U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27856725

Date: SEPT. 15, 2023

Appeal of California Service Center Decision

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

The Petitioner seeks to temporarily 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 Director of the California Service Center denied the petition, concluding that the record did not establish the Petitioner is a cap exempt non-profit entity affiliated or related to an institution of higher education. The Director also determined the record did not adequately establish that the Beneficiary was eligible for a period of petition validity beyond the sixth year. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (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. CAP EXEMPT PETITIONER

The Petitioner seeks to employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* section 101(a)(15)(H)(i)(b) of the Act. H-1B visas are numerically limited, or "capped," to 65,000 per fiscal year pursuant to section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A). The statute and regulations provide for exemptions from the "cap" in limited circumstances. *See* section 214(g)(5) of the Act, 8 U.S.C. § 1184(g)(5); section 214(l) of the Act, 8 U.S.C. § 1184(l) (exempting physicians who received a waiver of their home residency requirement under section 212(e) of the Act, 8 U.S.C. § 1182(e), upon a request by an interested federal or state agency); 8 C.F.R. § 214.2(h)(8)(ii)(A) (exempting beneficiaries already counted towards the "cap" from counting again for petition extensions and extension of stay). The Petitioner stated that they are a non-profit entity under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C.

§ 501(c)(3). They further represented that they have are affiliated or related to the [redacted] School of Medicine at [redacted] New York. So the Petitioner sought cap-exemption from the H-1B numerical limitations pursuant to section 214(g)(5)(A) of the Act.

A. Legal Framework

Section 214(g)(5)(A) of the Act provides an exemption from the H-1B cap contained at section 214(g)(1)(A) of the Act for Petitioners who are institutions of higher education of related or affiliated non-profit entities. Unless connected or associated through shared ownership or control by a common board or federation, operated by, or attached to an institution of higher education, a non-profit entity must establish that it has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. *See* 8 C.F.R. § 214.2(h)(8)((iii)(F)(2)(iv).

B. Analysis

The Petitioner submitted a letter from the Internal Revenue Service and an Academic Affiliation Agreement executed between itself and the [redacted] School of Medicine at [redacted] dated November 1, 2015 in support of their claimed exemption from the H-1B nonimmigrant category's numerical limits.

The Director concluded that the agreement between the Petitioner and [redacted] had expired and therefore did not support the Petitioner's claim of an active working between the two entities. But the Director's rationale for their conclusion relies on their evaluation of Section I.4 of the Academic Affiliation Agreement. Section I.4 of the Academic Affiliation Agreement is entitled "Record Retention" and contains the term for which the parties are required to retain books, documents, and records necessary to verify the nature and extent of the costs of the services provided under the agreement. Section I.4 of the Academic Affiliation Agreement does not relate to the term of the agreement. So we withdraw the Director's conclusion that the record reflects the Petitioner is not exempt from the H-1B numerical limitations.

But the Academic Affiliation Agreement the Petitioner submitted is incomplete; it appears to be missing page 12. So we are not able to evaluate whether the Academic Affiliation Agreement establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and that a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education. The Petitioner should be prepared to address this and provide a complete Academic Affiliation Agreement in future petitions where their exception from the H-1B numerical limitations is at issue.[1]

[1] Since provision of the complete Academic Affiliation Agreement would not have any beneficial effect on the disposition of the instant matter, we will not request it prior to rendering our decision.

II. H-1B PETITION VALIDITY BEYOND THE SIX-YEAR LIMITATION

A. Legal Framework

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), sets a six-year limitation on the period of authorized admission or stay for an H-1B nonimmigrant. But a petitioner may seek petition validity beyond the six-year limitation if they can demonstrate that an H-1B petition's beneficiary is the beneficiary of an approved immigrant petition subject to per country limitations on visa availability under section 104(c) of Public Law 106-313 and 8 C.F.R. § 214.2(h)(13)(iii)(E), the beneficiary of an application for permanent employment certification or immigrant petition filed more than one year before the end of the six-year limitation on H-1B validity under section 106(a) of Public Law 106-313 and 8 C.F.R. § 214.2(h)(13)(iii)(D), or is able to recapture time spent outside the United States before a beneficiary uses their full six-year petition validity as contained in 8 C.F.R. § 214.2(h)(13)(iii)(C).

B. Analysis

USCIS records indicate the Petitioner has filed H-1B petitions providing the Beneficiary with H-1B validity from July 23, 2008 to May 31, 2019.[2] As such, the record suggests the Beneficiary has exhausted their six-year limitation on H-1B admission.

The Petitioner has not submitted any evidence or documentation in the form of, for example, copies of passport stamps, Arrival-Departure Records (Form I-94), or airline tickets, together with a chart, indicating the dates spent outside of the United States which established by a preponderance of the evidence that the Beneficiary was absent from the United States prior to the completion of the six-year maximum H-1B admission period as contemplated by 8 C.F.R. § 214.2(h)(13)(iii)(C).

And the record does not contain any evidence reflecting the filing of a labor certification or immigrant petition more than one year before the end of the Beneficiary's sixth year in H-1B classification which could render the Petitioner eligible to request petition validity beyond the sixth year pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(D).

Finally, the Petitioner has not provided evidence in the form of an approved immigrant petition subject to per country limitations on visa availability filed and approved on behalf of the Beneficiary which could permit an extension of H-1B petition validity beyond the sixth year pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(E).[3] So the record as it is currently composed does not support an extension of petition validity for the Petitioner and Beneficiary beyond the sixth year.

[2] USCIS records also indicate that the Petitioner has submitted two prior H-1B petitions to seek validity beyond the sixth-year limitation and that the Beneficiary has not maintained H-1B status since May 31, 2019.

[3] USCIS systems reflect that the Petitioner has filed four previous unsuccessful immigrant petitions on behalf of the beneficiary which do not appear to confer any eligibility for additional H-1B petition validity on the Petitioner.

III. CONCLUSION

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. Here the Petitioner has not met the burden to establish their eligibility for H-1B petition validity beyond the six-year limitation on behalf of the Beneficiary by a preponderance of the evidence. So the appeal must be dismissed.

ORDER: The appeal is dismissed.