U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23414589

Date: DEC. 23, 2022

Appeal of Texas 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 Texas Service Center Director denied the H-1B petition, after issuing a notice of intent to deny (NOID) it. The Director concluded that the Beneficiary does not qualify for an exemption from the Fiscal Year 2022 (FY22) H-1B cap based on the Beneficiary's proposed employment. On appeal, the Petitioner submits a brief and asserts that the Director erred in finding that the Beneficiary does not qualify for an H-1B cap exemption.

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. LAW

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."

Section 214(g)(3) of the Act provides in pertinent part:

> If an alien who was issued a visa or otherwise provided nonimmigrant status and counted against the numerical limitations of paragraph (1) is found to have been issued such visa or otherwise provided such status by fraud or willfully misrepresenting a material fact and such visa or nonimmigrant status is revoked, then one number shall be restored to the total number of aliens who may be issued visas or otherwise provided such status under the numerical limitations of paragraph (1) in the fiscal year in which the petition is revoked, regardless of the fiscal year in which the petition was approved.

II. ANALYSIS

The sole issue before us is whether the Beneficiary qualifies for an H-1B cap exemption. The Director denied the petition concluding that the Beneficiary had forfeited his previously issued H-1B cap visa (cap visa) upon the revocation of his cap-subject petition for fraud or willful misrepresentation of a material fact (material misrepresentation). For the following reasons, we agree.

The Beneficiary entered the United States in April 2015 utilizing a cap visa to work for an employer other than the Petitioner (first employer). He obtained this visa through an approved cap-subject petition filed by his first employer. In March 2016, the Director of the California Service Center issued a notice of intent to revoke (NOIR) to his first employer, indicating her concerns that the basis for the approval of the petition involved fraud or material misrepresentation. The California Service Center Director ultimately revoked the approval of the Beneficiary's cap-subject petition with a finding of fraud or material misrepresentation on November 7, 2016.[1]

The instant Petitioner filed its own H-1B petition seeking to extend the Beneficiary's period of stay as an H-1B and to obtain authorization for him to change employers in order to employ him. The petition was approved in March 2016, seven months prior to the revocation of the first employer's cap-subject petition, for a period of employment from March 2016 to March 2019. Later on, the Petitioner filed a second H-1B extension petition which was approved for the period between March 2019 and March 2022.

The Petitioner filed the petition that is before us on appeal in January 2022, seeking to extend the Beneficiary's H-1B employment period from March 2022 to March 2025.[2] The Petitioner claimed in

[1] The approval of an H-1B petition may be revoked on notice under five specific circumstances, to include where the statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact. 8 C.F.R. § 214.2(h)(11)(iii)(A)(2).

[2] In particular, the Petitioner requested that the Beneficiary's stay be extended beyond the six-year limitation contained in section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), pursuant to section 104(c) of the "American Competitiveness in the Twenty-First Century Act" (AC21) - based upon the Beneficiary's approved Form I-140 immigrant petition conferring an

the petition that the Beneficiary was exempt from numerical limitations of the H-1B cap because he had already been counted against the cap. In other words, the Petitioner asserted that the first employer's approved (and later revoked) cap-subject petition conferred cap-exempt status on the Beneficiary as it relates to this petition. The Director denied the petition, determining the cap-subject petition filed on behalf of the Beneficiary had been revoked for fraud or material misrepresentation. Consequently, the Director concluded pursuant to section 214(g)(3) of the Act, that the Beneficiary's cap visa was forfeit and he could no longer qualify for H-1B cap-exemption.

On appeal, the Petitioner does not dispute that the Beneficiary's cap-subject petition filed by the first employer was revoked with a finding of fraud or material misrepresentation, a determination which is supported by USCIS records. USCIS records also reflect that the first employer did not file an appeal or a motion contesting USCIS' revocation of the Beneficiary's cap-subject petition, even though these administrative remedies were available to it. *See generally* 8 C.F.R. § 103.3.

The Petitioner maintains on appeal that "since the plain language of [section 214(g)(3) of the Act] does not address the continuing eligibility for cap exemption under [section 214(g)(7) of the Act], the [Director's] assertion that 'it is the cap number of the revoked petition that gets restored to the H-1B cap in the fiscal year in which the petition is revoked' and thereby necessarily concluding that 'the beneficiary is subject to the cap' is incorrect." It further contends "the revocation of the underlying cap-subject approval does not have any impact" on the Beneficiary's H-1B cap-exempt eligibility. We disagree.

