U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21164470

Date: APR. 28, 2022

Appeal of Vermont Service Center Decision

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

The Petitioner seeks to extend the Beneficiary's temporary employment 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 denied the Form I-129, Petition for a Nonimmigrant Worker. 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*. *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

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for foreign nationals who are coming temporarily to the United States to perform services in a specialty occupation. 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. Generally, H-1B petition beneficiaries are allocated a visa number and a cap number upon the petition's approval. *See* section 214(g)(3) of the Act; 8 C.F.R. § 214.2(h)(8)(ii)(A)–(B). Section 214(g)(7) of the Act states:

> Any alien who has already been counted, within the 6 years prior to the approval of a petition described in subsection (c) of this section, toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

In addition, section 214(g)(3) of the Act reads as follows:

> Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status. If an alien who was issued a visa or otherwise provided nonimmigrant status and counted against the numerical limitations of paragraph (1) is found to have been issued such visa or otherwise provided such status by fraud or willfully misrepresenting a material fact and such visa or nonimmigrant status is revoked, then one number shall be restored to the total number of aliens who may be issued visas or otherwise provided such status under the numerical limitations of paragraph (1) in the fiscal year in which the petition is revoked, regardless of the fiscal year in which the petition was approved.

II. ANALYSIS

We begin establishing a timeline of events:

July 29, 2011	H-1B petition #1 was filed for the Beneficiary
August 23, 2011	H-1B petition #1 was approved
November 15, 2011	H-1B petition #2 was filed for the Beneficiary
November 21, 2011	H-1B petition #2 was approved
January 6, 2012	Beneficiary entered United States using H-1B petition #2 approval
October 19, 2012	Approval for H-1B petition #2 was revoked
October 13, 2017	Relating directly to H-1B petition #1, an individual pled guilty to criminal charges for his role in an immigration fraud scheme
October 24, 2018	Approval for H-1B petition #1 revoked for fraud
July 6, 2020	This Petitioner filed the H-1B petition we have before us on appeal as being exempt from the H-1B cap because they were requesting to extend the Beneficiary's current H-1B classification and because he had previously been counted against the cap
October 5, 2020	Director issued a notice of intent to deny (NOID) on this H-1B petition
December 29, 2020	Petitioner responded to the NOID
March 25, 2021	Director denied this H-1B petition

The overarching question on appeal is whether the Petitioner has demonstrated that the employer that filed petition #2, filed that petition as being subject to the H-1B cap. That is the ultimate question because petition #1 was determined to involve fraud and that cap number was returned to the pool of available cap numbers for that fiscal year. Section 214(g)(3).

The Director's NOID discussed the fraud involved with petition #1 and noted that approvals for cap petitions filed by that company had been revoked for fraud. The Director also informed the Petitioner that they had revoked the approved H-1B petition through which the Beneficiary previously attained his cap number, which resulted in the Beneficiary no longer being considered cap exempt based on petition #1. The Director sought material from the Petitioner to establish that their petition was not

subject to the H-1B numerical cap limitations, and if they were unable to produce such evidence that this petition before us would be denied.

In response, the Petitioner submitted various arguments and evidence. Relating to petition #1, the Petitioner provided a statement from the Beneficiary as well as a Form I-797B, Notice of Action relating to petition #2. After considering the Petitioner's response, the Director determined that the material was insufficient and denied this petition because: (1) the organization did not establish that the Beneficiary was exempt from the H-1B numerical limitations; and (2) the agency had received a sufficient number of petitions needed to reach the congressionally mandated H-1B visa regular cap and the 20,000 H-1B visa U.S. advanced degree exemption, known as the master's cap, for fiscal year 2021. In making that determination, the Director's primary basis was because agency systems and records reflected that petition #2 was filed indicating that it was cap exempt based on the cap number conveyed from petition #1. And since petition #1 was revoked for fraud it could no longer be relied upon to convey cap-exempt status. This meant that for this petition to be approvable, an H-1B petition different from petition #1 must have been filed as being subject to the H-1B cap, then approved. Any such petition must have been filed and approved before the Petitioner filed this petition.

On appeal, the Petitioner asserts that because U.S. Citizenship and Immigration Services (USCIS) received and it approved petition #2 before the cap season closed, this meant petition #2 was subject to the H-1B cap for the corresponding fiscal year. The record also contains statements from the Beneficiary expressing his belief that based on the timing, petition #2 was counted against the H-1B cap. However, simply because an employer files an H-1B petition and that petition is approved before USCIS announces the close of cap season, this does not necessarily mean that such a petition was automatically cap-subject. This is because cap-exempt petitions may also be filed and approved while a cap season is open. The determining factor of whether a petition is filed as being subject to, or exempt from, the H-1B cap is the manner in which an employer files the Form I-129 and the accompanying H Classification Supplement to Form I-129. It is this supplement in which a petitioner specifies under Section 3, if the petition is filed as cap subject or cap exempt, and if exempt the reasons why.

Additionally, in response to the NOID and on appeal, the Petitioner further claims petition #2 was cap subject and in both instances only offered the Form I-797B notice as supporting evidence. This notice contains high-level and biographic information from petition #2, but it lacks detailed information from the H Classification Supplement to Form I-129 where a petitioner specifically designates if the petition is filed as cap subject or cap exempt, and if exempt the reasons why. The Form I-797B is therefore insufficient evidence to establish that petition #2 was filed by that employer as cap subject, as this Petitioner claims. The record lacks additional information relating to petition #2, such as correspondence from the employer that filed petition #2 accompanied by a copy of the petition that employer filed on the Beneficiary's behalf that preponderantly shows whether that petition was filed as cap subject or cap exempt. Based on the current record, the Petitioner has not presented arguments or evidence that overcome the Director's determination that petition #2 was filed as a cap-exempt petition.

Because of the Petitioner's failure to demonstrate petition #2 was filed as being subject to the H-1B cap, the following appellate claims are not persuasive and fall short of meeting its burden: (1) USCIS was not authorized to count the first H-1B petition under the cap; (2) neither this Petitioner nor the

Beneficiary had any knowledge of or involvement in any fraud or misrepresentation; (3) USCIS erred when it allowed petition #2 as a cap-exempt submission; and (4) the presence of positive factors and absence of adverse factors relating to the Beneficiary or this Petitioner should factor into the decision.

Finally, the Petitioner claims that the Director considered derogatory information in the petition denial but didn't give them sufficient notice of that information in violation of 8 C.F.R. § 103.2(b)(16)(i). Even if we agreed with the Petitioner on this issue—which we are not conceding—the Petitioner is now in possession of all of the adverse information and has still failed to sufficiently rebut or overcome that adverse information within this appeal. In other words, even if we agreed with the Petitioner, after being afforded the opportunity they still have not established the Director was incorrect. It would therefore serve no purpose for us to remand the matter to the Director for the Petitioner to continue to be unable to present sufficient evidence to meet its burden within those proceedings. This would not be a proper utilization of agency resources, and it would serve no purpose.

Ultimately, the Petitioner has not corroborated its claims that petition #2 was filed as cap-subject, and in turn, it has not demonstrated that we should decide in favor of the prospect that the Beneficiary was exempt as it relates to this petition.

ORDER: The appeal is dismissed.