U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25693623

Date: JUN. 02, 2023

Appeal of California Service Center Decision

Form I-129, Petition for a 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 Director of the California Service Center revoked the petition's approval, concluding that the Petitioner and the Beneficiary were not exempt from the H-1B numerical limitations contained at section 214(g)(5)(C) of the Act. 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. REVOCATION

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

> (A) *Grounds for revocation*. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
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> (1) The beneficiary is no longer employed by the petition in the capacity specified in the petition; or
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> (2) The statement of facts contained in the petition…was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
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> (3) The petition violated terms and conditions of the approved petition; or

(4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

(5) The approval of the petition violated paragraph (h) of this section or involved gross error.

The regulations require that USCIS provide notice consisting of a detailed statement of the grounds for revocation and provide an opportunity for the petitioner to respond to the notice of intent.

The Director's statements in the notice of intent to revoke (NOIR) adequately notified the Petitioner of the reasons to revoke the approval of its petition and afforded them an opportunity to respond. Subsequently, the Director revoked the petition's approval. We will dismiss the appeal for the reasons below.

II. PETITION SUBJECT TO H-1B NUMERICAL LIMITATION

A. Legal Framework

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 have 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). A beneficiary is counted against the "cap" if they are issued an H-1B visa or otherwise provided H-1B nonimmigrant status. 8 C.F.R. § 214.2(h)(8)(ii)(A). An H-1B visa is a travel document and does not provide H-1B status. A noncitizen is provided status in the United States when they are inspected by an immigration officer at entry. *See* section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A). When an approved H-1B is not used because the beneficiary does not apply for admission to the United States, the petition's approval is automatically revoked pursuant to 8 C.F.R. § 214.2(h)(11)(ii). Upon revocation, USCIS will "take into account" the unused number during the appropriate fiscal year. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B).

B. Procedural and Factual History

The Petitioner filed this petition on July 2, 2020 seeking a change in the Beneficiary's employment and an extension of their stay in H-1B classification. The Petitioner claimed that this petition was exempt from the H-1B numerical limitations because the Beneficiary had been previously counted against the H-1B "cap" based on a petition filed by the Beneficiary's first employer for potential employment in the United States. The Beneficiary's first employer filed an H-1B petition in June 2008 that was approved. And the Beneficiary applied for and was issued an H-1B visa from the U.S. Consulate in Mumbai (Bombay), India in October 2008. The Beneficiary never sought admission to

the United States in H-1B classification to work for their first employer. Their first employer subsequently requested withdrawal of the H-1B petition filed on behalf of the Beneficiary. USCIS acknowledged the first employer's withdrawal and automatically revoked the H-1B petition's approval on November 3, 2009 pursuant to 8 C.F.R. § 214.2(h)(11)(ii).

Almost two years later, a new employer of the Beneficiary filed an H-1B petition to employ the Beneficiary in the United States in H-1B status. The new employer claimed exemption from the applicable fiscal year's numerical limitation of H-1B visas based on the petition filed by the Beneficiary's first employer in 2008. It was approved, and a series of H-1B petitions filed by the Beneficiary's employers have followed throughout the years. Each one has claimed "cap" exemption from the applicable fiscal year's numerical limitations based on the original petition filed by the Beneficiary's first employer in 2008.

On July 13, 2020, USCIS approved the petition that is before us today. The Petitioner's Form I-129 claimed exemption from the applicable fiscal year's numerical limitations based on the original petition filed by the Beneficiary's first employer in 2008 like those that came before it. USCIS issued a notice of intent to revoke (NOIR) this approval on January 11, 2022 because it received information in connection with a different petition filed by the Petitioner for the Beneficiary. The information showed that this petition was approved in gross error because the regulations at 8 C.F.R. § 214.2(h)(8) were violated. The Director revoked the petition's approval on April 13, 2022.

C. Analysis

On appeal, the Petitioner argues that the regulations at 8 C.F.R. §§ 214.2(h)(8)(ii)(A) and (ii)(B) should be read in the disjunctive so that their petition can be exempt from the "cap." The Petitioner's argument is unpersuasive.

