U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21549628

Date: SEP. 02, 2022

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 initially approved the Form I-129, Petition for a Nonimmigrant Worker, but shortened the petition's requested validity period. The Petitioner appealed that decision and we remanded the matter for the Director to reconsider the petition's validity period. On remand, the Director again approved the petition for a shorter than requested timeframe. 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. LEGAL FRAMEWORK

A beneficiary's stay in H-1B status is generally limited to six years. Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), states "[i]n the case of a[n] [H-1B] nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years." Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A),

> An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

However, "[t]he statute, regulations, and current policy guidance, [] do not clearly address situations where an alien did not exhaust his or her maximum six-year period of admission." *See* 2 *USCIS Policy Manual* H.31.3(g)(15), https://www.uscis.gov/policy-manual. U.S. Citizenship and Immigration Services (USCIS) will therefore "allow an alien in the situation described above to elect either to: be re-admitted for the 'remainder' of the initial six-year admission period without being subject to the H-1B cap if previously counted; or seek to be admitted as a 'new' H-1B alien subject to the H-1B cap." *Id.*

II. ANALYSIS

According to USCIS records, a different employer filed a petition on the Beneficiary's behalf that USCIS approved on November 24, 2010. A subsequent petition—also from a different employer—amended the first filing and was approved with validity dates spanning August 16, 2011, to October 31, 2013. USCIS revoked the second petition's approval on June 26, 2012. The Beneficiary entered and departed the United States in 2011 and 2012 but did not exhaust his maximum period of admission. In 2014, the Petitioner filed the third H-1B petition resulting in an approval with a validity period from November 5, 2014, to July 30, 2017. The Beneficiary entered the United States on February 12, 2015.

The Petitioner then filed this petition in December 2019 seeking an extension of the Beneficiary's status. The Director approved the petition and included the Beneficiary's 2011 to 2012 time in H-1B status when calculating the maximum period available to the Beneficiary. The Director's reasoning for considering the Beneficiary's entrance in 2015 as a continuation of his six-year admission period was not clear when they approved this petition the first time around in June 2020. Presumably, the Director interpreted the Beneficiary's 2015 entrance as a re-admission for the remainder of the initial six-year admission period. Within that same decision, the Director then considered time that could be recaptured pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(e) in the decision.

In the first appeal, the Petitioner argued the current petition did not include a request to recapture any of the Beneficiary's time spent outside the United States. The Petitioner explained that the Beneficiary entered as a new H-1B nonimmigrant in 2015 because he spent more than one year outside the country and reset his six-year H-1B status time limit. In our first appellate decision in May of 2021, because we were unable to determine whether the third H-1B petition—the first petition this Petitioner filed—was filed subject to the H-1B cap in 2014, we remanded the matter for the Director to make that determination and to request any evidence necessary to make that decision.

On remand, the Director issued a request for evidence (RFE) in which they identified the two methods the Petitioner could show the petition warranted approval for the entire period requested. First, the Petitioner could demonstrate the Beneficiary's eligibility through recapturing his time outside the United States. Alternatively, they could establish that after his absence from the country for more than one year, the Petitioner filed the third H-1B petition as being subject to the H-1B numerically limited cap for that fiscal year. Within the RFE, the Director noted in both petitions this Petitioner filed, it requested the Beneficiary be considered as cap exempt, which required USCIS to count all of his previous time in H-1B status and grant only the time left in his six-year period.

After considering the Petitioner's response to the RFE, the Director reiterated the third petition reflected the Beneficiary was previously in the United States in H-1B status and the Petitioner

requested he "be re-admitted as cap exempt and use the remainder of his 6 years of H-1B status at this time." Moreover, the Director noted the following:

> [A] [r]eview of your petition and all supporting evidence that you filed on July 30, 2014, [] shows that while you selected New Employment/Notify the Office in Part 4, you also marked on the Form I-129 H-1B Data Collection Supplement, Page 18, Part C, Number 1 (d) CAP Exempt and on page 19 of the same form in Part C, you selected [option] g. [which stated] "The beneficiary of this petition . . . previously granted status as an H-1B . . . is applying from abroad to reclaim the remaining portion of the six years . . . or is seeking a 7th year extension based upon AC21 . . . ."

The Director then stated: "Based upon these answers, USCIS approved that petition, not as a New Petition filed under the CAP numerical limitations but rather as a Cap Exempt [petition] because the beneficiary previously held H-1 status and was applying abroad to reclaim the remaining portion of the six years." The Director also noted the petitioning organization filed the current petition requesting the Beneficiary be exempt from the H-1B cap. The Petitioner's requests for cap exemption on both of its petitions focused the Director's attention back on evaluating the issue of recapturing the Beneficiary's time spent outside the United States.

The Director approved the petition for a limited validity period for a second time in December 2021. In the decision, the Director noted that despite the Petitioner's stated intention to file the third petition as being subject to the cap and as a new admission resetting his six-year period, by making multiple indications on the petition they were requesting the third petition be considered as cap exempt, those indicators ultimately superseded their newly-stated intentions.

We agree with the Director. When the Petitioner filed the petition and selected the options for USCIS to consider the third petition as exempt from the H-1B cap, it retained and executed the choice it claims the Director failed to offer them. At that time, the Petitioner was afforded the choice to file as cap subject or cap exempt. When the Petitioner filed the petition as cap exempt, it chose to request that the Beneficiary "be re-admitted for the 'remainder' of the initial six-year admission period without being subject to the H-1B cap if previously counted" as noted above in the policy. When it made the choice to file as cap exempt, the Beneficiary's admission as a new H-1B nonimmigrant was foreclosed and it exercised the option to have his new time in H-1B status to serve as a continuum of his previous accrued time in that same status. Although the referenced policy afforded employers the option for beneficiaries to be considered as cap subject or cap exempt, the Petitioner has not identified an authority requiring the Director to essentially second-guess the cap-exempt options it selected on the 2014 petition.

Moreover, and as the Director informed the Petitioner, when the Petitioner filed the third petition in July of 2014, USCIS had already announced it would no longer accept petitions for inclusion in the H-1B cap for that fiscal year (2015). Even if the Petitioner had filed the 2014 petition as being subject to the cap, USCIS would have denied the petition. As the Petitioner's appeal brief reflects it is not arguing for the Beneficiary's time outside the United States to be recaptured, we will not provide any analysis on that topic.

The burden is on the Petitioner not only to establish eligibility, but also to properly complete the petition and to clearly establish in what manner it is filing. Here, it did so when it chose to file as exempt from the numerical limitations and it has not offered a persuasive alternative. The Petitioner signed the petition under the penalty of perjury, attesting the information on the form was correct. The Director therefore properly adjudicated the petition in the manner that it was filed. The Petitioner essentially requests USCIS allow it to make a material change to the petition that would result in a different type or manner of filing, and a different outcome. The Petitioner, however, identifies no legal authority to support that request. To the contrary, permitting such a change requested after receiving an adverse determination would be improper. *Cf. Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

We note the petition remains approved, as indicated in the Director's most recent decision, from January 5, 2020, through April 15, 2020.

III. 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.