U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20587150

Date: MAY 4, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, a gourmet food retail and marketing company, seeks to continue its temporary employment of the Beneficiary as a "computer systems analyst (electronics)" 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 Texas Service Center denied the petition, concluding that the Beneficiary's nonimmigrant status expired prior to filing the petition, that the Petitioner did not show the delay in filing the extension of stay was due to extraordinary circumstances beyond the Petitioner and Beneficiary's control, and that the delay was commensurate with the circumstances. On appeal, the Petitioner submits a brief and asserts that the Director erred by denying the petition.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit 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.

We observe at the outset of this decision that there is no provision in the regulations for an appeal from a denial of a change of status request made on behalf of a beneficiary. *See* 8 C.F.R. §§ 214.1(c)(5), 248.3(g); *see also* DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003). We therefore have no jurisdiction over that portion of the Petitioner's appeal and consequently will address neither (1) the Director's determination regarding the Beneficiary's nonimmigrant status, nor (2) the claims made on appeal contesting that determination.

The sole issue before us on appeal, therefore, is the Petitioner's eligibility to extend the prior petition. In other words, in this decision we will address the Petitioner's eligibility for the prior H-1B *petition* to be extended, but we will not address the Beneficiary's eligibility for his prior H-1B *status* to be extended. The Petitioner is seeking to "extend" the prior petition it filed on behalf of the Beneficiary

despite the fact that the Beneficiary's prior H-1B petition – [redacted] – expired in April 2017, long before this petition was filed in May 2020.[1]

The Petitioner's first request is, essentially, that we reopen the prior H-1B petition and approve it for a period of time that covers the gap between the expiration of the prior petition and the start-date of the instant petition. If we took that action, there would be no gap between the two petitions and the instant petition could be adjudicated as an "extension." However, this request suffers from at least two fatal hurdles. First and foremost, this appeal relates to the instant petition and to the instant petition alone – not the prior petition. The agency determined that the prior petition's approval had to be revoked in 2016, and it affirmed that decision in response to a subsequent motion the following year. The Petitioner now attempts, essentially, to shoehorn a second motion on the prior petition's revocation decision into *this* appeal. The Petitioner cannot do so. We may only consider the merits of the instant petition and will not honor consider the Petitioner's arguments on the merits of the prior petition.

As indicated, even if we were to set this first fatal hurdle aside, the Petitioner's request that we reopen and approve the prior H-1B petition would still face a second, and equally fatal, hurdle: the lack of a certified labor condition application (LCA) covering the "gap" between the expiration of the prior expiration and the start-date of the LCA submitted with the instant petition. 8 C.F.R. § 214.2(h)(4)(i)(B)(1), 214.2(h)(4)(iii)(B)(1); *see also* 8 C.F.R. § 103.2(b)(12).

We therefore find the Petitioner's arguments regarding the prior petition unpersuasive. Having made that determination, we will turn now to its arguments regarding the instant petition. Upon review, we conclude that the instant petition must remain denied because it was filed after the expiration of the petition it seeks to "extend."

As opposed to a discretionary extension of stay application,[2] there is no discretion to grant a late-filed petition extension. It must be noted for the record that, even if eligibility for the benefit sought was otherwise established, because our authority is limited to that specifically granted or delegated by the Act, its implementing regulations, and the Secretary of the U.S. Department of Homeland Security pursuant to 8 C.F.R. § 2.1, we cannot approve this petition *nunc pro tunc* as the Petitioner requests. Specifically, the regulations mandate that a petition extension be filed before the validity of the petition being extended has expired. Again, see 8 C.F.R. § 214.2(h)(14). Furthermore, a petitioner must establish eligibility for the benefit sought at the time the petition is filed. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). The Petitioner identifies no discretionary basis for us to waive these requirements.

A request for a petition extension and a request for an extension of stay are currently filed together on the Form I-129. Specifically, the requests are: (1) a petitioner's request to classify the employment offer as appropriate for the H-1B category (the basis for classification); and (2) the request for the

[1] It must be noted that this is the absolute most favorable reading of the prior petition's procedural history to the Petitioner. The approval of that petition was, in fact, revoked in January 2016, and the agency dismissed a motion filed on that decision in March 2017.

