U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22718661

Date: FEB. 9, 2023

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 (petition), concluding that the Petitioner did not establish that the Beneficiary qualified for the lengthy adjudication delay exemption relating to the six-year limit in H-1B status enacted under section 104(c) of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253 (AC21). 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. ANALYSIS

The Beneficiary does not qualify for an exemption from the six-year H-1B status limit based on the Petitioner's filings under AC21, as amended by the 21st Century Department of Justice Appropriations Authorization Act (DOJ21). *See* American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253–54 (2000); 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836–37 (2002) (Emphasis added to identify sections amended by DOJ21).

In general, 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." However, AC21 sections 104 and 106 remove the six-year limitation on the authorized period of stay in H-1B visa status for certain individuals. The exemption

under section 106(a) of AC21 is available for certain individuals whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays. According to the text of AC21 section 106(b), individuals may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21. Section 106(a) of AC21 reads:

> (a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b))*, if 365 days or more have elapsed since *the filing of any of the following:*
>
> > *(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).*
> >
> > *(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.*

DOJ21 amended section 106(b) of AC21 to read:

> (b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—
>
> > *(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;*
> >
> > *(2) to deny the petition described in subsection (a)(2); or*
> >
> > *(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.*

These provisions were published in the regulation at 8 C.F.R. § 214.2(h)(13)(iii)(D)(*1*)–(*2*) providing:

> (D) ***Lengthy adjudication delay exemption from 214(g)(4) of the Act.***
>
> > *(1)* An alien who is in H-1B status or has previously held H-1B status is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act, if at least 365 days have elapsed since:
> >
> > > *(i)* The filing of a labor certification with the Department of Labor on the alien's behalf, if such certification is required for the alien to obtain status under section 203(b) of the Act; or

(ii) The filing of an immigrant visa petition with USCIS on the alien's behalf to accord classification under section 203(b) of the Act.

(2) H-1B approvals under paragraph (h)(13)(iii)(D) of this section may be granted in up to 1-year increments until either the approved permanent labor certification expires or a final decision has been made to:

(i) Deny the application for permanent labor certification, or, if approved, to revoke or invalidate such approval;

(ii) Deny the immigrant visa petition, or, if approved, revoke such approval;

(iii) Deny or approve the alien's application for an immigrant visa or application to adjust status to lawful permanent residence; or

(iv) Administratively or otherwise close the application for permanent labor certification, immigrant visa petition, or application to adjust status.

We offer a timeline of relevant events:

- July 26, 2017: The Petitioner filed a permanent labor certification on the Beneficiary's behalf that was certified on December 5, 2017;
- June 4, 2018: The Petitioner filed their first employment-based immigrant petition (Form I-140) based on their approved labor certification;
- December 12, 2018: U.S. Citizenship and Immigration Services (USCIS) denied the Petitioner's first Form I-140:
- September 30, 2019: The Petitioner filed this H-1B extension request;
- December 15, 2021: The Petitioner filed a second Form I-140;
- January 27, 2022: The Director denied the H-1B petition we have on appeal only considering AC21 section 104(c);
- April 26, 2022: The Petitioner filed this appeal; and
- July 13, 2022: USCIS approved the Petitioner's second Form I-140.

The sole provision the Director discussed in their denial decision was AC21 section 104(c). On appeal, the Petitioner contends they were instead requesting an extension under AC21 section 106.

The Petitioner filed a labor certification and a subsequent Form I-140 on the Beneficiary's behalf, but USCIS denied the Form I-140. On appeal, the Petitioner argues the Director should have considered more than the Form I-140's denial, and instead should have concluded that the labor certification served as a basis for the extension request under AC21 section 106(a). We do not agree. While the statute and the regulation do allow for consideration of whether a labor certification or a qualifying petition were filed for more than 365 days, it also contains a limiting provision that ends a foreign national's eligibility for extensions beyond the six-year limit if a decision is issued to deny the petition. 8 C.F.R. § 214.2(h)(13)(iii)(D)(*2*)(*ii*). And that is the case here, as USCIS denied the employment-based petition several months before the Petitioner filed this petition.

Additionally, the fact that the Petitioner filed another Form I-140 after it filed this extension request has no effect on the Beneficiary's eligibility under AC21 because on the date they filed this H-1B petition, the first Form I-140 it filed was already denied. A filing party must establish eligibility for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1).

Applying 8 C.F.R. § 214.2(h)(13)(iii)(D)(*2*)(*ii*), we conclude that when the Petitioner filed the current H-1B petition, the Beneficiary was not eligible for an extension under any AC21 provision.

II. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.