U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

November 11, 2013 **PM-602-0092**

Policy Memorandum

SUBJECT: Additional Guidance on Determining Periods of Admission for Foreign Nationals Previously Admitted as H-4 Nonimmigrants who are Seeking H-2 or H-3 Status

Purpose

This policy memorandum (PM) provides additional guidance regarding how Immigration Services Officers (ISOs) should determine periods of admission for a foreign national. Specifically, this PM clarifies that time spent as an H-4 dependent does not count against the maximum allowable periods of stay available to principals in H-2A, H-2B, or H-3 status. This PM updates Chapter 31.2(d)(2) of the Adjudicator's Field Manual (AFM), AFM Update AD13-12.

Scope

Unless specifically exempted herein, this PM applies to and is binding on all U.S. Citizenship and Immigration Services (USCIS) employees.

Authorities

- Immigration and Nationlity Act (INA) 101(a)(15)(H)(ii)(a), (ii)(b), and (iii)
- 8 CFR 214.2(h)(5)(viii)(C)
- 8 CFR 214.2(h)(9)(iii)(C)(1) and (2)
- 8 CFR 214.2(h)(13)(iv) and (v)
- 8 CFR 214.2(h)(15)(ii)(C) and (D)

I. Introduction

A foreign national may be admitted to the United States in H-2A or H-2B status for a maximum period of three years.[1] A foreign national may be admitted to the United States in H-3 trainee status for a period of up to two years, and an H-3 participant in a special education program may be admitted to the United States for a period of up to 18 months.[2]

[1] 8 CFR 214.2(h)(5)(viii)(C) and 8 CFR 214.2(h)(15)(ii)(C). This regulation also limits the total period of stay to 45 days for H-2B workers in the Virgin Islands.
[2] 8 CFR 214.2(h)(9)(iii)(C)(1) and (2) and 8 CFR 214.2(h)(15)(ii)(D).

At the end of the maximum period of stay, the foreign national must either change to a different status or depart the United States. With some exceptions, USCIS regulations provide that a foreign national who has been outside the United States for the requisite three months may be eligible for a new period of admission of three years in H-2 status.[3] Further, USCIS regulations provide that a foreign national who has been outside the United States for the immediate prior six months may, generally, be eligible for a new two-year period of admission in H-3 trainee status or a new 18-month period of admission as an H-3 participant in a special education program.[4]

II. Previous Guidance Still Valid

On December 5, 2006, USCIS issued a memorandum stating that time spent as an H-4 and/or L-2 nonimmigrant does not count against, and is therefore "decoupled" from, the maximum period of admission allowable as an H-1B and/or L-1 nonimmigrant respectively.[5] All of the provisions of that memorandum remain in effect. This PM supplements the existing guidance and updates the AFM accordingly.

III. Policy

USCIS currently allows H-1B nonimmigrants to decouple H-4 time when calculating their maximum period of authorized stay. USCIS has determined that extending the decoupling policy to the H-2 and H-3 nonimmigrant classifications is appropriate because it is consistent with the statutory and regulatory framework along with the policy of promoting family unity.

As noted in the introduction, the statutory and regulatory framework allows an eligible foreign national a period of three years of authorized stay as an H-2 nonimmigrant or up to two years of authorized stay as an H-3 trainee or up to 18 months of authorized stay as an H-3 participant in a special education program. This interpretation promotes family unity by affording each qualified spouse the opportunity to be granted the maximum period of stay applicable to the classification. Congressional intent to limit a principal foreign national's ability to be classified as a temporary agricultural or non-agricultural worker or as a trainee or participant in a special education program for the relevant maximum period is not affected.

USCIS reviewed the current INA provisions governing the H-2 and H-3 nonimmigrant classifications as well as the applicable regulations and policy guidance, and found that existing guidance does not specifically address or clarify the issue on whether time spent in H-4 status counts against the maximum period of admission available to an H-2 or H-3 nonimmigrant.

