



U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

DEC 04 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. The previous decision of the AAO will be affirmed. The petition will be denied.

The petitioner is a nonprofit elementary school that seeks to extend its authorization to employ the beneficiary as an elementary teacher from September 2, 2003 to December 2, 2004. The petitioner, therefore, 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 been employed in the United States in "H" or "L" status for six years since September 1, 1997. The director also determined that the beneficiary was not eligible for benefits under the "American Competitiveness in the Twenty-First Century Act," (AC21) because the labor certification filed on her behalf on December 19, 2002 had not been pending 365 days or more at the filing of the instant petition on August 26, 2003.

The AAO affirmed the director's finding that the beneficiary was not qualified for benefits under section 106(a) of the AC21, or the amended section 106(a) of the AC21, because 365 days had not lapsed since the filing of the labor certification on December 19, 2002. The AAO also found beyond the decision of the director that the record contains insufficient evidence to establish eligibility to recapture "at least 162 days" the petitioner asserts the beneficiary spent outside the United States.

On motion, counsel asserts that the beneficiary is entitled to recapture at least 162 days she spent outside the United States during the validity of her H-1B petition, which would extend her H-1B status through at least February 10, 2004, thereby qualifying her for benefits under AC21.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's request; (4) the director's denial letter; (5) Form I-290B, with counsel's brief and additional evidence; (6) the AAO's decision to dismiss the appeal; and (7) counsel's motion to reopen, including a summary of the beneficiary's time spent outside the United States while in H-1B status and copies of the beneficiary's current and previous passports. The AAO reviewed the record in its entirety before reaching its decision.

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." However, section 106(a) of AC21, as amended, removed the six-year limitation on the authorized duration of stay in H-1B visa status once 365 days or more had passed since the filing of a labor certification or immigrant petition on behalf of the alien.

As amended by § 11030A(a) of DOJ21, § 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of

authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).

(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

Section 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made -

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

On November 2, 2002, the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act) was signed into law and amended section 106(a) of AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment based immigrant; or (2) 365 days or more have passed since the filing of the employment based immigrant petition (Form I-140).

Section 101(a)(13)(A) of the Act states that “[t]he 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 indicate that the six-year period accrues only

during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is supported and explained by the court in *Nair v. Coultice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by the United States Citizenship and Immigration Services (USCIS) that adopts *Matter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005), available at: <http://uscis.gov/graphics/lawregs/decisions.htm>, as formal policy. See Memorandum [REDACTED] Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005).

The AAO notes that the petitioner is in the best position to organize and submit proof of the beneficiary's departures from and reentry into the United States. Copies of passport stamps or Form I-94 arrival-departure records, without an accompanying statement or chart of dates the beneficiary spent outside the country, could be subject to error in interpretation, might not be considered probative, and may be rejected. Similarly, a statement of dates spent outside of the country must be accompanied by consistent, clear and corroborating proof of departures from and reentries into the United States. The petitioner must submit supporting documentary evidence to meet his burden of proof. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On motion, counsel submits the following chart and references to the beneficiary's passport pages pertaining to the beneficiary's physical presence outside the United States:

- June 11, 1998 (page 8) to July 25, 1998 (page 9) = 44 days;
- July 20, 1999 (page 7) to August 10, 1999 (pages 7 and 9) = 21 days;
- June 29, 2000 to August 10, 2000 (page 8) = 12 days;
- Visa issued in London on November 26, 2001 (page 11), re-entry on January 4, 2002 (page 10) = 39 days; and
- End June 2002 to August 22, 2002 (I-94 attached) = 53 days.

In accordance with the statutory and regulatory provisions previously cited, and the judicial decision in *Nair v. Coultice*, the AAO determines that the time the beneficiary spends in the United States after lawful admission in H-1B status is time that counts toward the maximum six-year period of authorized stay. In this case, however, the AAO finds that the beneficiary is ineligible for an extension of status and to recapture the period of time - "at least 162 days" - counsel asserts the beneficiary spent outside the United States. The record contains evidence, namely pages 8 and 9 of the beneficiary's passport, that the beneficiary departed the United States on June 11, 1998 and was readmitted to the United States on July 25, 1998, for a total of 44 days outside the United States. The record also contains evidence, namely pages 7 and 9 of the beneficiary's

passport, that the beneficiary departed the United States on July 20, 1999 and was readmitted to the United States on August 10, 1999, for a total of 21 days outside the United States.

The record, however, does not contain corroborating evidence that the beneficiary departed the United States on June 29, 2000 and was readmitted on August 10, 2000, for a total of 12 days, as asserted by counsel; although counsel refers to page 8 of the beneficiary's passport as evidence of this absence, page 8 contains only a departure stamp for August 10, 2000. The record contains no evidence of the beneficiary's departure on June 29, 2000. The AAO will credit the beneficiary with one additional day outside the United States.

The record indicates that the beneficiary was issued a visa in London on November 26, 2001. The record also indicates that the beneficiary entered the United States on January 4, 2002. The beneficiary's passport does not contain a departure stamp indicating that she was absent from the United States for a total of 39 days during this time period. Further, the record contains no evidence that the petitioner closes down for the entire month of December, or that another teacher assumed the beneficiary's teaching duties during this time period. The petitioner's 2007-2008 school year calendar indicates that the petitioner is closed from 1:00 p.m. on November 21 through November 25, and that the Winter Break is from December 21, 2007 through January 6, 2008. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The AAO will credit the beneficiary with two additional days outside the United States.

The record also contains no corroborating evidence that the beneficiary departed the United States in June 2002 and was readmitted on August 22, 2002, for a total of 53 days. Although the record contains an I-94, Departure Record, reflecting the beneficiary's admission to the United States on August 22, 2002, the record contains no evidence that she departed in June 2002, as asserted by counsel. Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The AAO will credit the beneficiary with one additional day outside the United States. In view of the foregoing, the record contains insufficient evidence to support counsel's assertion on motion that the beneficiary is entitled to recapture at least 162 days she spent outside the United States during the validity of her H-1B petition, which would extend her H-1B status through at least February 10, 2004, thereby qualifying her for benefits under AC21. The total proven number of days the beneficiary spent outside the United States is 69.

The AAO will now consider the beneficiary's eligibility for a one-year extension of H-1B classification under AC21, as amended by the 21st Century DOJ Appropriations Act. The instant petition was filed on August 26, 2003, and the labor certification (case number [REDACTED]) was filed on December 19, 2002. The evidence of record indicates that the beneficiary has been in continuous H-1B status for six years from September 1, 1997 through September 1, 2003. Since the AAO has determined that the beneficiary's period in valid H-1B status, after the recapture of 69 days spent outside the United States, ran until November 9, 2003, the starting date for

the employment period requested in the extension petition should be November 10, 2003. That date was less than 365 days after the labor certification application was filed.

In accordance with a CIS policy memorandum issued by [REDACTED] Associate Director of Domestic Operations, on September 23, 2005 - entitled "*Interim Guidance Regarding the Impact of the Department of Labor (DOL)'s PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year*" - the AAO determines that the beneficiary is not eligible for an exemption from the six-year limitation on her H-1B classification under AC21, section 106(a), or to an extension of her H-1B status for a seventh year under AC21, section 106(b), because the petitioner filed a labor certification application less than 365 days before the starting date of the employment period sought in the extension petition.

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 previous decision of the AAO, dated December 27, 2005, is affirmed. The petition is denied.