

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: MAR 04 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center ("the director"), denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to employ the beneficiary full-time and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), determining: (1) the beneficiary would have been employed in the United States for six years, the maximum time allowable in H-1B classification, from the employment start date requested in the petition; and (2) the petitioner had not established that the beneficiary had resided continually outside the United States for one year prior to filing the instant petition.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, counsel's brief, and additional documentation.¹

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition.² Accordingly, the appeal will be dismissed and the petition will remain denied.

I. Facts and Procedural History

United States Citizenship and Immigration Service' (USCIS) electronic records show a different petitioner initially petitioned for H-1B classification on behalf of the beneficiary on August 12, 2004 [REDACTED], and that said petition was approved on August 24, 2004 for a validity period from October 1, 2004 until September 30, 2007. The beneficiary's H-1B classification was then extended from October 1, 2007 until September 30, 2010 ([REDACTED]).

On December 20, 2012, the instant petitioner filed a petition for new employment with the California Service Center ([REDACTED]) seeking to recapture time the beneficiary had spent outside the United States during his previous approved H-1B status. USCIS approved the petition on January 11, 2013, valid from March 4, 2013 until September 30, 2013. The record includes a copy of the beneficiary's U.S Customs and Border Protection Form I-94, Departure/Admission record, with an admission stamp showing the beneficiary was admitted into the United States in H-1B status on March 2, 2013 in a stay authorized until September 30, 2013.

¹ Counsel attaches a Certificate of Amendment filed with the Delaware Secretary of State on April 16, 2013, changing the petitioner's name from [REDACTED]

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner filed the instant Form I-129 on April 1, 2013, seeking (1) new H-1B employment for the beneficiary from October 1, 2013 until August 25, 2016, and (2) to extend the beneficiary's stay in H-1B status as he now holds this status. The director determined that when the beneficiary returned to the United States on March 2, 2013, he chose to be re-admitted as an H-1B nonimmigrant using the remainder of his previously approved six-year admission period without being subject to the numerical H-1B cap. Accordingly, the director found that at the time the instant petition was filed (April 1, 2013), the beneficiary had not resided continually outside the United States for the immediate prior year and thus was not eligible to seek admission as an H-1B nonimmigrant for a new H-1B six-year admission period. Specifically, the director explained:

Where an alien has been absent from the United States for longer than a year but has time remaining on his or her initial maximum period of admission, USCIS will currently allow the alien to choose between being re-admitted for the remainder of the six-year period or admitted as a "new" H-1B alien subject to the H-1B fiscal year numerical limitation.

* * *

To be admitted as a new H-1B alien and be granted a new six-year admission period, the beneficiary would have had to have been counted against a new fiscal year cap number and begun employment on October 1, 2012. In this case, the beneficiary would have been eligible for a new six-year admission period since he was outside of the U.S. for one full-year.

However, at the time the beneficiary returned to the U.S. on March 03, 2013, he chose to be re-admitted as an H-1B non-immigrant using the remainder of his six-year admission period without being subject to the H-1B cap. He was admitted until September 30, 2013.

On appeal, counsel for the petitioner asserts that the petitioner and beneficiary did not have a choice between recapturing time and starting fresh with six new years of H-1B classification, because the cap had been reached at the time of filing the December 20, 2012 extension application ([REDACTED]). Counsel further contends, however, that if the beneficiary's use of the recapture time precludes him from requesting a new six-year admission period, the time the beneficiary spent in the United States from the time of his admission to the date that the instant petition was filed, was only 28 days.³ Counsel asserts that the "28 days" constitutes a

³ USCIS records show the admission date on the beneficiary's Form I-94 is March 2, 2013. The validity period for the extension petition is from March 4, 2013 to September 30, 2013. While 8 C.F.R. § 214.2(h)(13)(i)(A) provides that a beneficiary shall be admitted to the United States in an H classification for up to 10 days before the validity period begins, the beneficiary is not considered to be accruing time in the United States in H-1B status until the date the validity period begins, which in this case was March 4, 2013. Accordingly, the actual time spent by the beneficiary in H-1B classification prior to filing the instant petition during this visit was March 4, 2013 to March 31, 2013, which amounts to 28 days.

"brief trip for business" and does not interrupt the beneficiary's one-year residence abroad. Counsel also notes that the petitioner and beneficiary were acting in good faith when filing for H-1B status and asserts that the ambiguity in USCIS policy should not result in the denial of this petition.

II. Law and Analysis

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years."

In addition, section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), provides in relevant part (emphasis added):

Any alien who has already been counted, within the six years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations *unless the alien would be eligible for a full six years of authorized admission at the time the petition was filed.*

The regulation at 8 C.F.R. § 214.2(h)(13)(i)(B) states, in pertinent part, that:

When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside of the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad.

