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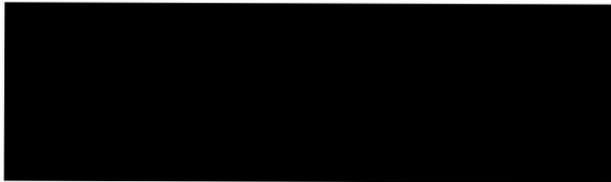
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: EAC 08 087 52674 Office: VERMONT SERVICE CENTER Date: **JUL 21 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

A handwritten signature in black ink that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be approved through July 1, 2008.

The petitioner manufactures and distributes collectible dolls and doll accessories. It seeks to continue the previously approved employment of the beneficiary as an operations manager. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On April 23, 2008, the director denied the extension petition because the beneficiary had remained in the United States in H-1B status for six years and the petitioner had not satisfied the requirements for an extension of stay under the "American Competitiveness in the Twenty-First Century Act," (AC21) and the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ Authorization Act). The director observed that the beneficiary did not have an approved employment-based immigrant visa petition pending as the Form I-140, Immigrant Petition for Alien Worker, (EAC 05 137 52382) filed on the beneficiary's behalf was denied on September 26, 2005 and a subsequently filed appeal had been dismissed on May 4, 2007. Upon review of the record of proceeding, including a motion received by the director on May 23, 2008, the director reopened the matter and issued a decision dated June 12, 2008. The director certified the following issue to the AAO:

Whether the petitioner is entitled to recapture time the beneficiary spent outside of the United States during the beneficiary's initial six-year period of authorized H-1B admission, and also whether the petitioner is entitled to recapture time the beneficiary traveled outside the United States which occurred during an extended period of H-1B stay pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).

The director determined that the petitioner's request to recapture the time the beneficiary spent outside the United States during the initial six-year period of his H-1B nonimmigrant worker stay is approvable.¹ The director recommended that the petitioner's request to recapture the beneficiary's time spent outside the United States which occurred during the extended period of the beneficiary's H-1B stay pursuant to the AC21 section 106 be denied. The director denied the ninth year extension petition. The director certified his decision and recommendation to the AAO for review. Although informed of the opportunity to submit a brief or written statement for consideration of the AAO, the record does not contain a brief, statement, or evidence submitted by the petitioner on certification.

The record of proceeding includes: (1) the Form I-129, Petition for a Nonimmigrant Worker, filed February 4, 2008, requesting approval of a ninth year of H-1B stay in H-1B status; (2) the director's February 12, 2008

¹ The AAO observes that the record does not indicate whether the petitioner requested that the beneficiary be allowed to recapture time spent outside the United States during the initial six-year period in the extension petitions for the beneficiary's seventh and eighth year stay pursuant to AC21. The record does contain evidence that the petitioner requested the recapture of this time in the current extension petition requesting a ninth year of stay pursuant to AC21.

Request for Further Evidence (RFE); (3) counsel's April 3, 2008 response; (4) the director's April 23, 2008 denial decision; (5) counsel's Form I-290B, Notice of Appeal, which the director treated as a motion to reopen; and (6) the director's June 12, 2008 certification decision. The AAO has reviewed the record in its entirety before rendering this decision.

The record of proceeding establishes that the beneficiary was first approved for H-1B classification on January 27, 2000 and that the beneficiary reached the six-year maximum authorized period of admission as an H-1B nonimmigrant on January 26, 2006. *See* section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), which provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." Section 106(a) of AC21, as amended, however, 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 § 11030(A)(a) of the DOJ Authorization Act, § 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 11030(A)(b) of the DOJ Authorization Act amended 106(a) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The Attorney General 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.

Section 106(b)(3) of AC21 indicates that the Attorney General [now Secretary, Department of Homeland Security] shall extend the stay of an eligible alien under Section 106(a) until such time as a final decision is made to grant or deny the alien's application for an immigrant visa or for adjustment of status.

The record shows that the petitioner's Application for Employment Certification (Form ETA 750), filed with the Department of Labor (DOL) on behalf of the beneficiary was accepted for processing on March 25, 2002 and was subsequently certified by the DOL on December 17, 2004. The record further establishes that a Form I-140, Immigrant Petition for Alien Worker, (EAC 05 137 52383) was filed on behalf of the beneficiary on April 12, 2005, that the director denied the Form I-140 on September 26, 2005, and that the AAO dismissed a subsequently filed appeal on May 4, 2007.

