U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26530645

Date: JUN. 09, 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 denied the petition, concluding that the record did not establish that the Petitioner and the Beneficiary were 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. 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).

II. PROCEDURAL HISTORY

The Petitioner filed this petition on December 8, 2022 seeking approval of H-1B classification and consular notification so that the Beneficiary could apply for the appropriate visa at the U.S. Consulate General in Hong Kong & Macau. 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 previous employer, [redacted] ("previous employer"), for potential employment in the United States. The previous employer filed an H-1B petition for the Beneficiary for Fiscal Year 2016 which was approved on May 6, 2015. And the Beneficiary applied for, and was issued, an H-1B visa from the consular section of the U.S. Embassy in Tokyo on August 28, 2015. The Beneficiary never sought admission to the United States in H-1B classification to work for the previous employer. The previous 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 pursuant to 8 C.F.R. § 214.2(h)(11)(ii).

Now, more than eight years later, the Petitioner has filed this H-1B petition to employ the Beneficiary in the United States in H-1B status. The Petitioner has claimed exemption from Fiscal Year 2023's numerical limitation on grants of H-1B visas based on the petition filed by the previous employer for the Beneficiary in 2015.

On December 27, 2022, the Director denied this petition because the regulations did not support the Petitioner's claimed exemption from the Fiscal Year 2023 H-1B "cap" based on the petition the previous employer had filed for the Beneficiary. The Petitioner now appeals.

III. ANALYSIS

On appeal, the Petitioner argues that the regulations at 8 C.F.R. §§ 214.2(h)(8)(ii)(A) and (ii)(B) and notes from a USCIS engagement with the American Immigration Lawyers Association (AILA) support the Beneficiary's claimed exemption from the Fiscal Year 2023 "cap" because the Beneficiary was issued an H-1B visa at the consular section of the U.S. Embassy in Tokyo. The Petitioner's authority and 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 and interpreted in the manner suggested by the Petitioner, 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 previous employer and the Beneficiary themselves took two respective affirmative actions. The Beneficiary did not seek admission to the United States and the previous 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 here has never held H-1B status pursuant to the petition filed by the previous employer or any other 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."

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. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B). 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 previous employer's petition. The Beneficiary was not admitted or otherwise afforded H-1B classification on the basis of the previous 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 2015. 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 2022 the Petitioner filed this H-1B petition seeking "cap" exemption.. 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 the Petitioner filed this "cap exempt" H-1B petition.

The Petitioner's reference to minutes from an AILA engagement with USCIS in 2014 is not reliable authority. Unpublished agency decisions and legal opinions are not binding, even when they are published in private publications or widely circulated. *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001). Nevertheless, the agency statement cited by Petitioner is consistent with the regulations and does not support the Petitioner's preferred outcome. According to the minutes of the meeting, the "USCIS representative" as styled by the Petitioner stated a beneficiary would not be considered counted under the cap if the H-1B petition's approval was revoked prior to an application for a visa or admission. As described above, the previous employer did request withdrawal and USCIS did revoke the petition's approval before the Beneficiary could be admitted to the United States in H-1B classification.

This petition's approval was automatically revoked on the request of the first employer 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.

IV. CONCLUSION

At the time the Petitioner filed the petition on December 8, 2022, USCIS had announced that the H-1B numerical limit for fiscal year 2023 had already been reached.[1] 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.

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.

[1] USCIS Reaches Fiscal Year 2023 H-1B Cap, https://www.uscis.gov/newsroom/alerts/uscis-reaches-fiscal-year-2023-h-1b-cap