U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20497205

Date: AUG. 23, 2022

Appeal of California Service Center Decision

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

The Petitioner, an information technology services and software development company, seeks to temporarily employ the Beneficiary and extend his stay as a data analyst under the H-1B nonimmigrant classification for specialty occupations. 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 California Service Center denied the petition, concluding that the requested employment period exceeded the six-year authorized admission limit for H-1B workers, and that the Petitioner had not demonstrated that the Beneficiary qualifies for an H-1B extension beyond the six-year limit. 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 I*nc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

## I. LEGAL FRAMEWORK

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides: "In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years." 8 C.F.R. § 214.2(h)(13)(iii)(A) states that an H-1B nonimmigrant who has spent six years in the United States under section 101(a)(15)(H) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) of the Act unless the nonimmigrant has resided and been physically present outside the United States for the immediate prior year.

8 C.F.R. § 214.2(h)(13)(iii)(E) removes the six-year limitation on the authorized period of stay in H-1B classification for nonimmigrants under certain conditions. 8 C.F.R. § 214.2(h)(13)(iii)(E) provides in part:

> Per-country limitation exemption from section 214(g)(4) of the Act. An alien who currently maintains or previously held H-1B status, who is the beneficiary of an approved immigrant visa petition for classification under section 203(b)(1), (2), or (3) of the Act, and who is eligible to be granted that immigrant status but for application of the per country limitation, is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act. The petitioner must demonstrate such visa unavailability as of the date the H-1B petition is filed with USCIS.
>
> (1) Validity periods. USCIS may grant validity periods for petitions approved under this paragraph in increments of up to 3 years for as long as the alien remains eligible for this exemption.
>
> (2) H-1B approvals under paragraph (h)(13)(iii)(E) of this section may be granted until a final decision has been made to:
>
> (i) Revoke the approval of the immigrant visa petition; or
>
> (ii) Approve or deny the alien's application for an immigrant visa or application to adjust status to lawful permanent residence.

## II. ANALYSIS

The issue on appeal is whether the Beneficiary is eligible for H-1B status beyond the six-year limitation. Upon review of the record in totality, we conclude that the Beneficiary is not eligible for an extension beyond the six-year limit.

The Beneficiary was in H-1B status from February 2014 to March 2020.[1] The Beneficiary's Form I-140 immigrant petition, filed by a different petitioner, was approved in March 2016; however, USCIS subsequently determined that it was approved in error and revoked the petition in October 2017.[2] In April 2020, the Petitioner filed the instant petition seeking to extend the Beneficiary's H-1B status for an additional three years. The Director concluded that the Beneficiary was not qualified to extend his H-1B status beyond six years.

On appeal, the Petitioner asserts, under 8 C.F.R. § 204.5(e), when an approved Form I-140 is revoked for grounds other than fraud, willful misrepresentation of a material fact, invalidation or revocation of the labor certification, or material error, the Beneficiary can extend his H-1B status beyond the six-year limit. The Petitioner contends that the Beneficiary's Form I-140 was not revoked for fraud, willful

[1] The Beneficiary was in H-1B status also from October 2008 to March 2011.
[2] In the decision, the Director noted that the immigrant petition was revoked as of the date of approval.

misrepresentation of a material fact, the invalidation or revocation of a labor certification, or material error.

However, the Petitioner does not explain the relevance of 8 C.F.R. § 204.5(e) to the instant case as the issue here is not whether the Beneficiary can retain the priority date of the revoked immigrant petition, but whether his H-1B status should be extended beyond six years. Furthermore, we disagree with the Petitioner's assertion that the Beneficiary's immigrant petition was not revoked based on material error. In the revocation decision, the Director explained that the petition was revoked based on USCIS' error and we conclude that the basis of the revocation – the petitioner in that case has not established that it has a bona fide job offer and the Beneficiary meets the minimum requirements of the labor certification – is material. See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398 (Nov. 18, 2016) (Examples of material errors include that the beneficiary did not have the education or experience required for the position offered.). See also 8 C.F.R. § 204.5(e)(2)(iv) (The priority date of a petition may not be retained if USCIS revokes the approval based on a material error.).

Next, the Petitioner cites excerpts from the final rule[3] discussing the effects of automatic revocation on the retention of priority dates and states that because the Beneficiary's immigrant petition was in approved status more than 180 days, the Beneficiary is eligible for the protections discussed in the regulations. However, the Beneficiary's immigrant petition was not automatically revoked, and the Petitioner does not explain the relevance of the cited sections of the final rule to the instant case. The relevant comments and responses of the final rule state:

> [Department of Homeland Security] will no longer automatically revoke the approval of a Form I-140 petition based on petitioner withdrawal or termination of the petitioner's business if the petition has been approved or the associated application for adjustment of status has been pending for 180 days or more. As long as the approval has not been revoked, the Form I-140 petition will generally continue to be valid with regard to the beneficiary for various portability and status extension purposes under the immigration laws, including extension of status for certain H-1B nonimmigrant workers under sections 104(c) and 106(a) and (b) of AC21.[4] Id at 82,451. See 8 C.F.R. 205.1(a)(3)(iii)(C) and (D).

Regarding reasons for automatic revocation, 8 C.F.R. 205.1(a)(3)(iii)(C) and (D) provide:

> (C) In employment-based preference cases, upon written notice of withdrawal filed by the petitioner to any officer of USCIS who is authorized to grant or deny petitions, where the withdrawal is filed less than 180 days after approval of the employment-based preference petition, unless an associated adjustment of status application has been pending for 180 days or more. A petition that is withdrawn 180 days or more after its approval, or 180 days or more after the associated adjustment of status application has been filed, remains approved unless its approval is revoked on other grounds. If an employment-based petition on behalf of an alien is withdrawn, the job offer of the

[3] 81 Fed. Reg. 82,414, 82,415 (Nov. 18, 2016).
[4] AC21 stands for American Competitiveness in the 21st Century Act.

petitioning employer is rescinded and the alien must obtain a new employment-based preference petition in order to seek adjustment of status or issuance of an immigrant visa as an employment-based immigrant, unless eligible for adjustment of status under section 204(j) of the Act and in accordance with 8 C.F.R. 245.25.

(D) Upon termination of the petitioning employer's business less than 180 days after petition approval under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act, unless an associated adjustment of status application has been pending for 180 days or more. If a petitioning employer's business terminates 180 days or more after petition approval, or 180 days or more after an associated adjustment of status application has been filed, the petition remains approved unless its approval is revoked on other grounds. If a petitioning employer's business terminates the job offer of the petitioning employer is rescinded and the beneficiary must obtain a new employment-based preference petition on his or her behalf in order to seek adjustment of status or issuance of an immigrant visa as an employment-based immigrant, unless eligible for adjustment of status under section 204(j) of the Act and in accordance with 8 C.F.R. 245.25.

Accordingly, the Petitioner's assertions apply only (1) when the approval is automatically revoked due to withdrawal; (2) but after 180 days or more since approval of Form I-140 or associated Form I-485 has been pending for 180 days or more; or (3) termination of employer's business after 180 days of the petition's approval or associated Form I-485 was pending for 180 days or more. None of these scenarios is applicable to the instant case.

Here, the Beneficiary's Form I-140 petition was revoked based on USCIS' error that was material. Therefore, the Petitioner has not demonstrated that the Beneficiary qualifies for an H-1B extension beyond the six-year limit.[5]

ORDER: The appeal is dismissed.

[5] As the grounds discussed above are dispositive of the Petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.