U.S. Citizenship and Immigration Services

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

In Re: 25551550

Date: FEB. 22, 2023

Appeal of California Service Center Decision

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

The Petitioner seeks to change the employment and extend the stay of 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 noncitizen 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) is a minimum prerequisite for entry into the position.

While the Director of the California Service Center approved the petition, they did so for a shorter period of time than the Petitioner requested. 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.

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. A noncitizen who previously held H-1B status may seek to qualify for a new six-year admission period without regard to any remaining admission period stemming from previous H-1B admissions if they have been outside the United States for more than one year. 8 C.F.R. § 214.2(h)(13)(iii)(A). Noncitizens who seek to qualify for a new six-year admission after having spent a year outside the United States are subject to the H-1B numerical limitations unless they are otherwise exempted. 8 C.F.R. § 214.2(h)(13)(iii)(C)(*2*).

Whether this position is a specialty occupation, whether the Beneficiary is qualified to perform its duties, and whether the Director's exercise of discretion to excuse the early termination of the Beneficiary's three-year period of employment with the health care facility named in the waiver application due to extenuating circumstances was correct 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 September 9, 2022 to September 8, 2025. The Director approved the petition

from September 22, 2022 to January 4, 2025. The Director reasoned in their Limited Validity Notice (Notice) that the Petitioner was requesting recapture time under 8 C.F.R. § 214.2(h)(13)(iii)(C). The Director noted the Beneficiary's previous H-1B employment in the United States between February 19, 2000 and June 19, 2002.

Although the Director provided a calculation of the Beneficiary's absences from the United States since December 19, 2019 in their notice, they did not specify what periods of the Beneficiary's stay in the United States in H-1B status they considered in their calculations. So it is unclear why the Director concluded the Beneficiary was eligible for less than the Petitioner's requested petition validity period.

We note that the Beneficiary was absent from the United States for more than a year (aside from brief trips for business or pleasure) from October 10, 2002 to August 7, 2010. The Beneficiary commenced a new six-year period of H-1B stay when they recommenced H-1B status on December 19, 2019 pursuant to an H-1B petition filed by a previous employer. That petition, like this one, was exempt from the numerical limitations contained at section 214(g)(1) of the Act because the Beneficiary is a former J-1 nonimmigrant physician who received a waiver of the J-1 home residency requirement contained at section 212(e) of the Act under section 214(l).

Without taking into account any absences from the United States from December 19, 2019 to present, the last day of the Beneficiary's six-year period of H-1B validity appears to be December 19, 2025.[1] The Petitioner requested a petition validity until September 8, 2025. The Petitioner's requested validity falls within the maximum allowable time for the Beneficiary's presence in the United States in H-1B status. So the Petitioner appears to be eligible for the requested validity date ending on September 8, 2025. The Director's decision will therefore be withdrawn and the matter remanded so that a first-line adjudication that takes into account the Beneficiary's multiyear absence from the United States may be conducted.

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

[1] The Petitioner has calculated the dates that the Beneficiary has been absent from the United States since December 19, 2019 and concludes that the Beneficiary's maximum H-1B validity is July 10, 2026. As the requested period of validity for this petition falls within a six-year period from the Beneficiary's recommencement of H-1B status without taking his absences into account, we will not evaluate today whether the Petitioner's calculations are correct.