U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24445475

Date: MAR. 1, 2023

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 (petition), concluding that the Petitioner violated the general prohibition on filing multiple H-1B petitions for the same Beneficiary in the same fiscal year. On appeal, the Petitioner characterizes the Director's denial as misrepresenting the spirit of the regulation, it claims the Director disregarded facts, and it asserts the service center executed an unannounced policy change. 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

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(G) provides that within a single fiscal year, an employer cannot file more than one H-1B petition subject to a numerical cap on behalf of the same foreign national. The regulation includes two exceptions. The first exception is for a single entity, and it applies when the initial petition is denied for any basis other than misrepresentation or fraud. Here, the regulation allows an organization to file a second petition—only *after* the initial petition's denial—if the numerically limited numbers for that fiscal year are not yet reached, or if the filing qualifies as exempt from the numerical limitation. The second exception is for multiple organizations in a situation in which related entities file multiple petitions and there is a legitimate business need for every filing. Neither scenario is present in this case, and as a result, the regulation mandates that every petition filing should result in a denial or a revocation.

II. ANALYSIS

Here, the Petitioner filed two H-1B petitions in the same fiscal year, and a timeline of events provides clarity (items associated with the first petition have a gray background in the chart):

November 20, 2021	The Petitioner's H-1B electronic registration for the Beneficiary was selected for the fiscal year 2022 H-1B numerical cap projections. The notice to the Petitioner indicated they were eligible to file a corresponding H-1B petition between November 22, 2021, and February 23, 2022.
January 26, 2022	U.S. Citizenship and Immigration Services (USCIS) received the first H-1B petition.
January 31, 2022	USCIS issued a request for evidence (RFE) on the first petition questioning whether the standard occupational classificational (SOC) code the Petitioner listed on the U.S. Department of Labor ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) was correct.
February 14, 2022	This is the date the Petitioner's counsel placed on a withdrawal request for the first petition.
February 14, 2022	The Petitioner signed a new LCA they would eventually submit with the second H-1B petition.
February 16, 2022	The relevant parties signed a second petition.
February 17, 2022	The second petition was mailed to USCIS.
February 22, 2022	USCIS physically stamped the second petition as received.
February 22, 2022	The Petitioner's counsel emailed the Director requesting confirmation of a withdrawal request related to the first petition.
February 24, 2022	The Director replied to counsel's email informing them that the service center was not in possession of any withdrawal request for the first petition.
February 26, 2022	USCIS updated agency electronic systems to reflect the second petition was received.
February 28, 2022	The Petitioner's counsel mailed a withdrawal request for the first petition through FedEx.
March 1, 2022	USCIS received the withdrawal request for the first petition.
March 2, 2022	USCIS acknowledged the first petition's withdrawal.
March 4, 2022	USCIS issued a notice of intent to deny (NOID) for the second petition.
April 1, 2022	USCIS received a response to the NOID for the second petition.
April 12, 2022	USCIS denied the second petition.

First, we address the RFE the Director issued on the first petition to place the Petitioner's subsequent actions in context. The RFE noted the LCA supporting the petition designated the position under the Judicial Law Clerks SOC code; an occupational code the Occupational Information Network (O*NET) defines as: "Assist judges in court or by conducting research or preparing legal documents." *Judicial Law Clerks 23-1012.00*, O*NET OnLine (Feb. 21, 2023), https://www.onetonline.org/link/details/23-1012.00. The Director's RFE put the Petitioner on notice that the proper classification of the position appeared to be under the Lawyers SOC code. We note that an LCA containing an incorrect SOC code may serve as the basis for denying an H-1B petition because it does not correspond with and support

the petition. *See* 20 C.F.R. § 655.705(b); *Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015).

Next, we will discuss the withdrawal request, then we will note the proper steps the Petitioner could have taken to remain in compliance with the regulation in this scenario. Regarding the first petition's withdrawal, the Petitioner claims that after the petitioning organization realized they provided the incorrect LCA, their counsel's office sent a withdrawal request for that petition.[1] But as the Director explained, regardless of when USCIS received the withdrawal request, it would not have influenced this case's outcome because the Petitioner still would have filed multiple cap-subject petitions within the same fiscal year, which is not permitted. Rebutting that conclusion, the Petitioner takes issue with the Director's statement contending it was undeniably wrong, it represents clear legal error and an abuse of discretion, and it warrants the second petition's reconsideration and approval.