Further, the regulation at 8 C.F.R. § 214.2(h)(13)(iii)(A) states the following:

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

Section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A), states the following:

The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer.

Accordingly, the plain language of the statute and the regulations indicate that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States in H or L status.⁴

Regarding counsel's first contention on appeal, the AAO finds counsel's assertion unpersuasive that the petitioner and the beneficiary did not have a choice between recapturing time and starting fresh with six new years of H-1B classification because the cap had been reached at the time of filing the December 20, 2012 extension application. We note that section 214(g) of the Act provides in pertinent part the following:

- (1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-

(A) under section 101(a)(15)(H)(i)(b), may not exceed---

* * *

(vii) 65,000 in each succeeding fiscal year

Accordingly, the petitioner had the choice to wait, as all other H-1B petitioners were required to do, and file a new petition for Fiscal Year 2014 (FY14). The petitioner chose instead to file a petition on December 20, 2012 to recapture time from a previously approved H-1B petition – one that was not subject to the H-1B numerical cap as the beneficiary had already been counted for cap purposes under a prior fiscal year's annual limitation. See section 214(g)(7) of the Act.

Having made that choice, counsel is now requesting that USCIS also permit the beneficiary a new six-year period of authorized admission in H-1B status (in three year increments) from the very date the beneficiary will reach his maximum period of authorized admission in the U.S. in H-1B status. Thus, to approve this request to employ the beneficiary for an additional three-year period would, in effect, allow the petitioner to circumvent the six-year time limit set out in section 214(g)(4) of the Act. The petitioner cannot have it both ways. Once the choice to recapture is made, a petitioner may not then seek a new six-year period of authorized admission unless eligibility for that benefit has been established.

In this matter, counsel asserts in the alternative that the time the beneficiary spent in the United

⁴ This conclusion is further supported and explained in a policy memorandum issued by USCIS. See Memorandum from Michael Aytes, Associate Director for Domestic Operations, CIS, Department of Homeland Security, *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*. AFM Update 06-29 (December 5, 2006) (stating that "[i]n AAO Adopted Decision 06-0001, USCIS has confirmed that the six-year period of maximum authorized admission accrues only during periods when the alien is lawfully admitted and physically present in the United States").

States prior to filing the instant petition constitutes a "brief trip for business" and thus is not interruptive of the beneficiary's one-year residence abroad. Counsel contends that the regulation at 8 C.F.R. § 214.2(h)(13)(iii)(A) does not articulate what is meant by *brief trips for business or pleasure*; however, he references statutory language pertaining to cancellation of removal for certain nonpermanent residents. Counsel cites specifically to section 240A(d)(2) of the Act, which states:

Treatment of certain breaks in presence. An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

Counsel claims that this section implies that a "brief trip" is less than 90 days. Counsel also cites Webster's dictionary definition of business as "dealings or transactions especially of an economic nature" and draws the conclusion that an entry on an H-1B visa constitutes a business trip. Upon review, we do not find counsel's claims persuasive.

The issue of what constitutes a brief trip for business or pleasure as set out in 8 C.F.R. § 214.2(h)(13)(i)(B) and 8 C.F.R. § 214.2(h)(13)(iii)(A) must be construed in harmony with the thrust of any related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). In that regard, we also consider the statute's six-year limitation on authorized admission for H-1B beneficiaries as well as the numerical cap for H-1B beneficiaries when considering the meaning of the phrase "brief trips for business or pleasure."

Counsel asserts that no regulation requires a trip for business to the United States to include only aliens who enter the United States on B-1 visas and that section 240A(d)(2) of the Act which defines a break in physical presence in the United States for the purpose of cancellation of removal and adjustment of status for certain nonpermanent residents implies that a brief trip is less than 90 days. However, section 240A(d)(2) of the Act deals with the maintenance of "continuous physical presence" in the United States and not the calculation of physical presence outside the United States. In any event, the actual time associated with a break in physical presence in regard to a number of immigration situations, not just cancellation of removal or adjustment of status, has long been debated. In general, a determination regarding a break in physical presence relies primarily on a determination regarding the intent of the individual in departing the United States and whether the departure was brief, casual, and innocent. *See generally Git Foo Wong v. INS*, 358 F.2d 151 (9th Cir. 1966) (holding that the petitioner's visit to Mexico for two hours did not indicate an intent to depart in a manner which can be regarded as meaningfully interruptive and did not bar him from consideration for suspension of deportation); *see also Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964); and *Matter of Wong*, 12 I&N Dec. 271 (BIA 1967).

