U.S. Citizenship and Immigration Services

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

In Re: 20475017

Date: MAR. 10, 2022

Appeal of Nebraska 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 Nebraska Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, after issuing a notice of intent to deny (NOID) the petition. 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

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, 8 U.S.C. § 1184(g)(1)(A), the total number of H-1B visas issued per fiscal year (FY) may not exceed 65,000. Generally, H-1B petition beneficiaries are allocated one of these numerically-limited visa numbers 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)(5) of the Act exempts three classes of beneficiaries from the cap, and section 214(g)(7) of the Act provides in pertinent part: "Any alien who has already been counted within the 6 years prior . . . toward the numerical limitations . . . 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."

## II. ANALYSIS

The Beneficiary entered the United States utilizing an H-4 nonimmigrant visa and worked for various employers to include [redacted] (first employer). According to the Beneficiary's curriculum vitae, she worked for the first employer from June of 2019 through April of 2020. The first employer filed a Form I-129 to classify the Beneficiary as an H-1B nonimmigrant, and that petition was approved for H-1B employment for the period between October of 2020 and August of 2023. However, prior to the Beneficiary working for the first employer as an H-1B nonimmigrant on the dates listed on the approved petition, they withdrew the petition and indicated she no longer worked for them. The Director issued correspondence acknowledging the withdrawal request and notifying the first employer that the petition's approval was automatically revoked under the regulation at 8 C.F.R. § 214.2(h)(11)(ii).

The Petitioner filed this petition on March 31, 2021, for an employment period to commence on April 1, 2021. The Petitioner claimed on the Form I-129 that the Beneficiary was exempt from numerical limitations of the H-1B cap because she had already been counted against the cap and she was applying for the remaining portion of the six-year period of admission. In other words, the Petitioner asserted that the first employer's approved H-1B petition conferred cap-exempt status on the Beneficiary as it relates to the subsequently filed petition we have before us.

After reviewing the record, the Director issued a NOID stating the H-1B petition from the first employer was approved in error and therefore, that first petition could not confer cap-exempt status on the Beneficiary in this Petitioner's petition. After the Petitioner responded to the NOID, the Director denied the Form I-129 concluding that previous approvals cannot be relied on where the approval was in error. Essentially, the Director determined that the first employer's petition did not imbue the Beneficiary with cap-exempt status. Without such status, the Director further indicated that based on the requested beginning employment date in the present Form I-129, the Beneficiary was subject to the FY 2021 numerical limitations and this Petitioner did not demonstrate that it was selected through the upcoming FY 2022 cap registration process, and therefore this petition could not be considered as a cap petition for FY 2022.

On appeal, the Petitioner identifies some incorrect information within the Director's decision (e.g., indicating the denial was not appealable, and at times confusing which employer filed the first petition). Although we agree that the Director's decision contained some inaccuracies, they do not appear as if they would have changed the Director's decision. It is not enough to demonstrate errors in an agency's decision; the Petitioner must also establish that it was prejudiced by the errors. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); *Molina-Martinez v. United States*, 578 U.S. 189, 203 (2016).

There is much dispute between the petitioning organization and the Director regarding the first petition and the means by which the Beneficiary's cap-exempt status flowed from that petition. For example, the Director states that the first petition made the Beneficiary exempt from the cap because of her education level. *See* section 214(g)(5)(C) of the Act. But the Petitioner states that because the Director did not provide it with any evidence relating to the first petition, they can only presume that the first petition was approved as one that was subject to the H-1B cap (i.e., the Beneficiary was already

counted against the cap). *See* section 214(g)(7) of the Act.[1] However, as we explain below, irrespective of how that status was initially conferred upon the Beneficiary, exemption from the H-1B cap can no longer serve as an advantage to her within this petition.

First, we address the exemption based on the Beneficiary's education. Section 214(g)(5)(C) of the Act provides an exemption from numerical limitations of the H-1B cap if a foreign national has earned a master's or higher degree from a United States "institution of higher education" as that term is defined in section 101(a) of the Higher Education Act of 1965 codified at 20 U.S.C. § 1001. 20 U.S.C. § 1001(a)(4) requires that any institution of higher education must be "a public or other nonprofit institution." Both the Director and the Petitioner agree that the institution where the Beneficiary earned her master's degree was a for-profit entity, and it cannot serve to establish she enjoys cap-exempt status.

With that scenario resolved, we address whether the Beneficiary could be considered cap-exempt based on the first petition that the Petitioner presumes was subject to the H-1B cap. Ultimately, answering that question will inform us of whether the Beneficiary should be subject to the cap within the present petition. Even if—as the Petitioner asserts on appeal—the Beneficiary was previously "counted" against the cap based on the first petition's approval, we would still conclude that she is not cap-exempt under the current petition because she did not accrue any time within her permitted six-years of H-1B status.

