

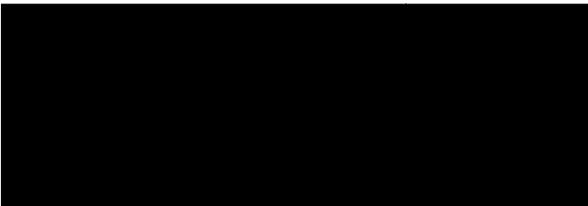
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**U.S. Citizenship
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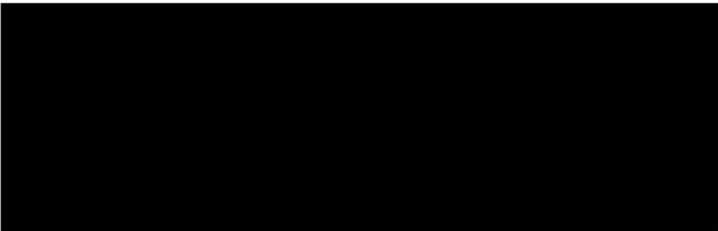
FILE: EAC 05 127 50077 Office: VERMONT SERVICE CENTER Date: DEC 04 2006

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved for an additional five days.

The petitioner is a software consulting firm. It desires to extend its authorization to employ the beneficiary temporarily in the United States as a programmer analyst, at an annual salary of \$75,000, for 94 days. The director determined that the time the beneficiary spent outside the United States during the validity period of his H-1B status would not be considered interruptive of his employment and must be counted towards the beneficiary's maximum stay in the United States.

Counsel submits a brief in support of the appeal. In its brief, the petitioner states that the director should have determined that the petitioner was allowed an extension of the beneficiary's H-1B status for the total number of days that it proved the beneficiary was out of the country.

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), defines an H-1(b) temporary worker as:

an alien . . . who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1) . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1) . . .

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.” [Emphasis added.]

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

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) . . . of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) . . . 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. [Emphasis added.]

The regulation states, “An H-1B alien . . . who has spent six years in the United States under section 101(a)(15)(H) . . . 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). 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 from Michael Aytes, 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)).

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. In this case, the beneficiary was admitted to the United States in H-1B status each time he returned from outside the country. The total period for which he could have been in lawful H-1B status in the United States was six years. When he 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 he was in H-1B status, and renewed that status with each readmission to the United States.

Therefore, counsel has prevailed in his contention that the beneficiary's time outside the United States does not count towards the six-year limit on the time that the statute and regulation places upon an alien's allowable time in the United States in H status. Accordingly, extension of the beneficiary's H-1B status would be justified for the total number of days that the petitioner proves the beneficiary was out of the country. However, still to be decided is the extent to which the evidence of record has substantiated the claimed periods of time outside the United States.

The record reflects that the beneficiary has been in the United States in H-1B status since December 21, 1998 and that he has reached the maximum six-year period of stay. The petitioner submitted a list of dates the beneficiary was outside the United States. The petitioner also submitted a copy of the beneficiary's passport showing he was admitted into the United States on January 3, 1999, April 22, 2001, November 10, 2003 and November 5, 2004. One of the entry stamps in the beneficiary's passport is illegible but for the date (18th) and year (1999). The AAO will accept this stamp as proof of reentry into the United States on one day in 1999. Based upon the evidence of record, the AAO finds that the petitioner has established that the beneficiary was outside the United States for a period of five of the 94 days claimed, the days he reentered the United States.

The petitioner has not provided travel records that corroborate that the beneficiary was outside the United States for the following dates: (1) December 13, 1998 to January 3, 1999 (22 days); (2) October 3 to October 18, 1999 (15 Days); (3) April 7 to April 22, 2001 (15 days); (4) November 1 to November 5, 2001 (5 days); (5) October 25 to November 10, 2003 (16 days); and (6) October 15 to November 6, 2004 (21 days). The record is devoid of passport stamps and travel records regarding the beneficiary's travels outside the United States. The beneficiary's

passport is devoid of foreign entry and exit stamps that coincide with the dates of the beneficiary's reentries into the United States. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The total days for which the petitioner has failed to establish the beneficiary's presence outside the United States is 89. Accordingly, the beneficiary should be credited with five days outside the United States during his periods of H-1B classification.

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 sustained that burden by establishing that the beneficiary was outside the United States for a period of five days. Accordingly, the appeal will be sustained, and the petition to extend the beneficiary's stay in the United States in H-1B classification shall be approved for a period of five days.

ORDER: The appeal is sustained. The petition is approved, so as to extend the beneficiary's stay in the United States in H-1B classification for a period of five days.