficiary during one fiscal year, we read that to mean that a petitioner, or their representative, may only submit one registration.

The Petitioner has not submitted sufficient evidence to rebut the contents of USCIS records or persuade us that the Director's decision to revoke the petition's approval was incorrect. As earlier stated, USCIS records establish two registrations were submitted on behalf of the Petitioner for the Beneficiary in the same fiscal year. If a petitioner submits more than one registration per beneficiary in the same fiscal year, all registrations filed by that petitioner relating to that beneficiary for that fiscal year will be considered invalid. 8 C.F.R. § 214.2(h)(8)(iii)(A)(*2*). As such, all of the Petitioner's registrations for the Beneficiary, including the selected registration, are invalid, and consequently, the Petitioner does not have a valid registration to file this H-1B petition. 8 C.F.R. § 214.2(h)(8)(iii)(A)(*1*).

III. CONCLUSION

Accordingly, the appeal will be dismissed for the above stated reasons. 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.