



**U.S. Citizenship
and Immigration
Services**

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

In Re: 36698129

Date: FEB. 18, 2025

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 file a petition with U.S. Citizenship and Immigration Services (USCIS) 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 that the record did not establish that either the Petitioner or the Beneficiary is exempt from the annual H-1B numerical limitation (H-1B cap). The matter is now before us on appeal pursuant to 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.

In general, H-1B visas are numerically limited, or "capped," at 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, such as for an extension of a beneficiary's current stay in H-1B status for up to six years. *See, e.g.*, section 214(g)(5) of the Act; section 214(l) of the Act, 8 U.S.C. § 1184(l); 8 C.F.R. § 214.2(h)(8)(ii)(A).

The Petitioner filed the instant petition as exempt from the H-1B cap on the basis that the Petitioner was requesting an amendment to or an extension of the Beneficiary's current H-1B classification. The record shows that the Beneficiary was previously the beneficiary of an approved cap-subject H-1B petition filed by a different petitioner. That petition, Receipt Number [REDACTED] was counted against the Fiscal Year (FY) 2023 H-1B cap and approved with consular notification in September 2022. However, the Beneficiary never entered the United States pursuant to this H-1B approval. The record also shows that in April 2023, the Petitioner filed an H-1B petition for the Beneficiary, Receipt Number [REDACTED] also requesting consular notification. The Petitioner filed that H-1B petition

as exempt from the cap on the basis that the Beneficiary had already been counted against the FY 2023 cap and was applying for the remaining portion of their six-year period of admission. That H-1B petition was approved in April 2023. The Beneficiary was issued an H-1B visa stamp on May 18, 2023, pursuant to that approval, and the Beneficiary was admitted to the United States in H-1B status on June 8, 2023.

In March of 2024, the Petitioner filed the H-1B petition in the instant matter, requesting to amend the Beneficiary's H-1B status and extend the Beneficiary's stay. The Director issued a notice of intent to deny (NOID), notifying the Petitioner that the H-1B petition, Receipt Number [REDACTED] in which the Beneficiary was counted against the FY 2023 H-1B cap, was revoked with a finding of fraud on May 8, 2023. The Director notified the Petitioner that, pursuant to section 214(g)(3) of the Act, the Beneficiary's H-1B cap number had therefore been lost, and the Beneficiary had no longer been counted against the H-1B cap. Following consideration of the Petitioner's response, the Director denied the petition on this basis.

On appeal, the Petitioner repeats its claim, also presented to the Director, that the Beneficiary's H-1B status was "revalidated," despite the revocation of the Beneficiary's cap-subject petition, because the Beneficiary was issued an H-1B visa on May 18, 2023 and was admitted to the United States on June 8, 2023, after the revocation of the prior H-1B cap-subject petition on May 8, 2023. The Petitioner does not offer legal support for its claim.

We acknowledge that the Beneficiary's H-1B visa was issued, and the Beneficiary was admitted to the United States, after the date of the cap-subject petition's revocation. However, a petition may be revoked at any time, including after the expiration of the petition. 8 C.F.R. § 214.2(h)(11)(i)(B). Even if the Beneficiary's H-1B visa was issued in error, the Petitioner does not offer legal support for the claim that USCIS should continue this error by approving an extension of a status that was erroneously granted.

The current extension petition was filed as cap exempt, claiming that the Beneficiary was counted against the FY 2023 H-1B cap. The Petitioner was notified that the Beneficiary's FY 2023 cap number was lost, and the Beneficiary is no longer considered to have been counted against the FY 2023 H-1B cap. The Petitioner has not provided any other basis upon which the instant petition is exempt from the cap. The Petitioner has not demonstrated that the instant petition was counted against the FY 2024 cap, the fiscal year in which the petition was filed, or eligibility for other exemption from the cap. Accordingly, the appeal will be dismissed for the above stated reasons. 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.