U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24059028

Date: JAN. 24, 2023

Appeal of California Service Center Decision

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

The Petitioner seeks to extend the Beneficiary's temporary employment 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 California Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker (petition), concluding the Petitioner 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. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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. ANALYSIS

Section 106 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), as amended by the 21st 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 provision. *See* American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253–54; 21st 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) that was filed for 365 days or more could receive one-year extensions until a decision was make on their LPR status application. DOJ21 expanded the exemption to the six-year limit to those who have a permanent labor certification or a qualifying employment-based petition filed for 365 days or more.

The exemption to the six-year limit under section 106(a) of AC21 is available for certain individuals whose labor certifications 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* § 11030A(a), 116 Stat. at 1836. According to the text of section 106(b) of AC21, individuals may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21.

This timeline of key events relating to filings on the Beneficiary's behalf offers context for our ultimate determination:

June 30, 2010	Employer 1 filed an H-1B petition on the Beneficiary's behalf and it was approved.
July 8, 2012	Employer 1 filed a qualifying employment-based petition with a priority date in February 2012 that was approved in January 2013.
2013	The Beneficiary accepted a different position in a different location with Employer 1.
December 17, 2013	Employer 1 filed a new H-1B petition to reflect the new position in the new location and it was approved.
July 2014	Employer 1 filed a new labor certification for the Beneficiary's new position in the new location and it was certified in December of that same year.
Early 2015	The Beneficiary terminated his employment with Employer 1 and began working for Employer 2.
November 2015	The Beneficiary departed the United States until November 2019.
August 19, 2019	The Petitioner filed an H-1B petition on the Beneficiary's behalf and it was approved.
July 15, 2020	The Petitioner filed an H-1B petition on the Beneficiary's behalf and it was approved.
July 16, 2021	The Petitioner filed an H-1B petition on the Beneficiary's behalf and it was denied on October 25, 2021.
September 2, 2021	The Petitioner filed a permanent labor certification on the Beneficiary's behalf.
November 12, 2021	The Petitioner filed the H-1B petition before us on appeal.
March 26, 2022	The Petitioner's H-1B petition was denied because it did not establish the Beneficiary's eligibility for the lengthy adjudication delay exemption at 8 C.F.R. § 214.2(h)(13)(iii)(D).
June 26, 2022	The Petitioner filed this appeal.
June 28, 2022	The Petitioner's labor certification was denied.

On appeal, the Petitioner asserts that the Beneficiary qualifies for an AC21 extension on two separate bases: (1) their September 2, 2021 labor certification was still pending when they filed the current H-1B petition on November 12, 2021; and (2) the labor certification and qualifying employment-based petition Employer 1 filed was pending more than 365 days prior the expiration of the Beneficiary's sixth year in H-1B status.

A. AC21 Section 106(a)

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

> (D) ***Lengthy adjudication delay exemption from 214(g)(4) of the Act.***
>
> *(1)* An alien who is in H-1B 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 Petitioner asserts that because their labor certification was still pending at the time the current H-1B extension was filed, the Beneficiary qualifies for a one-year extension under AC21 section 106(a). However, the referenced labor certification was filed in September 2021 (two months before filing the extension request before us), and thus, that filing does not meet the above requirements, as at least 365 days had not elapsed since its filing. *See generally* 2 *USCIS Policy Manual* Part H. retired *Adjudicator's Field Manual* Chapter 31.2(d)(4), https://www.uscis.gov/policymanual. Although it does not impact this case, we observe that DOL denied the Petitioner's labor certification soon after it filed this appeal, and it is no longer in a pending status.[2]

B. AC21 Section 106(b)

The regulation at 8 C.F.R. § 214.2(h)(13)(iii)(D)(*2*) implements the AC21 section 106(b) requirements and provides:

> *(2)* H-1B approvals under paragraph (h)(13)(iii)(D) of this section may be granted in up to 1-year increments until either the approved permanent labor certification expires or 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

[2] We note the Director incorrectly stated the permanent labor certification this Petitioner filed was approved on September 24, 2021, when it was never in an approved status and was denied immediately after the organization filed this appeal.

> *(iv)* Administratively or otherwise close the application for permanent labor certification, immigrant visa petition, or application to adjust status.

Any foreign national attempting to qualify for the exemption to the six-year limit is afforded one-year extensions under AC21 section 106(b) until one of the following several events occur:

- The labor certification validity period expires;
- There's an adverse decision on the labor certification;
- There's an adverse decision on the employment-based petition;
- There's a decision on an LPR application; or
- There's an administrative closure or a similar action on any of these filings.

