U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-S-, INC.

DATE: JULY 25, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an information technology company, seeks to temporarily employ the Beneficiary as a "programmer analyst" 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). H-1B visas are statutorily capped at 65,000 per year (H-1B cap) with an additional 20,000 provided for those who hold a U.S master's or higher degree. Section 214(g)(1)(A)(vii), (5)(C) of the Act, 8 U.S.C. § 1184(g)(1)(A)(vii), (5)(C).

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary qualifies for exemption from the fiscal year 2017 (FY 17) H-1B cap, which was reached prior to the filing of this petition.

On appeal, the Petitioner submits a brief and contends that the petition should be approved.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Each beneficiary shall be counted against the cap unless he/she is exempt from the numerical limitation. 8 C.F.R. § 214.2(h)(8)(ii)(A). When calculating the numerical limitations or the number of exemptions for a given fiscal year, U.S. Citizenship and Immigration Services (USCIS) will make numbers available to petitions in the order in which the petitions are filed and make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. 8 C.F.R. § 214.2(h)(8)(ii)(B). If the total numbers available in a fiscal year are used, new petitions and the accompanying fees shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year. 8 C.F.R. § 214.2(h)(8)(ii)(D). A petition received after the total numbers available in a fiscal year are used stating that a beneficiary is exempt from the numerical limitation will be denied and the filing fees will not be returned or refunded if USCIS later determines that the beneficiary is subject to the numerical limitation. *Id.*

When an approved petition is not used because the beneficiary does not apply for admission to the United States,[1] the petitioner shall notify the service center director who approved the petition that the number has not been used. 8 C.F.R. § 214.2(h)(8)(ii)(C); Volume 9 of the Foreign Affairs Manual, 9 FAM 41.53 n.23. The petition shall be immediately and automatically revoked and USCIS will take into account the unused number during the appropriate fiscal year. 8 C.F.R. § 214.2(h)(8)(ii)(C), (11)(ii).

With regard to revocations, the regulations state that the petitioner shall immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility. 8 C.F.R. § 214.2(h)(11)(i)(A). If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. *Id.*

According to section 214(g)(7) of the Act:

> Any alien who has already been counted within the 6 years prior to the approval of a petition . . . toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

II. ANALYSIS

The Petitioner has not established that the Beneficiary qualifies for the cap exemption. Specifically, we note that the Beneficiary never held H-1B status.

Prior to filing this petition, another employer filed an H-1B petition on behalf of the Beneficiary for fiscal year 2016 (FY 16). The petition was approved for employment commencing on October 1, 2015.[2] The prior employer indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the Beneficiary was outside the United States. and it requested that USCIS notify the U.S. consulate overseas of the petition's approval in order for the Beneficiary to obtain a visa and seek admission to the United States. However, the Beneficiary did not seek admission to the United States. Consequently, the prior employer notified USCIS that it wished to withdraw the approved petition. The petition was immediately and automatically revoked so that the unused visa number could be taken into account during the appropriate fiscal year. 8 C.F.R. § 214.2(h)(8)(ii)(C), (11)(ii).

Thereafter, the Petitioner filed the instant petition on behalf of the Beneficiary after the fiscal year 2017 (FY 17) cap was reached. On the Form I-129, the Petitioner indicated that the Beneficiary was

[1] Section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A), states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer."

[2] was approved from October 1, 2015, to December 2, 2017. It was revoked effective March 21, 2016.

exempt from the H-1B cap because he was already counted against the cap in FY 16. The Director did not agree and denied the petition.

On appeal, the Petitioner relies on section 214(g)(7) of the Act to assert that the Beneficiary has already been counted against the cap in FY 16, because Beneficiary's approved H-1B petition had a start date of October 1, 2015. However, as noted, the approved petition was not used to seek admission to the United States, and it was later revoked so that the unused number could be taken into account during the appropriate fiscal year.

Notably, 8 C.F.R. § 214.2(h)(8)(ii)(A) states "[e]ach alien *issued a visa* or *otherwise provided nonimmigrant status* under sections 101(a)(15)(H)(i)(b), 101(a)(15)(H)(i)(c), or 101(a)(15)(H)(ii) of the Act *shall be counted* for purposes of any applicable numerical limit . . . " (emphasis added). In other words, a beneficiary is considered counted when he or she is issued a visa or granted nonimmigrant status.[3] Here, the Beneficiary was not issued a visa or otherwise provided H-1B status.

