



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 05 2015

PETITION RECEIPT #: 

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:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. Please do not mail any motions directly to the AAO.

Thank you.


Ron Rosenberg
Chief, Administrative Appeals Office

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

I. PROCEDURAL HISTORY

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner states that it is engaged in "Custom Computer Software Design, Development, Integration, Migration and other IT related services." In order to employ the beneficiary in what it designates as a software developer position, the petitioner seeks 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 petition, concluding that the beneficiary had exhausted his period of authorized stay in H-1B classification.

The record of proceeding before us 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 Notice of Appeal or Motion (Form I-290B) accompanied by a letter from the petitioner.

Upon review of the entire record of proceeding, we find that the petitioner has not overcome the Director's grounds for denying this petition. Accordingly, the appeal will be dismissed and the petition will remain denied.

II. STANDARD OF PROOF

As a preliminary matter, and in light of the petitioner's references to the requirement that the "preponderance of the evidence" standard be applied in this matter, we affirm that, in the exercise of our appellate review in this matter, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we conclude that the petitioner has not established eligibility for the benefit sought.

III. LEGAL FRAMEWORK

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, the following:

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 (emphasis added):

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 statute and the regulations state that the six-year period accrues only during periods when the individual is lawfully admitted and physically present in the United States in H or L status. This conclusion is further supported and explained in a policy memorandum issued by United States Citizenship and Immigration Services (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) (hereinafter "Aytes Memo").

The December 5, 2006 Aytes Memo summarizes as follows the time limitations on stay in the United States in H-1B or L-1 status:

An alien may be admitted to the United States in H-1B status for a maximum period of six years and in L-1 status for a maximum period of five (specialized knowledge workers) or seven years (managers and executives). *See* INA 214(g)(4) and 214(c)(2)(D) of the Immigration and Nationality Act ("INA" or "Act"). At the end of the maximum period, the alien must either change to a different status (other than from H to L or from L to H) or depart the United States. USCIS regulations provide that an alien who has been outside the United States for at least one year may be eligible for a new six-year period of admission in H-1B status or a new five-year or seven-year period in L-1 status. *See* 8 CFR 214.2(h)(13)(iii)(A) and 214.2(l)(12).

Moreover, part II.C, "H-1B Remainder Option" of the Aytes Memo opens with a review of the limitation on stay in H-1B status in the United States:

Section 214(g)(4) of INA provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." INA section 214(g)(7) provides, in pertinent part, as follows:

Any alien who has already been counted within the 6 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 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

In 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.

The H-1B Remainder Option section provides that when an individual has reached the maximum period of admission, a new petition may be approved only if the individual has remained outside the United States for one year. The section then observes: "The statute, regulations, and current policy guidance, however, do not clearly address situations where an alien did not exhaust his or her maximum six-year period of admission." The H-1B Remainder Option policy is then stated as follows:

There have been instances where an alien who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the "remainder" of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. Pending the AC21 regulations, USCIS for now will allow an alien in the situation described above to elect either (1) to be re-admitted for the "remainder" of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a "new" H-1B alien subject to the H-1B cap.

Specifically, the "remainder" period of the initial six-year admission period refers to the full six-year period of admission minus the period of time that the alien previously spent in the United States in valid H-1B status. For example, an alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31, 2004), and then remained outside the United States for all of 2005, could seek to be admitted in January 2006 for the "remainder" of the initial six-year period, i.e. a total of one year. If the alien was previously counted toward the H-1B numerical limitations in relation to the time that has accrued against the six-year maximum period of admission, the alien would not be subject to the H-1B cap. If the alien was not previously counted against the H-1B numerical limitations (i.e. because cap-exempt), the alien will be counted against the H-1B cap unless he or she is eligible for another exemption.

In the alternative, admission as a "new" H-1B alien refers to a petition filed on behalf of an H-1B alien who seeks to qualify for a new six-year admission period (without

regard to the alien's eligibility for any "remaining" admission period) after having been outside the United States for more than one year. For example, the alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31, 2004), and then remained outside the United States for all of 2005, is eligible to apply for a "new" period of H-1B status based on his or her absence of at least one year from the United States. Most petitioners electing this option will seek a three-year H-1B petition approval, allowing for the possibility of later seeking a three-year H-1B extension. "New" H-1B aliens are subject to the H-1B numerical limitations unless they qualify for an exemption. *See* INA §§ 214(g)(1) and (g)(5).