Despite the Petitioner's arguments against the Director's determination that withdrawing one petition did not mitigate its prohibited act, the organization does not offer legal authority to show the Director erred. As a result, we consult the regulatory text revealing the Director was correct. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(G) prohibits the filing of more than one regular or master's cap-subject H-1B petition in the same fiscal year unless one of the two above noted exceptions apply. Again, those exceptions are: (1) the first H-1B petition is denied on a basis other than fraud or misrepresentation and the numerical cap has not been reached, or the filing qualifies as exempt from the numerical limitation; or (2) related entities filed the petitions with each having a legitimate business need. The regulation clearly states that outside these two situations, *all* petitions will be denied or revoked.

We are not persuaded by the Petitioner's appellate arguments claiming that the Director's decision violated the spirit or the intent of the regulation. When construing regulations and drafting attendant policies, the agency is expected to abide by the canons of construction that generally apply to the interpretation of statutory texts. *See Matter of F-P-R-*, 24 I&N Dec. 681, 683 (BIA 2008). An elemental rule of construction is that we should apply the plain meaning of regulatory provisions. *Matter of E-L-H-*, 23 I&N Dec. 814, 823 (BIA 2005).

And as noted above, the regulation plainly provides two exceptions to the bar on filing multiple cap-subject H-1B petitions. Because the scenario in this petition does not fit into either of those exceptions, the Petitioner violated the regulation; albeit in what appears to be in an accidental manner. Even so, we do not have the authority to ignore the regulation, not even when a filing party may have gone awry by accident. *See Blanton v. Office of the Comptroller of the Currency*, 909 F.3d 1162, 1176 (D.C. Cir. 2018) (quoting *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950–51 (D.C. Cir. 1986) (concluding an agency must adhere to its own rules and regulations, and ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

Although the Petitioner withdrew the first petition, that action did not relieve the organization of having performed a prohibited act. A similar scenario existed in an adopted decision from this office in which two related entities each filed a cap-subject petition on a beneficiary's behalf, both petitions

[1] There is a dispute about the timing of the withdrawal request, but because it doesn't impact the case we will not address it further.

were concurrently in a pending status, and one entity withdrew their petition. We concluded the withdrawal of the second petition did not remedy the fact that both entities committed an act that was prohibited by the regulation. *Cf. Matter of S-*, Adopted Decision 2018-02 at 5 (AAO Mar. 23, 2018).

The Petitioner also argues that 8 C.F.R. § 214.2(h)(2)(i)(G) prohibiting multiple H-1B petition filings was developed prior to the new H-1B electronic registration and lottery process, and that those processes eliminate any benefit to filing multiple petitions. Despite this sequence of events, USCIS has maintained it "will continue to enforce the existing prohibition" on filing multiple H-1B cap petitions for the same beneficiary and it "will deny or revoke all petitions filed on that beneficiary's behalf by the petitioner." Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 905, 907 (Jan. 31, 2019). And although the Petitioner submitted a single H-1B electronic registration for the Beneficiary, this does not overcome the bar to file multiple H-1B petitions in the regulation. We have stated that any "[m]ultiple or duplicative petitions will be denied or revoked even if they are filed pursuant to a selected registration." *H-1B Cap Season*, U.S. Citizenship and Immigration Services (Feb. 23, 2022), https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-cap-season.

Turning to the Petitioner's claims that the Director's actions constituted a change in agency policy, it supports this contention citing to USCIS' H-1B Cap Season website under the subheading "Delivery Service Error Guidance." The Petitioner claims that USCIS has allowed the practice of withdrawing an initial petition and the filing of a second petition if a petitioner realizes it committed an error. Our website does not support this contention. The website instead offers a remedy when a situation outside of the petitioning organization's control occurs, such as when an entity has "filed an H-1B cap petition in a timely manner but received notification from the delivery service that suggests that there may be a delay or damage to the package or that the package was misrouted . . . ." *H-1B Cap Season*, *supra*. Here, the mistake was within the Petitioner's control, and this exception listed on the USCIS website does not support their position on appeal.

III. CONCLUSION

Accordingly, the Petitioner did not meet an exception to avoid the regulation's restriction of filing multiple H-1B petitions, and this petition's approval is prohibited. 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 here, and the petition will remain denied.

ORDER: The appeal is dismissed.