U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23072782

Date: NOV. 21, 2022

Appeal of Texas 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.

While the Texas Service Center Director approved the Form I-129, Petition for a Nonimmigrant Worker, they did so for a shorter period of time than the Petitioner requested. 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 sustain the appeal.

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*).

Whether this position is a specialty occupation, and whether the Beneficiary is qualified to perform its duties, are not at issue here. The issue we address in this appeal is the appropriate timeframe for the petition's approval. The Petitioner requested an approval period from July 8, 2022, through December 28, 2024. The Director approved the petition from July 8, 2022, through February 28, 2023. In the Director's partial approval decision, they reasoned the Petitioner miscalculated the permissible timeframe in their requested employment dates. The Director indicated any days in which the Beneficiary spent a portion of that day in the United States in the relevant H nonimmigrant status must be counted against his period of authorized H-1B stay. This meant his travel days—those in which he was not outside the United States for the full 24-hour period—would not count as days he could "recapture." On appeal, the Petitioner submits a brief and additional evidence, and asserts the Director should have approved the petition for a lengthier timeframe.

We note the Director did not specify the total number of days the Beneficiary has been in the United States—since his first H-1B petition in 2013—while in H-1B status prior to this petition filing. We therefore must cabin our determination to the information relating to this petition and the Beneficiary's most recent petition that preceded this one. Additionally, the Director did not fully represent their calculations in their written decision. The Petitioner requested the following dates of employment for the Beneficiary in the petition that preceded the one before us: July 8, 2019, through July 7, 2022.

The total *requested* time in H-1B status within the most recent petition was 1,096 days. But that does not take into account the amount of time during the requested period that the Beneficiary spent the entire day outside of the United States; otherwise known as recapture time. Those actual dates that the Beneficiary can claim as recapture time when he was outside the United States for the entire day consist of:

Recapture Timeframe[1]	**Total Time**
July 25, 2019 – September 11, 2019	49 days
September 21, 2019 – September 26, 2019	6 days
September 29, 2019 – October 6, 2019	8 days
October 10, 2019 – November 14, 2019	36 days
November 28, 2019 – December 17, 2019	20 days
December 20, 2019 – January 7, 2020	19 days
January 10, 2020 – July 7, 2022	910 days
Sum of recapture time	1,048 days

As it relates to the previous petition with a requested timeframe between July 8, 2019, through July 7, 2022, the Beneficiary may recapture 1,048 days. On the current petition, the Petitioner is requesting

[1] We note the Petitioner's recapture calculations were not correct as they did not follow the process of counting any day the Beneficiary spent in H-1B status while in the United States, if he spent any portion of that day in the United States. In other words, simply because he departed on a certain date does not mean that he can rely on that day for recapture time because he spent a portion of it in the United States.

905 days from July 8, 2022, through December 28, 2024. Therefore, based on the information in the record, the Petitioner may be granted the dates as requested on this petition between July 8, 2022, through December 28, 2024.[2]

Consequently, the Petitioner's original requested end date of December 28, 2024, is a permissible request and we will sustain the appeal based on that original requested ending date.

ORDER: The appeal is sustained.

[2] We restate that the record does not contain the number of days in which the Beneficiary was in the United States in H-1B status prior to the filing of the immediately preceding petition and we are unable to calculate the Beneficiary's sum time in H-1B status. If the Petitioner plans to recapture additional H-1B time on behalf of the Beneficiary in a future filing, we suggest they make the calculation clearer and submit evidence beyond what was submitted here.