U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25334878

Date: JAN. 27, 2023

Appeal of Nebraska 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 Nebraska Service Center Director approved the Form I-129, Petition for a Nonimmigrant Worker (petition) on a limited basis, concluding that the Petitioner did not establish the Beneficiary was entitled for the full requested period of work. 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.

Section 104 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) removes the six-year limitation on the authorized period of stay in H-1B visa status for certain individuals and broadens the class of H-1B nonimmigrants who may take advantage of this provision. *See* American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 104(c), 114 Stat. 1251, 1253–54. More specifically, section 104(c) of AC21 reads in, pertinent part:

> Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—
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> (1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and
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> (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs, may apply for, and

> the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

The implementing regulation provides:

> An alien who currently maintains or previously held H-1B status, who is the beneficiary of an approved immigrant visa petition for classification under section 203(b)(1), (2), or (3) of the Act, and who is eligible to be granted that immigrant status but for application of the per country limitation, is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act. The petitioner must demonstrate such visa unavailability as of the date the H-1B petition is filed with USCIS.

8 C.F.R. § 214.2(h)(13)(E). Section 104(c) of AC21 is applicable when an individual, who is the beneficiary of a Form I-140, Immigrant Petition for Alien Workers, is eligible to be granted lawful permanent resident status but for the application of a per country limitation to which that individual is subject or, alternatively, if the immigrant preference category applicable to that individual is, as a whole, "unavailable." Thus, to establish eligibility under the exemption at section 104(c) of AC21, a petitioner must establish that at the time of filing for the extension of H-1B nonimmigrant status, a beneficiary is not eligible to be granted lawful permanent resident status on the sole basis that they are subject to a per country or worldwide visa limitation in accordance with their immigrant visa "priority date."

A review of the filing before the Director does not reveal any explicit claim under AC21 for the Beneficiary's extension request. As a result, the Director concluded the Beneficiary should receive a shortened approval period ending at what would normally be construed as his six-year limit in the relevant nonimmigrant status. However, on appeal, the Petitioner provides additional information that places their previously submitted evidence into context. Although we see no error on the Director's part, the Petitioner states the Beneficiary is eligible for H-1B status extensions beyond the six-year limit based on AC21 section 104(c).

Even though the Petitioner provided an immigrant petition approval notice among the 400-plus pages of evidence before the Director, it did not instruct the Director of how that material corresponded with the Beneficiary's eligibility under AC21. On the date the Director adjudicated this petition, the immigrant petition filed on the Beneficiary's behalf was approved and a visa number was not available based on the designated immigrant classification. Based on this new information, we are remanding the matter to the Director to consider, in the first instance, what effect the Petitioner's claims have on the Beneficiary's extension request.

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