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[3] 8 CFR 214.2(h)(5)(viii)(C) and 8 CFR 214.2(h)(13)(iv). See 8 CFR 214.2(h)(5)(viii)(C) and 8 CFR 214.2(h)(13)(v) for exceptions.
[4] 8 CFR 214.2(h)(13)(iv). See generally 8 CFR 214.2(h)(13)(v) for exceptions.
[5] *See* USCIS Memorandum, M. Aytes, "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).

Further, USCIS has not issued any recent policy guidance that clarifies the issue of decoupling time spent in H-4 status from time spent in H-2 or H-3 status.[6]

USCIS is now clarifying that any time spent in H-4 status will not count against the maximum period of admission applicable to H-2 and H-3 nonimmigrants. Thus, a foreign national who was previously granted H-4 dependent status and subsequently is granted H-2 or H-3 classification may be eligible to remain in the United States for the maximum period of stay applicable to the classification. For example, a husband and wife who come to the United States as a principal H-2B and dependent H-4 spouse may maintain status for three years, and then change status to H-4 and H-2B respectively, as long as the change of status application is properly filed before the principal H-2B has spent the maximum allowable period of stay in the United States. Note that, upon the switch, the new "principal" foreign national would be subject to the H-2B cap. USCIS will consider, in the context of any applications for change of status from H-4 to H-2 and H-4 to H-3, whether the H-4 nonimmigrant complied with the requirements of accompanying or following to join the H principal foreign national, and whether the H-4 nonimmigrant otherwise maintained valid nonimmigrant status.[7]

IV. Adjudicator's Field Manual Update

Chapter 31.2(d)(2) of the AFM (AFM Update AD13-12) is revised as follows.

☞ 1. Chapter 31.2(d)(2) of the AFM is revised to read as follows:

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(d) Limits on a Temporary Stay.

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(2) Spouse and Dependents.

Limitations on the duration of time spent in H-1B, H-2, or H-3 nonimmigrant status refer only to the principal worker in H status and do not apply independently to the principal worker's dependent spouse and children. Normal rules for maintenance of derivative status still apply such that the dependent may remain in the United States only for the purpose of family unity with the principal worker.

Time spent as an H-4 dependent does not count against the maximum allowable period of stay for principals in H-1B, H-2, or H-3 status. Thus, a foreign national who was previously an H-4 nonimmigrant and subsequently becomes an H-1B, H-2, or H-3 principal may be eligible for the maximum period of stay allowed under the H-1B, H-2 or

[6] The most recent USCIS guidance on time spent in H-4 status is from the 2006 memorandum cited above, which focuses only on decoupling time spent in H-4 status from time spent in H-1B or L-1 status.
[7] Maintenance of H-4 status continues to be tied to the principal's maintenance of H status. Thus, H-4 dependents may only maintain such status as long as the principal maintains the relevant principal H status.

H-3 classifications. Furthermore, a principal H-1B, H-2, or H-3 nonimmigrant who subsequently changes to H-4 status may remain in the new derivative status for as long as the principal foreign national spouse maintains that principal status. The application for a change of status to H-4 must be properly filed before the H-1B, H-2, or H-3 foreign national has spent the maximum allowable period of stay in the United States.

USCIS may limit, deny, or refer for removal an H-4 dependent that is not primarily intended for the purpose of being with the principal worker in the United States. Therefore, a spouse or child may be required to show that the requested stay is not intended to evade the normal requirements of the nonimmigrant classification that otherwise would apply when the principal foreign national is absent from the United States.

USCIS officers may adjudicate applications for dependent stays in order to prevent an H-1B nonimmigrant from using only occasional work visits to the United States in order to "park" the family members in the United States for extended periods while the principal alien is normally absent.

☞ 2. The AFM **Transmittal Memorandum** button is revised by adding a new entry, in numerical order, to read:

AFM Update AD13-12 11/11/2013	Chapter 31.2(d)(2)	To provide additional guidance regarding how Immigration Services Officers (ISOs) should determine periods of admission for a foreign national.

Use

This PM is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Policy and Strategy.