U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22935688

Date: NOV. 10, 2022

Appeal of California Service Center Decision

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

The Petitioner, a social networking company, seeks to amend and extend the temporary employment of the Beneficiary as a product marketing manager 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 Form I-129, Petition for a Nonimmigrant Worker, concluding that the record did not establish that the Beneficiary qualifies for an exemption from the H-1B numerical limitation for the 2022 fiscal year (FY) pursuant to section 214(g)(5)(C) of the Act. The matter is now before us on appeal. On appeal, the Petitioner submits a brief and additional evidence, and asserts that the Director erred in 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.

I. LAW

Under Section 101(a)(15)(H) of the Act and 8 C.F.R. § 214.2(h)(4), an H-1B nonimmigrant is an alien employed in a specialty occupation. A "specialty occupation" is an occupation that requires theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's degree or higher degree in the specific specialty as a minimum qualification for entry into the United States.

Unless exempted, the total number of temporary workers who may be issued initial H-1B visas or otherwise provided H-1B nonimmigrant status in a fiscal year is 65,000 with an additional 20,000 provided to U.S. post-graduate degree holders. Section 214(g)(1)(A)(vii) and (5)(C) of the Act, 8 U.S.C. § 1184(g)(1)(A)(vii) and (5)(C). *See also*, 8 C.F.R. § 214.2(h)(8)(i)(A) and 8 C.F.R. § 214.2(h)(8)(ii)(A). This numerical limitation is known as "the cap."

According to section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), in pertinent part:

> Any alien who has already been counted within the 6 years prior to the approval of a petition . . . 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.

Section 101(a)(13)(A) of the Act states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer."

Depending on the factual circumstances, U.S. Citizenship and Immigration Services (USCIS) regulations provide for both the automatic revocation of approved H-1B petitions, as well as revocation on notice after USCIS provides the Petitioner with notice of its intent to revoke and allows an opportunity to respond. *See* 8 C.F.R. § 214.2(h)(11).

The regulation at 8 C.F.R. § 214.2(h)(11)(ii) provides for "immediate and automatic revocation," without notice, when: "the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based." Directly incorporating this provision by reference, the regulations also provide for the automatic revocation of an approved H-1B visa petition when the beneficiary does not use an approved petition to apply for admission to the United States:

> When an approved petition is not used because the beneficiary(ies) does not apply for admission to the United States, the petitioner shall notify the Service Center Director who approved the petition that the number(s) has not been used. The petition shall be revoked pursuant to paragraph (h)(11)(ii) of this section and USCIS will take into account the unused number during the appropriate fiscal year.

8 C.F.R. § 214.2(h)(8)(ii)(C).

II. ANALYSIS

In December 2021, the Petitioner filed the current H-1B petition and claimed on the Form 1-129 that the Beneficiary was exempt from numerical limitations of the H-1B cap because he had already been counted against the cap. As noted by the Director, in June 2008, a different employer filed an H-1B petition on behalf of the Beneficiary that was approved (first petition). Subsequently, the Beneficiary successfully obtained his H-1B visa from the consulate in October 2008 but did not enter the United States with that visa. According to section 214(g)(3) of the Act, this Beneficiary was allocated an H-1B visa number and a cap number upon the first petition's approval. However, that first H-1B petition approval was automatically revoked in November 2009 when the previous employer requested the petition's withdrawal because it did not employ him based on the first petition. As a result, the Beneficiary was not lawfully admitted and physically present in the United States as an H-1B nonimmigrant based on that first petition. The Director noted that due to these circumstances with the first petition, the Beneficiary was no longer cap exempt. Different employers filed H-1B petitions on behalf of the Beneficiary after the revocation of the first petition, but each petition indicated that the

Beneficiary was cap exempt stemming from that first petition. The Petitioner in the current filing did the same.

After reviewing the record, the Director issued a Notice of Intent to Deny (NOID) stating the H1B petition from the first employer was approved in error and therefore, that first petition could not confer cap exempt status on the Beneficiary in subsequent petitions, including the Petitioner's instant petition. After the Petitioner responded to the NOID, the Director denied the petition essentially concluding 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 2022 numerical limitations and this Petitioner did not demonstrate that it was selected through the FY 2022 cap registration process, and therefore this petition could not be considered as a cap petition for FY 2022.

On appeal, the Petitioner contends that the first employer's approved H-1B petition and the Beneficiary's H-1B visa conferred cap-exempt status on the Beneficiary as it relates to the subsequently filed petition we have before us. Upon review of the record, the Petitioner has not demonstrated that the Beneficiary qualifies for cap exemption.

