U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 28470527

Date: OCT. 10, 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-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 Nebraska Service Center denied the petition, concluding the record did not establish that the Beneficiary qualified for the lengthy adjudication delay exemption relating to the six-year limit in H-1B status. 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. LAW

Section 106 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ21) removes the six-year limitation on the authorized period of stay in H-1B visa status for certain individuals and broadens the class of H-1B nonimmigrants who may take advantage of this provisions. *See* American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54; Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1758, 1836-37 (2002).[1]

[1] Under the original AC21 statute, only those with a particular employment-based immigrant petition or an application for lawful permanent residence (LPR) pending greater than 365 days could receive one-year until a decision was made on their LPR status application. DOJ21 expanded the exemption to the six-year limit to those who have a permanent labor certification or qualifying employment-based petition pending greater than 365 days.

The AC21 section 106(a) provisions were published in the regulation at 8 C.F.R. § 214.2(h)(13)(iii)(D)(*1*). The regulations states in pertinent part:

> (D) Lengthy adjudication delay exemption from 214(g)(4) of the Act.
>
> (1) An alien who is in H-1 status or has previously held H-1B status is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act, if at least 365 days have elapsed since:
>
> (i) The filing of a labor certification with the Department of Labor on the alien's behalf, if such certification is required for the alien to obtain status under section 203(b) of the Act; or
>
> (ii) The filing of an immigrant visa petition with USCIS on the alien's behalf to accord classification under section 203(b) of the Act.

The exemption to the six-year limit under section 106(a) of AC21 is thus available for certain individuals whose labor certification or immigrant petitions remain undecided due to lengthy adjudication delays. A delay of 365 days or more in the final adjudication of a filed labor certification application or employment-based immigrant petition under section 203(b) of the Act is considered "a lengthy adjudication delay" for purposes of this exemption. *See* DOJ21 § 11030A(a), 116 Stat. at 1836.

According to the text of section 106(b) of AC21, codified in the regulation at 8 C.F.R. § 214.2(h)(13)(iii)(D)(*2*) individuals may have their "stay" extended in the United States in one-year increments until a final decision has been made to:

> (i) Deny the application for permanent labor certification, or, if approved, to revoke or invalidate such approval;
>
> (ii) Deny the immigrant visa petition, or, if approved, revoke such approval;
>
> (iii) Deny or approve the alien's application for an immigrant visa or application to adjust status to lawful permanent residence; or
>
> (iv) Administratively or otherwise close the application for permanent labor certification, immigrant visa petition, or application to adjust status.

A petitioner and beneficiary lose eligibility to extend H-1B petition validity beyond the six-year limit under this section if the beneficiary failed to file an adjustment of status application or apply for an immigrant visa within one year of an immigrant visa being authorized for issuance based on their preference category and country of chargeability unless they can demonstrate that they warrant an act of discretion to excuse the failure to apply due to circumstances beyond their control.

## II. ANALYSIS

The Petitioner filed the instant petition on behalf of the Beneficiary to seek the Beneficiary's services in the Petitioner's proffered position of technical program manager for a one-year period.[2] The Director's request for evidence (RFE) notified the Petitioner of the limitation to extensions beyond the six-year limitation to H-1B stay and invited the Petitioner to submit evidence to establish the Beneficiary filed an adjustment of status or immigrant visa application within 365 days of an immigrant visa's availability. The Petitioner submitted a copy of the approval notice for Form I-140, Immigrant Petition for Alien Worker, filed by the Beneficiary's previous employer, an employment verification letter from the Beneficiary's previous employer, copies of email correspondence between the Beneficiary and their previous employer, and a statement from the Beneficiary in response to the Director's RFE. The Petitioner's appeal, which is resemblant of its response to the Director's RFE save the inclusion of an additional statement from the Beneficiary, asserts the Beneficiary's failure to file their adjustment of status application was beyond their control because the previous employer sponsor for the Beneficiary's immigrant petition was unwilling or unable to continue to offer the Beneficiary the permanent indefinite employment described in the immigrant petition.

