U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23414635

Date: SEP. 26, 2023

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 withdraw the Director's decision and remand the matter for entry of a new decision which considers the analysis below.

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 on appeal is when the Beneficiary's H-1B status began, which will then establish the petition's validity dates. We acknowledge that the validity period of the petition is the subject of this appeal and not the Beneficiary's maintenance of status. Nevertheless, in this particular case, the two issues are closely intertwined. In order to determine the petition's length, we must explore the Beneficiary's status. We therefore provide the below analysis to facilitate an accurate decision.

In the H-1B petition that is the subject of this appeal [redacted] the Petitioner requested employment dates of June 23, 2022 to June 22, 2025. The Director calculated the Beneficiary's time in H-1B status as having begun on October 1, 2016, the day the Petitioner's first H-1B on behalf of the Beneficiary ([redacted]) was approved. The Director added six years to this date and arrived at September 30, 2022. To September 30, 2022, the Director then added 56 days, representing the time during which the Beneficiary was physically present outside of the United States. The Director thus approved the instant petition for a limited period, ending on November 25, 2022. However, based on the record, we cannot conclude that the Director accurately determined the start date of the Beneficiary's H-1B status as having begun on October 1, 2016. In addition, the Director's conclusion that the Beneficiary was eligible for a recapture of 56 days may have been incorrect.[1] Specifically, the record reflects that the Beneficiary exited the United States at a time during which he appears to have held valid and approved post-completion Optional Practical Training (OPT) in F-1 status, and that he reentered the United States in that same status following his travels.

On appeal, the Petitioner submits a brief and additional evidence, and asserts the Director should have approved the petition for a lengthier timeframe. The Petitioner contends that although the Beneficiary had an approved H-1B petition [redacted] covering the period of October 1, 2016 to August 8, 2018, the Beneficiary did not utilize this initial H-1B petition (in other words, that the Beneficiary did not utilize this petition to enter H-1B status). Rather, the Petitioner claims the Beneficiary first entered H-1B status on April 29, 2019, the starting date for the validity period upon which a second H-1B petition ([redacted]) had been approved.[2] In support of the Petitioner's arguments, the Petitioner provides the Beneficiary's various Forms I-20, Certificate of Eligibility of Nonimmigrant Student Status documents, the Form I-797, Notice of Action documents for the Petitioner's H-1B approvals on behalf of the Beneficiary, the Beneficiary's passport stamps

[1] The Director calculated 56 days based upon the Beneficiary's departure from the United States on December 4, 2016, and his arrival back into the United States on January 30, 2017. Neither the day the Petitioner departed the United States, nor the day he returned, is counted as a day to recapture.

[2] On the second question of part 2 on page 2 of the petition, relating to the basis for classification, the Petitioner selected "(b)" to indicate that the Beneficiary is continuing his previously approved employment without change and with the same employer. In question 4, relating to the requested action, the Petitioner selected "(c)" to extend the stay of the Beneficiary because the Beneficiary now holds this (H-1B) status. In section 3, item 3, on page 21 of the petition, the Petitioner indicated that the Beneficiary is "cap exempt" because of "(e)," relating to the Beneficiary requesting an amendment to or an extension of stay for the Beneficiary's current classification. These selections on the Form I-129 reflect that at the time of filing the petition on April 4, 2022, the Petitioner considered the Beneficiary to be in H-1B status.

evidencing his arrivals to the United States in F-1 status for duration of status, abbreviated "D/S," as well as his arrival and departure stamps to and from India.

As stated, the Petitioner contends that the Beneficiary did not begin his H-1B status until April 29, 2019. Accordingly, the Petitioner claims that the Beneficiary is entitled to a full six years from that date, which amounts to April 28, 2025.[3] However, in our de novo review of the record, we conclude that the Petitioner has not offered sufficient evidence to support a finding that the Beneficiary began his H-1B status on April 29, 2019.[4] While the Petitioner may have submitted evidence to establish that the Beneficiary remained in F-1 status when completing his graduate courses at a U.S. university, his OPT, and an additional Science, Technology, Engineering, and Math (STEM) OPT, the Petitioner did not provide sufficient evidence to establish that his H-1B status began on April 29, 2019.