While the Petitioner here relies on the approved petition, 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, 8 U.S.C. § 1201(h); section 235(a)(3) of the Act, 8 U.S.C. § 1225(a)(3). An immigration official did not inspect and make a determination that the Beneficiary was qualified to be admitted to the United States in H-1B nonimmigrant status; therefore, the Beneficiary never held H-1B status. Moreover, the Beneficiary cannot apply for admission to the United States based upon the previously approved H-1B petition because that petition was revoked. For the Beneficiary to be exempt from the numerical limitations at section 214(g)(7) of the Act, he must have held H-1B status.

The Petitioner cites from an internal USCIS memorandum[4] which states that "'beneficiaries who have been counted once toward the numerical limit, and are the beneficiaries of multiple petitions' who are 'beneficiaries of approved H-1B petitions are exempt from the H-1B FY cap.'" However,

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[3] Similarly, section 214(g)(3) of the Act, which provides for a cap number to be restored to the numerical limitation in cases of fraud or willful misrepresentation, states:

> "[I]f an alien *who was issued a visa or otherwise provided nonimmigrant status* and counted against the numerical limitation . . . is found to have been issued such a visa or otherwise provided such status by fraud or willfully misrepresenting a material fact and such visa or nonimmigrant status is revoked, then one number shall be restored to the total number of aliens who may be issued visas or otherwise provided such status under the numerical limitations . . . in the fiscal year in which the petition is revoked, regardless of the fiscal year in which the petition was approved."

(Emphasis added.)

[4] Michael D. Cronin, Executive Associate Commissioner, Office of Programs, USCIS, HQPGM 70/6.2.8, *Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)* (June 19, 2001), http://www.uscis.gov/laws/policy-memoranda.

the Beneficiary does not have an approved petition. The approval of the prior H-1B was revoked before the instant petition was filed. Therefore, this memo does not apply to the Beneficiary.

The Petitioner relies on another internal USCIS memorandum[5] to assert that the Beneficiary is not subject to the H-1B cap because he is reclaiming the "remainder" of his authorized H-1B admission period.[6] However, this memorandum is also not relevant, as the Beneficiary has never held H-1B status. Again, though his previous H-1B *petition* was approved, he never held H-1B *status* because he never obtained the visa and entered the United States.

The Petitioner has identified no error in the Director's analysis. We agree with the Director that 8 C.F.R. § 214.2(h)(8)(ii)(C) applies here. The Beneficiary never received H-1B status and his prior petition was revoked. The revocation of the Beneficiary's prior H-1B approval rendered his H-1B number unused, thereby subjecting him to the H-1B cap for FY 17.

In addition, we note that the Petitioner did not complete the Form I-129 properly, and did not establish the Beneficiary's eligibility at the time of filing. On the Form I-129, the Petitioner indicated in Part 2 that the basis for the requested classification is "Change of Employer." The instructions that accompany the Form I-129 state that this basis applies if the petitioner is applying for a beneficiary to begin employment working for a new employer *in the same nonimmigrant classification that the Beneficiary currently holds*. However, as noted, the Beneficiary's previous petition was revoked prior to filing, and the Beneficiary was not in any nonimmigrant classification.

General requirements for filing immigration applications and petitions set forth at 8 C.F.R. § 103.2(a)(1), state, in pertinent part: "[e]very benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission." We further note that the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1).

Here, the Petitioner did not complete the Form I-129 correctly, and did not establish that the Beneficiary was eligible for the requested benefit at the time of filing.

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[5] Michael Aytes, Associate Director for Domestic Operations, USCIS, HQPRD 70/6.2.8, HQPRD 70/6.2.12, AD 06-29, *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year* (Dec. 5, 2006), http://www.uscis.gov/laws/policy-memoranda.

[6] For example, the memorandum states that its purpose is to "[c]larif[y] how to determine the maximum period of admission in H-1B status for a beneficiary who was in the United States in valid H-1B status for less than the six-year maximum period of admission, but who has since been outside the United States for more than one year." Further, the memorandum explains that the burden of proof must be satisfied to establish that "[the beneficiary] held H-1B status in the past and is eligible to apply for admission for the H-1B remainder time. Petitions should be submitted with documentary evidence of previous H-1B status. . . ." Here, the Beneficiary was never in the United States in H-1B status.

III. CONCLUSION

The Petitioner has not established that the Beneficiary qualifies for exemption from the numerical limitation placed on H-1B filings.[7]

ORDER: The appeal is dismissed.

Cite as *Matter of T-S-, Inc.*, ID# 373244 (AAO July 25, 2017)

[7] Because this issue precludes approval of the petition we will not address any of additional issues we have observed in our *de novo* review of this matter including whether the proffered positional qualifies as a specialty occupation, and whether the Petitioner has not established an employer-employee relationship with the Beneficiary.