U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22973155

Date: OCT. 11, 2022

Appeal of Vermont Service Center Decision

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

The Petitioner seeks to 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 Vermont Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the Beneficiary abandoned the request to change his nonimmigrant status and therefore was not eligibility for a change of status from a North American Free Trade Agreement Professional to an H-1B nonimmigrant worker. 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 conclude that a remand is warranted in this case.

The Petitioner filed this petition requesting new employment and a change of the Beneficiary's status to an H-1B. The Director subsequently issued a request for evidence seeking evidence showing the Beneficiary was maintaining his nonimmigrant status, and the Petitioner submitted documents in response. While the petition was pending, the Beneficiary departed then reentered the United States as the same type of nonimmigrant visa that he held prior to this petition's filing. The Director then denied the entire H-1B petition. The Director first noted the portion of the petition relating to the Beneficiary's change of status was being denied because he abandoned that request upon departing the United States. Then, without offering an explanation or a basis, the Director stated: "Therefore, your petition is denied."

The petition before us consists of two separate benefit requests: (1) the Petitioner's request to classify the employment offer as appropriate for the H-1B category; and (2) the Beneficiary's change of status request.[1] The Director issued a decision on the change of status request, but not on the merits of the

[1] Before 1991, these functions required two to three separate filings depending upon whether a change of status was being

H-1B petition.[2] Because the Director did not explain the basis for denying the H-1B petition on the merits, we will remand the matter so they may consider the issue of whether the offered position qualifies for classification as a specialty occupation.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and entry of a new decision.

requested: one by the petitioner (Form I-129H) and the others by the beneficiary (Forms I-506 and I-539). For example, the regulations in effect on January 1, 1991 provided 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). Those 1991 regulations required applications for a change of status or visa classification to be submitted by the nonimmigrant alien on Form I-506, Applicant for Change of Nonimmigrant Status, filed with the district director having jurisdiction over the place of employment if changing to H or L status. 8 C.F.R. § 248.3(a) and (b) (1991). In addition, they provided 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, Pub. L. No. 101-649, 104 Stat. 4978, the agency combined these functions into one form (Form I-129) to process the separate requests more efficiently. 56 Fed. Reg. 61111 (Dec. 2, 1991); 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991).

[2] We have no appellate jurisdiction over the change of status request. 8 C.F.R. § 248.3(g). Our decision therefore does not impact the Director's determination that the Beneficiary abandoned the change of status request.