U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20862421

Date: JUN. 22, 2022

Appeal of California Service Center Decision

Form I-129, Petition for 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.

While the Director of the California Service Center approved the petition, she did so for a shorter period of time than requested. On appeal, the Petitioner submits a brief and additional evidence, and asserts that the Director should have approved the petition for the full period requested.

It is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will sustain the appeal.

I. LAW

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), sets a six-year limitation on the period of authorized admission or stay for an H-1B nonimmigrant. However, as provided by 8 C.F.R. § 214.2(h)(13)(iii)(A), time spent outside the United States does not necessarily count when calculating the end-date of that six-year period. When it comes to making that calculation, the regulation at 8 C.F.R. § 214.2(h)(13)(iii)(C) states the following:

> Calculating the maximum H-1B admission period. Time spent physically outside the United States exceeding 24 hours by an alien during the validity of an H-1B petition that was approved on the alien's behalf shall not be considered for purposes of calculating the alien's total period of authorized admission under section 214(g)(4) of the Act, regardless of whether such time meaningfully interrupts the alien's stay in H-1B status and the reason for the alien's absence. Accordingly, such remaining time

> may be recaptured in a subsequent H-1B petition on behalf of the alien, at any time before the alien uses the full period of H-1B admission described in section 214(g)(4) of the Act.

Further details regarding this calculation, including the types of evidence that may be submitted and clarification that we may grant all, part, or none of the recapture period requested, are contained at 8 C.F.R. § 214.2(h)(13)(iii)(C)(*1*).

II. ANALYSIS

Whether the proffered position is a specialty occupation, and whether the Beneficiary is qualified to perform its duties, are not at issue here. The only question before us today is how long the petition's period of approval should be.

There is no dispute that the Beneficiary has exhausted her six-year period of authorized stay in H-1B status. The Petitioner, however, argues that 133 days from that period are eligible for recapture per the terms of 8 C.F.R. § 214.2(h)(13)(iii)(C). As such, the Petitioner requested on the Form I-129, Petition for a Nonimmigrant Worker, that the petition be approved from December 12, 2021, to April 21, 2022.

While the Director did agree that some time was eligible for recapture, she did not agree with the Petitioner that the period allowable for recapture amounted to 130 days. Instead of approving the petition through April 21, 2022, as requested, she approved it through February 10, 2022.

We have reviewed the evidence submitted on appeal and see that, while holding continuous H-1B status, the Beneficiary took numerous trips outside of the United States. That evidence establishes that it is more likely than not she is indeed eligible to recapture 133 of the days she spent outside the United States, as requested.[1] On appeal, the Petitioner asserts that the H-1B validity period should have been approved until April 24, 2022. In support of its assertion, the Petitioner provides copies of the Beneficiary's passport stamps and flight itinerary information.

After reviewing the record in its entirety, we find that the Beneficiary spent a total of 133 days outside of the United States that she is eligible to recapture:

Departure Date	Entry Date	Days Outside the U.S.[2]
May 28, 2016	June 11, 2016	13
April 24, 2017	April 29, 2017	4
July 1, 2017	July 4, 2017	2
June 3, 2018	June 23, 2018	19
August 17, 2019	September 21, 2019	34

[1] On appeal, the Petitioner explains that it made a mistake calculating the duration of the fourth trip, as the departure date was June 3, 2018, and not June 6, 2018, as initially indicated. The Petitioner therefore concludes that the Beneficiary is eligible to recapture 133 days, rather than 130 as initially requested.

[2] In reaching these figures we included neither departure nor reentry dates. For example, when calculating the number of days eligible for recapture from the overseas trip memorialized in the first row, the sum came to 13 days because we included neither the departure date (May 28, 2016) nor the reentry date (June 11, 2016).

December 21, 2020	December 26, 2020	4
July 30, 2021	September 26, 2021	57
		Total Days Outside the United States: 133 days

The evidence of record now establishes by a preponderance of the evidence that the Beneficiary is eligible to recapture 133 days from her six-year period of H-1B stay. We will therefore sustain this appeal. However, because the Petitioner requested at the time of filing that the petition be approved until April 21, 2022, we cannot approve it through April 24, 2022, as now requested on appeal. Instead, the petition will be approved to April 21, 2022, as the Petitioner requested when it filed the petition.

ORDER: The appeal is sustained.