U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28673128

Date: NOV. 1, 2023

Appeal of California Service Center Decision

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

The Petitioner seeks to temporarily 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 because the requested petition validity dates passed before the date of adjudication. 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.

The regulation at 8 C.F.R. § 214.2(h)(9)(ii)(B) states that:

> If a new H petition is approved after the date the petitioner indicates that the services [] will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner, as long as that date does not exceed either the limits specified by paragraph (h)(9)(iii) of this section or other Service policy.

The regulation at 8 C.F.R. § 214.2(h)(9)(iii) explains that an H-1B petition approval "may not exceed the validity period of the labor condition application."

The Petitioner filed the instant petition on June 30, 2022, seeking new employment for the Beneficiary from October 1, 2022 to November 2, 2022 and requested consular processing upon approval. The filing was accompanied by a certified labor condition application (LCA) with validity dates of November 3, 2019 to November 2, 2022. After issuing a notice of intent to deny on November 29,

2022, the Director denied the petition explaining that U.S. Citizenship and Immigration Services (USCIS) is precluded from retroactively approving a "new H petition" pursuant to 8 C.F.R. § 214.2(h)(9)(ii)(B).

Upon consideration of the entire record, including the evidence submitted and arguments made on appeal, we adopt and affirm the Director's decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted this issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight U.S. Court of Appeals in holding the appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

On appeal, the Petitioner contends that there is no authority that prohibits USCIS from retroactively approving a new H petition for validity dates that have already passed and asserts that "in other contexts" it is "common practice." In support of its assertions, the Petitioner submits an approval notice for a B-2 extension petition, which shows that it was approved on February 17, 2023, for the validity dates of August 4, 2020 to December 2, 2020. However, a nunc pro tunc approval for an extension of stay, such as the submitted B-2, is expressly permitted under specific circumstances pursuant to the regulation at 8 C.F.R. § 214.1(c)(4). The Petitioner does not cite to any regulation or policy which would allow for a similar retroactive approval for an initial or new H-1B petition.[1]

In addition, the Petitioner states that "retroactive approval of the instant petition would not violate any of the requirements at 8 C.F.R. § 214.2(h)(9)(iii)" because the requested validity dates are not more than three years and they do not exceed the validity period of the LCA. Notably, the Petitioner asserts that the Director would not have been precluded from issuing an approval notice valid from November 29, 2022 (the date of the decision) until November 2, 2022 (the end date of the requested validity period), which would, in fact, have a requested start date that was not within the LCA validity period. Regardless, as explained above, the Petitioner does not cite to any regulation or policy which would allow for a retroactive approval of this H-1B petition.

The Petitioner also claims that "[i]f the denial is reversed" and approved "with the requested validity dates" then the "Petitioner can file a second Form I-129 petition on the Beneficiary's behalf since he has already been counted under the H-1B cap pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(C)(2)."[2] However, the regulation at 8 C.F.R. § 214.2(h)(8)(ii)(A) provides that "[e]ach alien issued a visa or otherwise provided nonimmigrant status" under section 101(a)(15)(H)(i)(b) of the Act "shall be counted for purposes of any applicable numerical limit." In other words, an individual is considered counted against the H-1B cap only when he or she is issued a visa or granted nonimmigrant status. The approval of an H-1B petition does not in itself grant any immigration status to a beneficiary and does not guarantee that a beneficiary will subsequently be eligible for a visa and for admission to the United States. Section 221(h) of the Act.

[1] Counsel's unsubstantiated assertions do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

[2] This regulation addresses the maximum H-1B admission period calculation.

Finally, we are also not persuaded by the Petitioner's assertion that there was a "lengthy delay" in adjudicating the petition and, therefore, the Petitioner and Beneficiary should not be penalized for the passing of the requested validity dates. In support, the Petitioner relies on a printout for the "Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year" for fiscal year 2018 through December 31, 2022. The provided data, however, only "represents the time it took to complete half of the cases in a given time period." Further, as previously noted, the Petitioner's requested validity end date of November 2, 2022 was approximately four months from the date of filing.

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.