The regulations cited by the Petitioner at 8 C.F.R. §§ 214.2(h)(8)(ii)(A) and (ii)(B) are not disjunctive. They are required to be read together to give the rules their proper meaning. If the regulations were written in the Petitioner's preferred disjunctive manner, individuals who were not present in the United States and had no intention of working in the United States for United States employers would be permitted to reap the benefits of exemption from the H-1B "cap."

The H-1B program is a numerically limited benefit. So it is important to reserve this scarce benefit for those best positioned to contribute to the workforce needs of United States employers. A beneficiary cannot contribute to the needs of United States employers if they are not physically in the United States and/or the United States employer seeking their services no longer has the intent to employ a beneficiary in the specialty occupation. The regulations require a beneficiary be "issued a visa or otherwise provided nonimmigrant status" to count towards the "cap." *See* 8 C.F.R. § 214.2(h)(8)(ii)(A). The Petitioner would like us to consider anyone issued a H-1B visa to have been afforded H-1B status and count against the "cap." But the issuance of an H-1B visa does not in and of itself grant any immigration status to a beneficiary. For a noncitizen outside the United States, only entry after inspection can permit a noncitizen to be afforded a status in the United States when they possess a valid visa. *See* section 101(a)(13)(A) of the Act. So the regulations are read together to require that a beneficiary outside the United States with an H-1B visa be provided H-1B status and counted against the H-1B numerical limitation only upon admission to the United States. If such a

beneficiary is not admitted to the United States, then the petition is revoked. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B). And that beneficiary would then be subject to the H-1B numerical limitations in the future unless exempt.

Here, the Beneficiary's first employer and the Beneficiary themselves took two respective affirmative actions. The Beneficiary did not seek admission to the United States and the Beneficiary's first employer withdrew the H-1B petition they filed on behalf of the Beneficiary. Petitioners are required to withdraw unused H-1B petitions, including when a beneficiary does not apply for admission to the United States. 8 C.F.R. § 214.2(h)(8)(ii)(B). These actions result in that petition's revocation under 8 C.F.R. § 214.2(h)(11)(ii) and the return of the H-1B visa number to the pool of available numbers for the appropriate fiscal year. These are two separate actions but they have the same result: the Beneficiary never held H-1B status pursuant to the petition filed by their first employer. For the Beneficiary to be exempt from the numerical limitations at section 214(g)(1)(A) of the Act, they must have held H-1B status. And since the Beneficiary never held H-1B status on the basis of the only petition ever filed on their behalf that did not seek exemption from the H-1B "cap," it follows that they were never counted against the "cap."

The USCIS will only "take into account" an H-1B visa forfeited in the manner described above after a beneficiary has not applied for admission and the unused petition is revoked. So how or when the "cap" number was subsequently "taken into account" by USCIS in the appropriate fiscal year is irrelevant. What is relevant to determining whether the Beneficiary counted against the "cap" is whether they were admitted to or otherwise afforded H-1B classification on the basis of the first employer's petition. The Beneficiary was not admitted or otherwise afforded H-1B classification on the basis of the first employer's petition, the unused petition was revoked, and they were not counted against the "cap" as a result.

The Act at section 214(g)(7) only exempts noncitizen beneficiaries of H-1B petitions from the "cap" if they have been counted within the six years prior and would not be eligible for a new six-year period of H-1B classification. The Beneficiary's first employer filed the only H-1B petition on behalf of the Beneficiary identified as subject to the numerical "cap" in 2008. The Beneficiary did not subsequently seek admission to the United States despite having been issued an H-1B visa. So they were eligible for a full six-year period of H-1B classification. In 2011 the Beneficiary's second employer filed the first H-1B petition seeking "cap" exemption for them. As the Beneficiary had never been admitted to the United States in H-1B classification in the six prior years, the Beneficiary had never been counted against the "cap." So the Beneficiary here could not be exempt from the "cap" when their second employer filed the first "cap exempt" H-1B petition. Nor were they "cap exempt" for any subsequent petition by any of the Beneficiary's sponsoring employers.

