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U.S. Citizenship
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FILE: SRC 01 241 52322 Office: TEXAS SERVICE CENTER Date: NOV 2 2014

IN RE: Petitioner:
Beneficiary:



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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center 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 petition will be denied.

The petitioner is a public school district that seeks to extend the employment of the beneficiary as an elementary school teacher. The petitioner endeavors to classify the beneficiary 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 petition because the beneficiary had already remained in the United States in H-1B status for six years, the regulatory limit on the classification. On appeal, counsel submits a statement.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A):

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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

At the time the petition was filed, the beneficiary had been in H-1B status for six years, the maximum allowed by the regulations. The director requested additional evidence to establish that the beneficiary had not reached the six-year limit of her H-1B status. In response, counsel submitted a list of the beneficiary's trips outside the United States, along with various documents establishing that she had actually been outside of the country at the listed times. Counsel stated that the beneficiary's employment as a schoolteacher was seasonal, and that she should receive a 514-day extension of H-1B status, the number of days she was allegedly outside the country. The director determined that school vacations are part of the regular work schedule of a teacher, and that the time cannot be reclaimed for purposes of extending the six-year limit. The AAO disagrees with the director.

The regulation states, "An H-1B alien . . . 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." 8 C.F.R. § 214.2(h)(13)(iii). Section 214(g)(4) of the Act states, "In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years." Section 101(a)(13)(A) of the Act states, "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." The plain language of the statute and the regulations indicates that the six-year period accrues after admission into the United States. This premise is further supported and explained by the court in *Nair v. Coultice*, 162 F.Supp.2d 1209 (S.D. Cal. 2001).

The AAO finds that the time that counts toward the maximum six-year period of authorized stay is time that the beneficiary spends in the United States after lawful admission in H-1B status. The beneficiary was admitted to the United States in H-1B status each time she returned from outside the country. The total period for which she could have been in lawful H-1B status in the United States was six years. When she was outside the country, the beneficiary was not in any status for U.S. immigration purposes. By virtue of departing the country, the beneficiary stopped the period that she was in H-1B status, and renewed that status with each readmission to the United States. The director should have determined that the beneficiary's H-1B status could be extended for the total number of days the petitioner proved the beneficiary was out of the country.

The AAO notes that while the petitioner provided documentation to establish some of the periods that she was outside the country, not all of the dates can be established. In addition, all of the documents submitted are in Spanish, without translation. Pursuant to 8 C.F.R. § 103.2(b)(3), any document written in a foreign language must be accompanied by a full English language translation. The AAO also notes that counsel states on appeal that the beneficiary took a leave of absence from her job and was not employed for one school year. If this is true, then the beneficiary may have been out of legal status while in the United States.

The petition still may not be approved, however. The beneficiary was in H-1B status from August 1, 1995 through July 31, 2001. The petitioner filed for an extension of that status on August 1, 2001. The regulations state, "A request for a petition extension may be filed only if the validity of the original petition has not expired." 8 C.F.R. § 214.2(h)(14). Since the petition was filed out of time, it must be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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