U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25629863

Date: MAR. 13, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks to temporarily employ the Beneficiary under the H-B 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 noncitizen 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.

While the Director of the Nebraska Service Center approved the petition, they did so for a shorter period than the Petitioner requested. 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. APPLICABILITY OF THE LENGTHY ADJUDICATION EXEMPTIONS

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), sets a six-year limitation on the period of authorized admission or stay for an H-1B nonimmigrant. *See also* 8 C.F.R. § 214.2(h)(13)(iii)(A) (requiring residence and physical presence outside of the United States for the immediate prior year before seeking to resume H-1B status after exhausting the six-year period). Exemptions from the six-year limitation are present in the regulations to ameliorate delays from lengthy adjudication or per-country limitations of certain employment-based immigrant visas for those H-1B nonimmigrants pursuing employment based lawful permanent resident status in the United States. H-1B noncitizens who are the beneficiaries of a labor certification filed with the Department of Labor or an employment-based immigrant petition under 203(b) of the Act pending greater than 365 days may seek a one-year extension of their status for relief from lengthy adjudication delays. *See* 8 C.F.R. § 214.2(h)(13)(iii)(D)(*1*)-(*10*). H-1B noncitizens who are the principal beneficiaries of employment-based immigrant petitions under 203(b) of the Act but prevented from obtaining immigrant status due to per country limitations may apply for a three-year extension of H-1B status. *See* 8 C.F.R. § 214.2(h)(13)(iii)(E)(*1*)-(*6*). A Petitioner must demonstrate eligibility for the exemptions at the time

of filing. *See* 8 C.F.R. § 103.2(b)(1) ("An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication.").

The Petitioner, a lodging company, filed this petition on September 23, 2016 to employ the Beneficiary as a computer systems analyst for the period October 25, 2016 to October 25, 2017. The Director approved the petition on October 21, 2020 but issued a limited validity notice because the approved petition's period of validity was shorter than that requested by the Petitioner. The Director noted that the Beneficiary commenced their H-1B period of stay in the United States on May 6, 2011. So the Beneficiary's six-year period of admission would conclude on May 5, 2017 unless the Petitioner demonstrated that the Beneficiary could recapture time spent outside the United States pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(C), or was exempt from the six-year maximum period of stay or admission due to lengthy adjudication delays or per-country limitations. The Petitioner did not submit any evidence of the Beneficiary's eligibility for recapture time and could not demonstrate eligibility due to a lengthy adjudication delay or per-country limitations to applying for permanent resident status based on the Beneficiary's country of birth.

Since October 21, 2020, the Petitioner has submitted three successive substantially similar motions to reopen and/or reconsider the Director's decision, as well as this appeal. The Director has made the same legal conclusion and dismissed all three motions, including the one before us today on appeal. The Director's reasons for dismissal were correct and the limited validity notice remains undisturbed for the following reasons.

The Beneficiary was not eligible for a three-year extension of H-1B status at the time the petition was filed on September 23, 2016. The Petitioner would like us to conclude that the Beneficiary is eligible for a three-year extension beyond the six-year maximum because he has become the beneficiary of a Form I-140 subject to the per-country limitations in the period since the petition was filed. We do not agree.

The fact that a Form I-140 subject to the per-country limitations was filed and approved on behalf of the Beneficiary after the Form I-129 was filed does not change the outcome here. The Petitioner must demonstrate eligibility on the date of filing. 8 C.F.R. § 103.2(b)(1). The labor certification and the Form I-140 were not in existence on September 23, 2016 when this petition was filed. The record reflects that the Beneficiary's labor certification was filed on September 27, 2017. That was over a year after the Form I-129 was filed. The Form I-140 was approved on January 7, 2019. That was more than two years after the Form I-129 was filed. The very foundation upon which the Petitioner rests their eligibility for H-1B time beyond the statutory and regulatory maximum materialized more than two years after the Petitioner filed this petition on the Beneficiary's behalf. We cannot consider facts that only came into existence after the filing of the petition. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1988). So there is no basis in law, regulation, or policy for the Petitioner's desired outcome here.

We are also without authority to entertain the Petitioner's request for the benefit of equitable estoppel to support a longer validity of the petition nunc pro tunc. *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).

II. CONCLUSION

The Petitioner should note that the filing of a motion to reopen or reconsider does not provide any interim benefits such as staying the execution of any decision or extending a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv). The Petitioner has not demonstrated that the Beneficiary was eligible for additional H-1B time beyond the statutory and regulatory six-year limitation. The record does not contain evidence of any time the Beneficiary was physically outside of the United States during the validity of an H-1B petition that was approved on their behalf that could be recaptured as described in 8 C.F.R. § 214.2(h)(13(3)(C). So the last day of the Beneficiary's six-year period of H-1B validity was May 5, 2017. The Petitioner requested petition validity until October 25, 2017. The Petitioner's requested validity falls outside the maximum allowable time for the Beneficiary's presence in the United States in H-1B status. So the Director's limitation of the validity of this petition was correct and remains undisturbed. 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.