The petition filed by the Beneficiary's first employer was automatically revoked on their request because it went unused after the Beneficiary did not seek admission to the United States in H-1B classification on its basis. We conclude that a petition automatically revoked for being unused because a beneficiary did not seek admission to the United States cannot indefinitely grant a noncitizen exemption from the H-1B program's numerical limitations. Such a noncitizen beneficiary must either be counted against the numerical limitations for the fiscal year in which their next petition is filed or demonstrate exemption from the numerical limitations.

III. DUE PROCESS

On appeal, the Petitioner contends that the petition's revocation violates the Petitioner's right to procedural due process.[1] The Petitioner argues that the discovery of the Beneficiary's ineligibility for "cap" exemption occurred too late for any corrective action (now or in the past) such as preparing and filing a petition on behalf of the Beneficiary which would be subject to the numerical limitations. The Petitioner states that 10 successive petitions by the Beneficiary's previous employers and the Petitioner itself have been prepared, filed, and approved without the discovery of the Beneficiary's ineligibility. The Petitioner essentially argues that procedural due process demands that we continue to extend an immigration benefit despite ineligibility.

We have no authority to entertain constitutional due process challenges to lawful USCIS action. *Cf. Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002). Even if we did have that authority, the parties would have to demonstrate a showing of "substantial prejudice" to prevail on a due process challenge. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004). The Petitioner has not shown any violation of the regulations that resulted in "substantial prejudice." We are also without authority to entertain the Petitioner's arguments to the extent that they advance claims of equitable estoppel. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-339 (BIA 1991). Estoppel is a form of equitable relief available only through the courts. There is no delegation of authority, statute, regulation, or policy that permits us to apply this doctrine to the matter before us. *See* 8 C.F.R. § 2.1 (2004); *See also* DHS Delegation Number 0151.1 (effective March 1, 2003).

There is also no time-bar to our discovery of prior ineligibility in the regulations. We have the authority to identify previous ineligibility and correct it through our decisions. *See* 8 C.F.R. § 214.2(h)(8)(ii)(C) ("[p]etitions received after the total numbers available in a fiscal year are used stating that the alien beneficiaries are exempt from the numerical limitation will be denied…if USCIS later determines that such beneficiaries are subject to the numerical limitation"). USCIS is not required to approve petitions where eligibility has not been demonstrated merely because of erroneous prior approvals. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988).

III. CONCLUSION

At the time the Petitioner filed the petition on July 2, 2020, USCIS had announced that the H-1B numerical limit for fiscal year 2020 had already been reached.[2] So this petition would have to demonstrate exemption from the "cap" in order to be approvable. The Petitioner has not shown that any exemption from the "cap" applies to them or the Beneficiary. Grossly erroneous or mistaken determinations of "cap-exemption" do not create an automatic and enduring "cap-exemption" for subsequent petitions. And the approval of any "cap" subject petition, such as this one, approved for

[1] The Petitioner's due process argument mainly consists of their conclusions based on a set of facts from proceedings spanning over a decade and to which they were not a party. There could have been many reasons why the Beneficiary's previous employers and the Beneficiary made their choices or took actions over the last ten years and more. The Petitioner is not in a place to divine the thoughts, intentions, or conclusions of the Beneficiary's previous employers from those choices or actions. Nor are we. We only examine here whether the revocation of this petition was proper under the regulations.

[2] USCIS Reaches FY 2020 H-1B Regular Cap, https://www.uscis.gov/archive/uscis-reaches-fy-2020-h-1b-regular-cap.

the beneficiary of a petition that went unused petition because the beneficiary never applied for admission to the United States was grossly erroneous because it was approved in violation of the applicable regulations. This petition's approval was consequently appropriately revoked by the Director pursuant to 8 C.F.R. § 214.2(h)(11)(iii).

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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.