[2] Again, determinations on extensions of stay lie outside the scope of our jurisdiction.

procedural benefit relevant to a beneficiary's authorized stay in the United States.[3] The regulations are clear, however, that even though the request to extend the petition and the request to extend the beneficiary's stay are combined on the Form I-129, the director shall make a separate determination on each. *See* 8 C.F.R. § 214.2(h)(15)(i).[4]

The regulation at 8 C.F.R. § 214.2(h) states, in pertinent part, the following about petition extensions:

> (14) *Extension of visa petition* validity. The petitioner shall file a request for a petition extension on Form I–129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. *A request for a petition extension may be filed only if the validity of the original petition has not expired.*

(Emphasis added.) As noted above, a request for a *petition extension* may be filed only if the *validity of the original petition has not expired.* Thus, the regulations do not permit for the late filing of a *petition extension.*

The regulation at 8 C.F.R. § 214.2(h) provides the following information regarding extension of stay requests:

> (15) *Extension of stay*--
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> (i) General. The petitioner shall apply for extension of an alien's stay in the United States by filing a petition extension on Form I–129 accompanied by the documents described for the particular classification in paragraph (h)(15)(ii) of this section. *The petitioner must also request a petition extension.* The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. *Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each.* If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa. When the total period of stay in an H classification has been reached, no further extensions may be granted.

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[3] These functions previously required two separate filings: one by the Petitioner (Form I-129H) and the other by the Beneficiary. For example, the regulations in 1991 stated that a petitioner "shall file a petition in duplicate on Form I-129H with the service center which has jurisdiction over I-129H petitions in the area where the alien will perform services or receive training or as further prescribed in this section." 8 C.F.R. § 214.2(h)(2)(i)(A) (1991). Further, the 1991 regulations stated that "[a]n alien . . . shall apply for an extension of stay on Form I-539. . . . [E]ach alien seeking an extension of stay generally must execute and submit a separate application for extension of stay to the district office having jurisdiction over the alien's place of temporary residence in the United States." 8 C.F.R. § 214.1(c)(1)(1991). In implementing the Immigration Act of 1990 (IMMACT90) Pub. L. No. 101-649, 104 Stat. 4978, these functions were combined to more efficiently process the Form I-129. *See* 56 Fed. Reg. 61111 (Dec. 2, 1991).

[4] Again, the second request – the extension of a beneficiary's *status* – lies outside the scope of our appellate jurisdiction.

(Emphasis added.) As previously mentioned, while the regulations state that the request to extend the petition and the request to extend a beneficiary's stay are combined on the Form I-129, a separate determination is made on each request.

Notably, 8 C.F.R. § 214.1 states, in pertinent part, the following about *extension of stay* requests:

> (c) *Extension of stay* –
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> * * *
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> (4) Timely filing and maintenance of status. An *extension of stay* may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:
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> (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
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> (ii) The alien has not otherwise violated his or her nonimmigrant status;
> (iii) The alien remains a bona fide nonimmigrant; and
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> (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

(Emphasis added.) As evident from the above regulations, a request for a petition extension can be distinguished from a request for an *extension of stay* in that the late filing of a request for an extension of stay may be excused at the discretion of the director under certain circumstances. In contrast, as noted earlier, the regulations clearly state that a "*request for a petition extension may be filed only if the validity of the original petition has not expired.*" *See* 8 C.F.R. § 214.2(h)(14) (emphasis added).

In the instant case, the petitioner stated on the Form I-129 (in Part 2.1) that it was requesting H-1B nonimmigrant classification. The petitioner marked (in Part 2.2) the "Basis for Classification" as "Continuation of previously approved employment without change with the same employer." In the section entitled "Requested Action" (Part 2.3) the petitioner marked "Extend the stay of the person(s) since they now hold this status."

Again, the prior petition that the petitioner seeks to extend expired in 2017. The instant petition was filed on May 15, 2020, almost three years after the expiration of the last approved petition filed by the Petitioner on behalf of the Beneficiary. USCIS records indicate that additional H-1B petitions were filed on behalf

of the Beneficiary, including in 2010 (expired) and in 2011 (revoked). Each petition expired or had its approval revoked prior to the filing of the instant petition.

The instant petition was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14) (stating that a "request for a petition extension may be filed only if the validity of the original petition has not expired"). There is no discretion to approve a late-filed petition extension.

In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden here, and the petition will remain denied.

ORDER: The appeal is dismissed.