Apart from one exception, section 214(g)(7) of the Act generally provides that any noncitizen who has already been counted against the cap within the six-year period before the approval of a new H-1B petition, will not again be subject to any numerical limitations. This provision only speaks to the number of available visas but does not govern the separate issue of accruing any time toward the period of authorized admission that section 214(g)(4) of the Act limits to six years. It is a noncitizen's accrual of time within this period of limited admission that determines whether a petition falls under that one exception within section 214(g)(7) of the Act. That exception provides that if a foreign worker would be eligible for the full six years of authorized admission at the time of a second or subsequent H-1B visa approval, the new visa petition must be subject to the cap.

One way that a noncitizen would be eligible for the full six years of authorized admission (i.e., subject to the cap) at the time of a second or subsequent H-1B visa approval is if they did not use the first visa. The period of authorized admission commences when the noncitizen: (1) is lawfully admitted and physically present in the United States (*Matter of IT Ascent, Inc.*, Adopted Decision 2015-01, at 2 (Sept. 2, 2005)); (2) and begins working for the petitioning organization in accordance with the petition on or after the beginning validity date. *See* 8 C.F.R. § 214.2(h)(9)(ii)(A); 8 C.F.R. § 214.2(h)(13)(i)(A). The period of authorized admission does not commence when the petition is approved, nor when the petition's beginning validity date occurs unless the beneficiary is working for the petitioning entity as detailed in the approved petition.

Pertaining to the first petition in the present matter that was approved in 2008, although the visa and cap number were allocated, they were not used because the Beneficiary did not apply for admission to the United States based on that visa. That means the regulation at 8 C.F.R. § 214.2(h)(8)(ii)(C) applied to the first petition, and the Director automatically revoked the petition's approval according to 8 C.F.R. § 214.2(h)(11)(ii), which effectively returned that unused cap number to the pool of available numbers for the appropriate fiscal year. The constructive return of that cap number necessitated that any subsequent petition filed on the Beneficiary's behalf be subject to the cap.

When a new employer filed a second petition on behalf of the Beneficiary in 2011, it appears that the Beneficiary was eligible for "a full 6 years of authorized admission at the time the petition [was] filed. *See* section 214(g)(7) of the Act. Therefore, the Beneficiary was not cap exempt when the previous employer filed the H-1B petition in 2011. In addition, all subsequent petitions filed on behalf of the Beneficiary, including the current petition, do not qualify as cap exempt filings. Thus, the prior H-1B petitions were approved in error.

On appeal, the Petitioner contends that the Beneficiary was counted, and he never "lost" his H-1B cap number even after the first petition was automatically revoked. The Petitioner indicated that the first petition was filed in FY 2009, however, the H-1B petition was not revoked until October 2010 in FY 2010. Furthermore, when a petition is revoked, the regulations state that USCIS will take into account the unused number during the appropriate fiscal year. Therefore, the Petitioner asserts that since the petition was revoked in FY 2010 rather than FY 2009, the unused number was not used in the appropriate fiscal year thus taking away the Beneficiary's cap number would serve no purpose. However, the Petitioner did not provide sufficient evidence to establish that the "appropriate fiscal year" is FY 2009. Further, the Petitioner did not provide evidence to establish how USCIS utilized that number and whether the Beneficiary can keep a cap number if USCIS does not utilize it that year.

On appeal, the Petitioner also contends that the denial violates the Petitioner's procedural due process right to a fair proceeding because USCIS failed to timely notify prior employers of the cap exempt issue when a remedy was readily available. The Petitioner contends that 10 subsequent cases, including the current petition, filed on behalf of the Beneficiary claimed exemption from the H-1B cap deriving from the first approved petition. The Petitioner contends that if the parties were given notice of the cap exemption issue, they could have remedied the issue and filed a regular petition rather than a cap exemption petition. However, the Petitioner was not a party of the previous filings. In addition, the Director sent the current Petitioner a NOID detailing the cap exempt issue present in this filing providing notice of the issues in the filing.

Although the respondents argue that their rights to procedural due process were violated, they have not shown that any violation of the regulations resulted in "substantial prejudice" to them. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an individual "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The respondents have fallen short of meeting this standard. A review of the record and the adverse decision indicates that the Director properly applied the statute and regulations to the Petitioner's case. The Petitioner's primary complaint is that the Director denied the petition. As previously discussed, the Petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the Petitioner's claim is without merit.

As USCIS announced that it reached the H-1B cap for fiscal year 2022 before the Petitioner filed this Form I-129, this petition cannot be approved unless a cap-exemption is applicable. However, the Petitioner has not seemingly shown that any such exemption applies.

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.