We conclude that the Petitioner's contentions supported by the evidence it submitted do not merit a favorable exercise of discretion to excuse the Beneficiary's failure to file an adjustment of status application within one year of the authorization for issuance of an immigrant visa based on their preference category and country of chargeability. The Beneficiary's statement indicates that they failed to file their adjustment of status application within one year of the availability of an immigrant visa based on their preference category and country of chargeability because of "the life-alternating (sic) health issues [their] family suffered, alongside the COVID-19 pandemic…" The "life-alternating (sic) health issues" did not become apparent in the Beneficiary's life until January 2014 according to the Beneficiary's statement. And COVID-19 was not officially classified as a pandemic by the World Health Organization until March 2020. But the Beneficiary's employment with the sponsoring employer ceased in June 2013. It is not clear from the record how the cessation of the Petitioner's employment six months before the first of their family's "life-alternating (sic)" issues and almost seven years before the start of the COVID-19 pandemic composed an extraordinary circumstance which could excuse their failure to file an adjustment of status or immigrant visa application within one year of the authorization for issuance of an immigrant visa based on their preference category and country of chargeability.

The Beneficiary also describes circumstances which prevented them from pursuing employment-based permanent immigration sponsored by other employers. Between June 2013 and March 2018 (a period of almost 5 years) the Beneficiary was employed in the United States by two separate employers. The Beneficiary refers to the closure of one previous employer and the comparatively short duration of employment with another previous employer as circumstances which influenced their permanent immigration posture. In sum, the Petitioner avers that, but for the combination of circumstances they identified, they would have been able to pursue other avenues for permanent immigration which could have resulted in their ability to file an adjustment of status application. But it is not apparent how their history with other previous employers relates to their failure to apply for

[2] The Petitioner asserts they requested a three-year petition validity, but the Form I-129, Petitioner for Nonimmigrant Worker, reflects they requested a period of petition validity from October 1, 2022 to September 30, 2023.

adjustment of status or an immigrant visa based on the petition that was approved on their behalf on the sponsorship of an unrelated previous employer due to a circumstance beyond their control.

The Petitioner also submitted copies of email correspondence exchanged between the Beneficiary and the employer sponsor related to the approved immigrant petition the Petitioner and Beneficiary contend confers eligibility for the additional petition validity beyond the six-year limit. The correspondence reflects that, after they resigned from their employment with the sponsoring employer, the Beneficiary contacted them to seek re-employment. But it is not apparent how the employer sponsor's unwillingness to engage with the Beneficiary about re-employment prospects would form a set of circumstances beyond the control of the Beneficiary such that their failure to file their adjustment of status or immigrant visa application within one year of the authorization for issuance of an immigrant visa based on their preference category and country of chargeability.

The one-year filing requirement at 8 C.F.R. § 214.2(h)(13)(iii)(D)(*10*) was intended to facilitate LPR status for those who experienced delays in the adjudicative process, and it aligns with the temporal limit Congress placed on extensions beyond the six-year limit. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,450 (Nov. 18, 2016). U.S. Citizenship and Immigration Services further stated within the preamble of this same final rule:

> Allowing foreign workers to benefit from the exemption when they do not file applications for [LPR status] after an immigrant visa becomes immediately available, may allow such workers to remain in H-1B status indefinitely, which would run counter to the purpose of the statute. *See* S. Rep. No. [106-]260, at 23 [(2000)]. To avoid this result, DHS is confirming that beneficiaries of section 106(a) must file an application for adjustment of status within 1 year of immigrant visa availability.

So whilst we agree that the Beneficiary is not eligible to file for LPR status because their sponsoring employer will not engage with them and no other sponsoring employer exists, we do not agree that this constitutes a circumstance or set of circumstances beyond the control of the Beneficiary such that their failure to file an adjustment of status or immigrant visa application would be excusable in a favorable exercise of discretion.

Simply claiming the Beneficiary is eligible for extensions beyond the six-year limit without demonstrating how he complies with the legal requirements will not satisfy the Petitioner's burden of proof in these proceedings. *See Chawathe*, 25 I&N Dec. at 371–72 (discussing assertions that are not supported by probative material will not meet a filing party's burden of proof).

For the above reasons, we conclude that the Petitioner and Beneficiary are not eligible for H-1B petition validity beyond the statutory six-year limitation.

## III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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.

**ORDER:** The appeal is dismissed.