AC21 section 106(b); 8 C.F.R. § 214.2(h)(13)(iii)(D)(*2*). The regulation further provides an additional limitation on the time a foreign national may continue to receive H-1B extensions under AC21 section 106(b) and mandates that once a visa becomes available for a continuous one-year period, they must apply for LPR status within that timeframe. 8 C.F.R. § 214.2(h)(13)(iii)(D)(*10*). This regulatory provision provides in part:

> Limits on future exemptions from the lengthy adjudication delay. An alien is ineligible for the lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section if the alien is the beneficiary of an approved petition under section 203(b) of the Act and fails to file an adjustment of status application or apply for an immigrant visa within 1 year of an immigrant visa being authorized for issuance based on his or her preference category and country of chargeability. . . . USCIS may excuse a failure to file in its discretion if the alien establishes that the failure to apply was due to circumstances beyond his or her control.

To qualify based on Employer 1's petition, this Petitioner must demonstrate the Beneficiary followed all the regulatory requirements, including the mandate meant to ensure those who have experienced delays in the adjudicative process timely seek LPR status when it is available to them. *See* 8 C.F.R. § 214.2(h)(13)(iii)(D)(*10*).

Although the U.S. Department of State's Visa Bulletin indicates a visa has been continuously available to the Beneficiary since January 2017, he has not filed for LPR status. As the Petitioner acknowledges in the appeal brief, "the implication of [the Beneficiary's departure from Employer 1] is that after his departure, he was no longer eligible—and will continue to remain ineligible—to apply for his [LPR status] until an employer who DOES possess a permanent, full time job opportunity first obtains a new [petition] approval."

The Petitioner argues that, as a result:

> [P]er the plain language of [8 C.F.R. § 214.2(h)(13)(iii)(D)(*10*)], such a showing [i.e., a failure to timely file for LPR status] is only necessary when a beneficiary seeks to 'excuse', or overcome, their failure to apply for their AOS during the uninterrupted,

> 1-year period.[] Seeing as there was NOT a full, uninterrupted 1-year period during which he could have, but failed to, lawfully apply for his AOS, this point is moot.

It is the Petitioner's claim that, because Employer 1 is no longer sponsoring the Beneficiary for LPR status, the one-year filing requirement is inapplicable to him because he could not "lawfully apply for his AOS" without a sponsor, (but he should still be able to rely on their filings for an AC21 extension beyond the six-year limit) and, thus, the timely LPR filing requirement is a moot point. But setting aside the Beneficiary's conundrum and skipping to the end to conclude he is perpetually eligible for one year H-1B extensions is not an argument that fares well for the Petitioner or for the Beneficiary.

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.

Inherent with seeking immigration benefits for foreign nationals and employers alike are additional burdens the parties must satisfy. Part of that burden in the H-1B context is compliance with all the statutory and regulatory provisions that lead to the benefit the parties are seeking. Here, that includes the requirements to timely file for LPR status once a visa becomes available. We do not agree that the regulation is a moot point here, we consider this provision to be directly relevant to the Beneficiary's situation, and we conclude he is subject to its requirements. While we agree that the Beneficiary is not eligible to file for LPR status, that does not absolve him from meeting the regulation's plain language requirements, which only provides one method in which a foreign national is not required to file for such status within one year of visa availability. Further, we do not find that the Beneficiary's failure to apply was due to circumstances beyond his control.

The only avenue for this Beneficiary to receive H-1B status extensions beyond the six-year limit is to demonstrate he meets the requirements contained in the statute and in the regulations. The two sole methods the statute permits are provided within AC21 sections 106 and 104(c), with the latter being inapplicable to this filing. But here, the Petitioner appears to propose the Beneficiary can deviate from the pathway Congress established, and somehow still navigate to the end result the legislature prescribed. Unlike in Robert Frost's poem "The Road Not Taken" where the preferred way forward was to journey down the road less traveled, the Beneficiary's proper course to qualify for this exception was to stick to the "beaten path" Congress laid out for him. The Petitioner does not explain how the Beneficiary can circumvent the statute's requirements, nor do they offer an alternative legal authority that he might rely upon to bypass the statute's dictated route.

A petitioner's ipse dixit assertions—as it has expressed here—will not carry its burden of demonstrating eligibility. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (citing to *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (6th Cir.), *cert. denied*, 506 U.S. 826 (1992). In other words, simply claiming something is so—that 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). Rather, the Petitioner should offer an explanation illustrating how the Beneficiary complied with the statute and the regulation.

For the above reasons, we agree with the Director's position that 8 C.F.R. § 214.2(h)(13)(iii)(D)(*10*) prevents the Beneficiary from receiving any additional H-1B status extensions.

II. 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.