We explain. The statute limits the period of authorized admission at six years for an H-1B nonimmigrant. *See* section 214(g)(4) of the Act. An H-1B worker's time in their six-year period of authorized H-1B admission does not begin when the petition is approved, nor does it start when the petition's beginning validity date occurs unless the beneficiary is working for the petitioning entity as detailed in the approved petition. *See* 8 C.F.R. § 214.2(h)(13)(i)(A) (relying on a beneficiary's validity period on the petition to govern their dates of admission to work for the petitioning employer).[2] An H-1B worker may not work as an H-1B nonimmigrant "except during the validity period of the petition." *Id.*[3]

Section 214(g)(7) of the Act generally provides that if a foreign worker has already been counted against the H-1B cap within the six years prior to the approval of a subsequent H-1B petition, they will not be subject to the cap again. The only exception is the scenario in which "the alien would be eligible for a full 6 years of authorized admission [as an H-1B nonimmigrant] at the time the [subsequent] petition is filed." *Id.* We restate a timeline of events relating to the first petition for

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[1] The Petitioner seems to imply that the Director should have provided it with a copy of the prior petition. To the extent the Petitioner is trying to shift its burden of production to USCIS, we disagree. USCIS' obligation is to assess the facts and to provide the Petitioner with the facts as they relate the present filing. By doing so, the Director correctly presented the Petitioner with the facts informing them of their burden of proving eligibility for this immigration benefit. *See* section 291 of the Act. While an adjudicator must determine whether the evidence indicates that the party in question qualifies, that determination is an evidentiary one that does not stem from any burden on USCIS. *Cf. Matter of Negusie*, 28 I&N Dec. 120, 154 (A.G. 2020). Rather, USCIS' responsibility is to fully consider the evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, and to provide a reasoned decision of whether that material satisfies the filing party's burden of proof. *Chawathe*, 25 I&N Dec. at 376.

[2] We acknowledge the grace period of 10 days before and after a petition's validity period to allow an H-1B worker to get their affairs in order.

[3] The only other time one may accrue time in H-1B status is during the pre- and post-10-day grace period. *Id.*

context because the Petitioner on this petition does not appear to be fully aware of the first petition's history. The first employer filed a Form I-129 to classify the Beneficiary as an H-1B worker in April of 2020. Subsequently, the Director approved the petition in May of 2020 for the Beneficiary to perform work during the period between October of 2020 and August of 2023. But, before the Beneficiary worked for the first employer based on the H-1B petition, they withdrew the petition and informed the Director that she no longer worked for their company. When a petitioner of an approved H-1B petition withdraws an approved petition, U.S. Citizenship and Immigration Services (USCIS) will automatically revoke the approval as of the date it was approved. 8 C.F.R. § 214.2(h)(11)(ii). As a result, the first employer's petition was revoked as of the date it was approved in May of 2020.

Returning to apply the facts to the issue of whether USCIS should count the Beneficiary against the cap more than one time, we conclude that it should. Based on the fact pattern discussed here, the only manner in which the Beneficiary should not be subject to the H-1B cap is if she worked for the first employer on or after October 1, 2020, in the capacity specified in the first H-1B petition (i.e., during the period of authorized admission and in accordance with the duties specified within that petition). The Petitioner has not demonstrated that the Beneficiary worked for the first employer as specified in their petition at any time during the H-1B approval period. Consequently, it has not established that she accrued any time in H-1B status and she was therefore, "eligible for a full 6 years of authorized admission at the time [this Petitioner's] petition [was] filed," and the single exception under section 214(g)(7) of the Act applies in this scenario. For that reason, we conclude that the Beneficiary was subject to the numerical limitations of the H-1B cap when the Petitioner filed this petition, and it cannot be approved.

One additional indication that the regulation would require USCIS to count the Beneficiary against the cap in the present petition is found at 8 C.F.R. § 214.2(h)(8)(ii)(F)(*5*) that states: "If cap-exempt employment ceases, and if the alien is not the beneficiary of a new cap-exempt petition, then the alien will be subject to the cap if not previously counted within the 6-year period of authorized admission to which the cap-exempt employment applied." The ultimate question is whether the Beneficiary accrued any time in H-1B status that would subtract from her six-year period of restricted admission in that status. And the answer is that she has not.

As a final note, the Petitioner highlights within the appeal that their registration for the Beneficiary was selected for the FY 2022 H-1B electronic registration process. Based on that selection, they ask us to remand the matter to the Director to consider this petition filing under the FY 2022 H-1B cap, if we conclude that she should be subject to the cap in the present petition. We decline that invitation, mindful that the Petitioner filed this petition before April 1, 2021; the first date upon which employers were eligible to file H-1B petitions based on selection in the FY 2022 H-1B electronic registration process. *FY 2022 H-1B Cap Season Updates*, U.S. Citizenship and Immigration Services (Feb. 23, 2022), https://www.uscis.gov/news/alerts/fy-2022-h-1b-cap-season-updates.

In summary, regardless of the means by which we consider whether the Beneficiary could be exempt from the numerical limitations of the H-1B cap, the Petitioner has not demonstrated that we should decide in favor of the prospect that she was exempt as it relates to their petition.

**ORDER:** The appeal is dismissed.