U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27032715

Date: JUN 15, 2023

Appeal of California Service Center Decision

Form I-129, Petition for a 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 Director of the California Service Center approved the petition, but for a shorter period than requested. On appeal, the Petitioner submits a brief and additional evidence.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (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 dismiss the appeal.

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. The regulation at 8 C.F.R. § 214.2(h)(13)(iii)(C) indicates:

> *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.

Section 101(a)(l3)(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 individual is lawfully admitted

and physically present in the United States. *See also Matter of IT Ascent, Inc.*, Adopted Decision 06-0001 (AAO Sept.2, 2005); *Nair v. Coultice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001); Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, USCIS, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-l Nonimmigrants (AFM Update AD 05-21)* (October 21, 2005). In other words, contrary to the Petitioner's assertions on appeal, travel days are not eligible for recapture because any day (or portion thereof) in which the Beneficiary is "lawfully admitted and physically present in the United States" counts towards the six-year maximum period of admission.

Details regarding recapture requests, including the types of evidence the Petitioner may submit, are contained at 8 C.F.R. § 214.2(h)(13)(iii)(C)*(1)* which states that:

> *It is the H-1B petitioner's burden to* request and *demonstrate the specific amount of time for recapture* on behalf of the beneficiary. The beneficiary may provide *appropriate evidence*, such as copies of passport stamps, Arrival-Departure Records (Form I-94), or airline tickets, *together with a chart*, indicating the dates spent outside of the United States, and *referencing the relevant independent documentary evidence*, when seeking to recapture the alien's time spent outside the United States. *Based on the evidence provided, USCIS may grant all, part, or none of the recapture period requested.*

(Emphasis added).

Likewise, and as explained in the submitted copy of *Matter of IT Ascent, Inc.*:

> *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 1-94 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.* T*he 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)).

(Emphasis added).

While we acknowledge that the Beneficiary lives near the U.S. border with Mexico and generally drives across the border, this does not relieve the Petitioner of their burden of proof to submit sufficient documentary evidence in support of the recapture request consistent with the above. Upon review of the documentation,[1] including that submitted on appeal, we conclude it is insufficient to establish that the Beneficiary is eligible for any additional recapture time. First, we cannot consider

[1] The Petitioner, who states that they initially submitted 265 pages of documentation, did not provide an accompanying chart, list, or statement identifying which evidence supported which claimed period of absence from the United States.

documents which do not include certified translations as required by 8 C.F.R. § 103.2(b)(3) or the Beneficiary's absences from the United States prior to obtaining H-1B status (such as her trip to [redacted] in September 2016). Second, although the Petitioner submitted a variety of evidence, as explained above, it must substantiate the Beneficiary's claimed exits from and entries into the United States.[2] Similarly, while some of the evidence, such as food delivery receipts and/or other transactions may establish the Beneficiary's presence in Mexico, without accompanying documentation which demonstrates when she arrived and departed, we cannot accurately determine how many days, if any, she is entitled to recapture. Third, there are also inconsistencies between some of the claimed recapture dates and the supporting documentation. For example, the Petitioner indicated the Beneficiary did not leave the United States in April or May of 2020. However, according to the letter from the Administrator of [redacted] in Mexico, "since January 2020, [the Beneficiary] has been a permanent resident of the gated community, entering on Fridays and leaving on Sundays" and that this information was "identified under our electronic access control system" based on the Beneficiary's automobile registered with them. The letter does not address any absences by the Beneficiary. For all these reasons, the Petitioner has not sufficiently established that the Beneficiary is eligible for additional time beyond that already granted by the Director.

Regarding the Petitioner's statement that the Director should have issued a request for evidence (RFE) if "the [p]etition was insufficient for an approval of the requested extension of stay," we note that the extension of stay was approved. The Petitioner has not established that the Director is required to issue an RFE where the petition has been approved.[3]

In light of the above, we will not disturb the Director's decision to limit the validity dates of the H-1B extension.

ORDER: The appeal is dismissed.

[2] For example, hotel and flight reservations without additional supporting documentation, such as copies of the final bill or boarding passes, do not sufficiently demonstrate the Beneficiary's departure from (or reentry into) the United States.
[3] *See generally* Aytes Memorandum, *supra,* at 5.