Evidence in the record indicates that the Petitioner had approved OPT for the employer [redacted] from April 19, 2016 to February 7, 2017. Additionally, the record indicates that the Beneficiary had approved STEM OPT, with the employer [redacted] from February 8, 2017 to February 7, 2019.[5] The record contains a March 4, 2020 employment letter from [redacted] stating that the Petitioner began working with [redacted] on May 1, 2016 and ended his employment with [redacted] on March 17, 2017. Along with other employer letters, the record also contains a March 3, 2020 letter from [redacted] stating that [redacted] employed the Beneficiary from June 26, 2017 to September 29, 2017. The below table summarizes the evidence regarding the Beneficiary's employment during the validity period of his F-1 student status.[6]

Form I-20	Start Date	End Date
OPT Approval Period[7]	April 19, 2016	February 7, 2017
STEM OPT Approval Period[8]	February 8, 2017	February 7, 2019
Employer Letters	Start Date	End Date
[redacted]	May 1, 2016	March 17, 2017
	March 23, 2017	June 23, 2017
	June 26, 2017	September 29, 2017
	October 2, 2017	October 30, 2018

[3] On appeal, the Petitioner requests the validity period until April 29, 2025. However, April 29, 2025 would be the first day of the seventh year, rather than the last day of the sixth year. Therefore, even if the Director finds that the Beneficiary began his H-1B status on April 29, 2019, six years added to this date is April 28, 2025.

[4] In the H-1B petition that is the subject of this appeal, filed on April 4, 2022, the Petitioner requested the employment dates of June 23, 2022 to June 22, 2025. On appeal, the Petitioner submits a replacement page 5 of the H-1B petition to request employment dates of June 23, 2022 to April 29, 2025.

[5] Although [redacted] may be "doing business as" [redacted], the Petitioner has not provided sufficient evidence to support this. We acknowledge the March 2020 employment letters from [redacted] a manager at [redacted] however, this is insufficient to establish that [redacted] is doing business under the name [redacted]

[6] It bears mentioning that the referenced employment letters suggest that the Beneficiary may have engaged in employment with unauthorized employers before working for the Petitioner. Specifically, employment letters provided with the original petition state that the Beneficiary worked for [redacted] from March 23, 2017, to June 23, 2017, and [redacted] from October 2, 2017 to October 30, 2018. As the record does not reflect that these are approved OPT employers, we question the status the Beneficiary held while engaging in such employment.

[7] The Beneficiary's Form I-20 states that his authorized employer for post-completion OPT is [redacted]

[8] The Beneficiary's Form I-20 states that his authorized employer STEM OPT is [redacted]

While the Beneficiary may have an F-1 student visa sticker in his passport, his status refers to the formal immigration classification indicated on the his I-94 record. The record includes an I-797A, Notice of Action, which has an I-94 record attached to the bottom of it. The I-797A for the Petitioner's second petition ([redacted] states that the I-94 is valid from April 29, 2019 to July 10, 2019.[9] As the I-797 instruction sheet indicates, "[i]f you are a student planning to reenter the United States within 30 days to return to the same school, review the "Instructions to Students" on Page 3 of Form I-20 before surrendering your replacement I-94." Notably, the Petitioner did not submit a page 3 for any of the Forms I-20 related to the Beneficiary's OPT and STEM OPT. We note that the only page 3 among the Beneficiary's Forms I-20 is one relating to his computer science studies at a U.S. university.[10] Further, the Beneficiary's travel outside of the United States exceeded 30 days.

Consequently, it does not appear that the Director's determination of a validity period until November 25, 2022 was correct.[11] Nor does it appear, however, that the record is sufficient to establish that the Beneficiary is eligible for the requested validity period of June 23, 2022 to June 22, 2025, as requested in the petition [redacted], nor has the Petitioner sufficiently established that it is entitled to the validity dates of June 23, 2022 to April 29, 2025, as it requests on appeal. Because the Director's original decision did not include a discussion of matters relating to when the Beneficiary's F-1 status ended and when the Beneficiary's H-1B status began, we remand the case to the Director to consider these factors and provide a new determination.

II. CONCLUSION

It is the Petitioner's burden to establish eligibility for the requested period. In making a determination as to whether the Petitioner has met its burden, the Director may request any additional evidence considered pertinent to this issue, as well as to any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision which considers the foregoing analysis.

[9] The record does not contain an I-797A for the Petitioner's initial H-1B petition on behalf of the Beneficiary. Rather, the record contains an I-797B for the initial petition, which differs from the I-797A in that it is not issued as a replacement Form I-94. Instead, the I-797B informs the Petitioner of the approval of a noncitizen worker petition but does not necessarily serve as a replacement I-94. It is unclear from the record whether the initial petition has an I-797A associated with it.

[10] This page 3 instructs that "[i]f you need more information concerning your F-1 nonimmigrant student status and the relating immigration procedures, please contact either your foreign student advisor on campus or a nearby Immigration and Naturalization Service office" (all-capital letters removed).

[11] As noted in footnote three, six years from April 29, 2019 would be April 28, 2025.