U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27697416

Date: AUG. 24, 2023

Appeal of Texas Service Center Decision

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

The Petitioner seeks to extend and change the Beneficiary's status to commence temporary employment under the H-1B nonimmigrant classification for specialty occupations.[1] *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 a specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish the Beneficiary's remaining period of H-1B admission or their eligibility for a new six-year period of H-1B admission. The matter is now before us on appeal. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

The Beneficiary was selected for further processing in the FY 2023 H-1B numerical cap[2] on March 25, 2022.[3] The Petitioner filed this petition on June 29, 2022 to temporarily employ the Beneficiary as a software developer from October 1, 2022 to September 30, 2025. The Director denied the petition, concluding that the Beneficiary had exhausted their permissible period of time for H-1B admission or stay and did not provide sufficient evidence in the record establishing eligibility for any remainder or recapture time or eligibility for a new six-year period of H-1B time.

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[1] The Director incorrectly stated the Petitioner sought consular notification in their Decision. We conclude that to have been a harmless error.

[2] Additional information regarding the H-1B numerical cap may be found on the USCIS website at https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-cap-season.

[3] Contrary to the Director's assertions, the Beneficiary does not appear to have ever previously been counted against any prior H-1B numerical limitation or cap.

The Beneficiary maintained L-1A classification from August 4, 2017 to March 21, 2019 and again from April 15, 2019 to December 2, 2019. An H or L petition was not filed and approved in favor of the Beneficiary, and the Beneficiary was not present in the United States during the validity of any H or L petition any time after December 3, 2019. The Beneficiary resumed lawful nonimmigrant status in H-4 classification on September 23, 2021.[4] So it appears the Beneficiary has not accrued any time that could count towards an H-1B period of admission after December 3, 2019.

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), sets a six-year, or 2,192 day, limitation on an H-1B nonimmigrant's period of authorized admission or stay. Time spent in the United States in either L-1A or L-1B classification counts towards that limitation. *See* 8 C.F.R. § 214.2(h)(13(iii)(A). Time spent in the United States in L-2 or H-4 classification does not. *See generally* Memorandum from Michael Aytes, Associate Director, Domestic Operations, HQPRD 70/6.2.8, 70/6.2.12, AD 06-29, *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), http://www.uscis.gov/legal-resources/policy-memoranda.

The total elapsed period of the Beneficiary's L-1A stay in the United States amounted to 827 days. Consequently, the Petitioner has not exhausted their maximum allowable time for H-1B classification and are eligible for a remaining period of 1,365 days. So they do not have to depart the United States for a period of one year before reapplying to commence a new six-year period of admission. And the Petitioner's requested period of H-1B validity for the Beneficiary from October 1, 2022 to September 30, 2025, is an elapsed period of 1,096 days, which is less than the total amount of time they have remaining to them. So the Beneficiary appears eligible for the requested period of H-1B admission. The Director's decision will therefore be withdrawn and the matter remanded so that a first-line adjudication consistent with the foregoing analysis may be conducted.

As the Director conducts that first-line adjudication, they may wish to also examine the following issue we have identified in our de novo review. Notably, it appears that the Beneficiary departed the United States on March 14, 2023 and returned on June 20, 2023. Departure generally abandons a request for change of status. *See generally* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, HQ 70/6.2.9, *Travel After filing a Request for a Change of Nonimmigrant Status* (June 18, 2001), http://www.uscis.gov/legal-resources/policy-memoranda. So the Director should conduct a first-line review to evaluate the record and determine whether the Beneficiary remains eligible for a change of status and extension of stay. In so doing, they may wish to examine the issues we have identified above. We express no opinion regarding the ultimate disposition of this petition.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[4] The Beneficiary's nonimmigrant status expired on December 2, 2019. The Beneficiary filed a Form I-539 to change to H-4 nonimmigrant status prior to when their authorized period of stay lapsed on September 14, 2020 when a petition to extend L-1A status filed by the Beneficiary's previous employer was denied. This application was approved in an exercise of favorable discretion nunc pro tunc pursuant to 8 C.F.R. § 248.1(b) on September 28, 2021 granting H-4 status to the Beneficiary effective September 23, 2021.