We find, similarly, that an examination of the intent of both the petitioner and beneficiary in having the beneficiary enter into the United States on an H-1B visa is necessary to assess whether the beneficiary's entry was a brief trip for business as alleged by counsel. In that regard, it appears that both the petitioner and the beneficiary intended for the beneficiary to be admitted and remain in the United States for H-1B employment until at least September 30, 2013 at the time of his admission on March 2, 2013. The petitioner requested the amount of time the beneficiary could recapture from his previously approved H-1B petition, and the beneficiary was approved to continue to work on an H-1B visa for over six months. For counsel to now assert that the beneficiary's admission into the United States was for a "brief" business trip is untenable.

The Act also describes a nonimmigrant "business visitor" as "an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor . . .) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business" Section 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B). The pertinent regulation elaborating on this statute is set out at 22 C.F.R. § 41.31.

The regulation at 22 C.F.R. § 41.31(b) states the following with respect to temporary visitors for business or pleasure (emphasis added):

(b) Definitions.

(1) The term "business," as used in INA 101(a)(15)(B), refers to conventions, conferences, consultations and other legitimate activities of a commercial or professional nature. It does not include local employment or labor for hire. For the purposes of this section building or construction work, whether on-site or in plant, shall be deemed to constitute purely local employment or labor for hire; provided that the supervision or training of others engaged in building or construction work (but not the actual performance of any such building or construction work) shall not be deemed to constitute purely local employment or labor for hire if the alien is otherwise qualified as a B-1 nonimmigrant. *An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of § 41.53.*⁵ An alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature requiring such merit and ability, but having no contract or other prearranged employment, may be classified as a nonimmigrant temporary visitor for business.

(2) The term pleasure, as used in INA 101(a)(15)(B), refers to legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature.

⁵ The regulation at 22 C.F.R. § 41.53 is applicable to H visa classifications.

In this matter, the beneficiary did not enter the United States as a B-1 visitor for a brief business or pleasure trip but rather as an H-1B nonimmigrant for employment pursuant to a contract. *See Matter of Lawrence*, 15 I&N Dec. 418, 420 (BIA 1975) (finding that the respondent "did not seek to enter the United States for a reasonably short and relatively definite period of time" and therefore, the respondent "was not entitled to enter the United States as a business visitor on the date of his last entry"). Moreover, the very nature of the beneficiary's admission as an H-1B authorized employee establishes that the beneficiary entered the United States as a "nonimmigrant for employment or labor pursuant to a contract or other prearrangement," not to perform temporary business activities that are simply incidental to international trade or commerce. *See Mwongera v. INS*, 187 F.3d 323, 329 (3rd Cir. 1999).

We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this matter, a brief trip for business or pleasure as set out in 8 C.F.R. § 214.2(h)(13)(iii)(A), does not include an admission into the United States to perform authorized employment for a six-month period of time, a period that the petitioner currently seeks to extend for an additional three years. The beneficiary's admission into the United States on March 2, 2013 was to recapture H-1B authorized time in accordance with section 214(g)(4) of the Act and 8 C.F.R. § 214.2(h)(13)(iii)(A). It was not a trip of short duration as a B-1 visitor to engage in business activities incidental to international trade or commerce.

Counsel's further assertion that the petitioner and beneficiary's good faith when filing for H-1B status and the ambiguity in USCIS policy should not result in the denial of this petition is not persuasive. First, the AAO finds no ambiguity in USCIS's policy in this matter. As explained above, USCIS provides a choice of either recapturing time spent in H-1B status *or* seeking a new six-year period of admission in H-1B status when a visa number became available.

Second, while the AAO does not doubt the petitioner and the beneficiary's good faith in the filing of this petition, the petitioner must establish that the beneficiary was physically present and resided outside the United States for the immediate prior year. The director properly reasoned that the beneficiary's stay in the United States in H-1B status in the year immediately prior to filing for the new six-year H-1B classification precludes the establishment of a residence and physical presence outside the United States for the immediate prior year. In response, the petitioner has not established that an admission into the United States in H-1B status is an admission comparable to a brief business trip to the United States as a B-1 visitor, which by a common understanding of immigration law includes a temporary journey to engage in actions relating to business, and does not include employment pursuant to a contract or other prearrangement.

As noted in *Chevron, supra*, at 843, where Congress has not expressed "an intention on the precise question," the agency must provide a reasonable interpretation. Further, to the extent the regulations are ambiguous with regard to the terms "brief" or "business," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v.*

Methow Valley Citizens Council, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

In this matter, we find the beneficiary's admission on an H-1B visa to recapture time interrupts the beneficiary's residence and physical presence outside the United States for the immediate prior year. An entry into the United States on an H-1B visa is for pre-arranged employment and does not constitute a business trip. Even if it did, the beneficiary's trip in this matter was not brief, as it was the beneficiary's clear intent to remain and work in the United States for up to an additional three and a half years at the time the instant petition was filed.

III. Conclusion

The petition will be denied and the appeal dismissed. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.