Moreover, the Aytes memo states the following:

The burden of proof rests with the alien to show that he or she has been outside the United States for one year or more and is eligible for a new six-year period, or that he or she held H-1B status in the past and is eligible to apply for admission for the H-1B "remainder" time. Petitions should be submitted with documentary evidence of previous H-1B status such as Form I-94 arrival-departure records, I-797 Approval notices and/or H-1B visa stamps.

IV. SIX YEAR PERIOD

USCIS records show that the petitioner previously petitioned for H-1B classification on behalf of the beneficiary. The petitioner states that during that the beneficiary was outside the United States from May 5, 2011 until March 4, 2013.

On January 25, 2013, the petitioner filed a petition for new employment with the Vermont Service Center [REDACTED] seeking to recapture the period of time the beneficiary had spent outside the United States. USCIS approved the petition on February 1, 2013, and the petition was valid from February 1, 2013 until June 30, 2014. 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 4, 2013 in a stay authorized until June 30, 2014.

The petitioner filed the instant Form I-129 on April 14, 2014, seeking new H-1B employment for the beneficiary from October 1, 2014 until September 30, 2017.² The Director determined that when the

² We note that the petitioner initially checked box "b" in Part 2, Section 4 of the petition, which requested a change in the beneficiary's status and extension of his stay since he was currently in the United States in another status. The Director questioned this selection in the RFE, noting that the record demonstrated that the beneficiary was currently in H-1B status (the same status the petitioner was currently seeking for the beneficiary) at the time the petition was filed. The petitioner acknowledged that box "a" in this section, which requests consular notification so the beneficiary could obtain a visa or be admitted, should have been checked based on the circumstances of the beneficiary at the time of filing.

beneficiary returned to the United States on March 4, 2013, he chose to be re-admitted as an H-1B nonimmigrant using the remainder of his previously-approved admission period without being subject to the numerical H-1B cap. Accordingly, the Director found that at the time the instant petition was filed, 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 stated:

[A]n alien who was previously admitted to the United States in H-1B status and has remained outside the United States for 1 year or more, but did not exhaust his or her entire 6-year period of admission, may elect to: (1) seek admission as a "new" H-1B alien, be subject to the cap unless he or she qualifies for an exemption, and begin a new 6-year admission period, OR (2) be readmitted for the "remainder" of the initial 6-year period without being subject to the H-1B cap if previously counted. The beneficiary was readmitted for the remainder of his initial six-year period. As he did not seek admission as a "new" H-1B alien, he is not subject to the H-1B cap and not qualified to begin a new six year period.

On appeal, the petitioner asserts that since the beneficiary spent more than 365 consecutive days outside of the United States from May 5, 2011 until March 4, 2013, the beneficiary meets the regulatory requirements and is eligible for a new six-year period of admission in H-1B status under the instant petition. The petitioner's assertions, however, are misplaced.

The petitioner filed a petition for new employment () on January 25, 2013, seeking to recapture the period of time that the beneficiary had spent outside the United States. At the time that petition was filed, the beneficiary was outside the United States and had been absent for more than one year. When the beneficiary returned to the United States on March 4, 2013, he elected to recapture the remainder of the initial six-year period.

The petitioner acknowledges that the beneficiary had been admitted for the remainder of the six-year period under the petition () and confirms that when the current petition was filed on April 14, 2014, the beneficiary was present in the United States and working for the petitioner in H-1B status.

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. When the petitioner filed () on January 25, 2013, the petitioner elected to have the beneficiary re-admitted for the remainder of his six-year period. Having made that choice, the petitioner 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). 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. However, 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.

It appears that the petitioner has misinterpreted the regulatory language by presuming that being outside of the United States for more than one year, at any given time, will permit the beneficiary to petition for a new six-year period of admission in H-1B status. The petitioner, however, 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 in the instant petition precludes the establishment of a residence and physical presence outside the United States for the immediate prior year.

The beneficiary's admission into the United States on March 4, 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). 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. The petition cannot be approved, as the beneficiary was present in the United States in H-1B status for the year immediately prior to the filing of the instant petition.

V. CONCLUSION

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.