Based on this information in the record, the AAO finds that the director properly extended the beneficiary's stay in the United States for a seventh year (January 27, 2006 to January 26, 2007) and an eighth year (January 27, 2007 to January 26, 2008) as 365 days or more had passed since the filing of a labor certification or immigrant petition on behalf of the alien and a final decision had not been reached on the Form I-140 (EAC 05 137 52383) filed on the beneficiary's behalf when those decisions were issued. However, once the underlying Form I-140 (EAC 05 137 52383) was no longer pending when the appeal was dismissed on May 4, 2007 the beneficiary was no longer entitled to an extension of stay in one-year increments under AC21. Under these circumstances, the AAO concurs with the director's determination that a ninth year of H-1B stay pursuant to AC21 section 106 must be denied.

As the director notes in the June 12, 2008 certification decision, however, the recapture of time the beneficiary spent outside the United States while in H-1B classification was not addressed in the April 23, 2008 decision. The AAO observes that in the January 23, 2008 letter submitted in support of the ninth year extension petition, the petitioner sought to recapture 157 days of time that the beneficiary had spent outside the United States during the beneficiary's authorized admission from January 27, 2000 to January 26, 2006 as well as an additional 25 days of time the beneficiary had spent outside the United States during the beneficiary's seventh and eighth year extensions of stay from January 27, 2006 to January 26, 2008. Although the record does not contain evidence that the petitioner had previously sought to recapture this time, this element of the ninth year extension request should have been considered.

Section 101(a)(13)(A) of the Act states: "[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 Coultrice*, 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://www.uscis.gov/files/article/sep0205_02d2101.pdf 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). Thus, the time that

counts toward the maximum six-year period of authorized stay is only the time that the beneficiary spends in the United States when admitted in lawful H-1B status.

The AAO notes that the petitioner is in the best position to organize and submit proof of the beneficiary's departures from and re-entry into the United States. In this matter, the petitioner has provided copies of the beneficiary's passport showing passport departure and arrival stamps and an accompanying chart of dates detailing the days the beneficiary spent outside the United States. Thus, the record contains sufficient information accompanied by consistent, clear and corroborating proof of departures from and re-entries into the United States to demonstrate the time the beneficiary spent outside the United States during the initial six years of authorized stay. Based on the dates provided, the petitioner has shown that the beneficiary spent 157 days outside of the United States during the time period - January 27, 2000 to January 26, 2006. 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. The beneficiary in this matter was admitted to the United States in H-1B status each time he returned from outside the country. When he was outside the United States he was not in any status for U.S. immigration purposes, thus interrupting his period of H-1B status when he departed the country, and renewing his period of H-1B status each time he was readmitted in the United States. The AAO concurs with the director's determination on certification that the beneficiary's H-1B classification should be extended to July 1, 2008, to credit the beneficiary for the 157 days he was outside the United States during the initial six years of valid H-1B status and to complete the six-year maximum authorized period of admission as an H-1B nonimmigrant.

The AAO agrees with the director that the one-year extension of stay in the United States under AC21 as amended by the DOJ Authorization Act is not subject to recapture for time spent outside the United States pursuant to Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). As referenced above, the plain language of the statute and the regulations indicate that the maximum six-year period of stay allowed in H-1B status accrues only during periods when the alien is lawfully admitted and physically present in the United States in H-1B status. When the alien is outside the United States during the first six years of authorized stay in H-1B status, the alien is not accruing time toward the maximum period of stay, and such time is subject to recapture. The one-year extension granted under AC21 is not limited to time spent admitted into the United States following inspection and authorization. Neither the statute nor the regulations allow the expansion of the one-year extension of stay for time spent outside the United States. The AAO concurs with the director's recommendation that the beneficiary's time spent outside the United States that accrued during the beneficiary's extended period of H-1B stay is not subject to recapture.

In this matter, the petitioner's request for a ninth year extension of stay in H-1B status is denied for the reason stated above; the petitioner's request to recapture 157 days of time the beneficiary spent outside the United States during his six-year H-1B classification is approved, thus extending the beneficiary's authorized stay to July 1, 2008; and the petitioner's request to recapture 25 days of time the beneficiary spent outside the United States accrued during the period of the beneficiary's extended stay pursuant to AC21 is denied for the reason stated above.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden regarding the recapture of 157 days which extends the beneficiary's authorized stay to July 1, 2008. The petitioner has not sustained that burden regarding the denial of the ninth year of the beneficiary's extension of stay pursuant to AC21 and has not sustained that burden regarding the denial of the request to recapture 25 days accrued during the beneficiary's extended stay pursuant to AC21.

ORDER: The director's June 12, 2008 decision is affirmed and the petition is approved through July 1, 2008.