Under the plain language of section 214(g)(3) of the Act, if a cap-subject petition is approved through fraud or material misrepresentation and that petition is later revoked, the beneficiary's visa number allocation is forfeit. Contrary to the Petitioner's assertions, section 214(g)(3) of the Act specifically mandates the restoration of cap-subject visas in these circumstances so that these visa number allocations may be used by other petitioners and H-1B beneficiaries in the fiscal year in which the petitions are revoked. Because USCIS found that the prior petition had been approved as a result of fraud or material misrepresentation, ultimately leading to the prior petition being revoked on this basis (with the first employer's failure to adequately address USCIS' concerns in this regard in its response to the NOIR), the Director was correct in denying the petition as the Beneficiary could no longer be considered cap-exempt as of November 7, 2016, the date the prior petition was revoked and his cap visa number allocation was restored for use by another petitioner and H-1B beneficiary.

USCIS has long followed established operational procedures for the return of such cap visa numbers for use by other eligible petitioners and H-1B beneficiaries pursuant to section 214(g)(3) of the Act. For instance, in 2004 USCIS provided the following information to the public regarding how H-1B petitions that are revoked for fraud or material misrepresentation are processed:

> How Will USCIS Process H-1B Petitions That Are Revoked for Fraud or Willful Misrepresentation?
>
> Section 108 of the American Competitiveness in the Twenty-first Century Act of 2000, Public Law 106-313 ("AC21"), sets forth the procedure when an H-1B petition is

immigrant visa priority date for which immigrant visas are not currently available. See Pub. L. No. 106-313, §§ 104(c) and 106(a), (b), 114 Stat. 1251, 1253-54(2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002).

> revoked on the basis of fraud or willful misrepresentation. Under AC21, *one number for each petition* that is revoked on the basis of fraud or misrepresentation shall be *restored to the total number of H-1B petition approvals available* for the fiscal year during which an H-1B petition is revoked, regardless of the fiscal year in which the petition was approved. (emphasis added.)

See Information Regarding the H-1B Numerical Limitation for Fiscal Year 2005, 69 Fed. Reg. 68155, 68156 (Nov. 23, 2004).

Here, the Petitioner asserts that the Beneficiary continues to be cap-exempt after his cap-subject petition was revoked in November 2016 with a finding of fraud or material misrepresentation and his visa number was *restored to the total number of H-1B petition approvals available* in FY16. *Id.* We conclude that the Petitioner has not provided evidence sufficient to support its contentions regarding the current basis for the Beneficiary's cap-exemption eligibility. *Matter of Chawathe*, 25 I&N Dec. at 376. For instance, the Petitioner has not demonstrated how the instant Beneficiary and the recipient H-1B beneficiary of the "restored" cap visa number may *both* utilize the same cap-subject visa number allocation when H-1B visas are numerically capped by statute. *See* section 214(g)(3) of the Act; 8 C.F.R. § 214.2(h)(8)(ii)(A)–(B). We determine the Petitioner's proposition that two H-1B beneficiaries may concurrently utilize the instant Beneficiary's cap visa, which was restored to the H-1B cap numbers in FY16 - a year in which the H-1B visa cap was reached, impermissibly violates the numerical H-1B visa cap requirements of section 214(g)(1)(A) of the Act.[3]

On appeal, the Petitioner also points to the second H-1B extension petition that it had filed on behalf of the Beneficiary which was approved after his cap-subject petition was revoked in November 2016, asserting that USCIS "considered [the Beneficiary] as previously counted toward the annual H-1B [c]ap" in approving the petition. It appears based on USCIS records that the Petitioner's second extension petition was approved in error as it was filed after the revocation of the Beneficiary's cap-subject petition, and thus his cap visa allocation was no longer available to him. We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See Matter of Church Scientology Int'l, 19 I&N Dec. 593, 597 (Comm'r 1988); see also Sussex Eng'g, Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. La. Philharmonic Orchestra v. INS, No. 98-2855, 2000 WL 282785, at *3 (E.D. La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001).

We conclude that the Director was correct in denying the petition before us as the Beneficiary could no longer be considered H-1B cap-exempt as of November 7, 2016, the date his cap-subject petition was revoked. The Petitioner has not met its burden to show that the Beneficiary is eligible for the benefit sought in this petition. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The appeal is dismissed.

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[3] *See generally USCIS Completes the H-1B Cap Random Selection Process for FY 2016*, https://www.uscis.gov/archive/uscis-completes-the-h-1b-cap-random-selection-process-for-fy-2016.