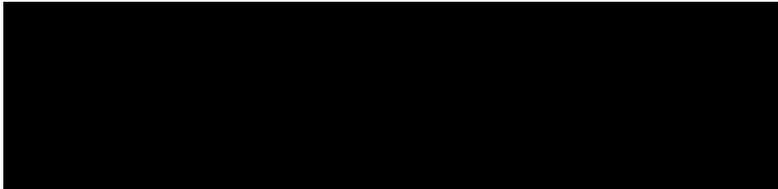


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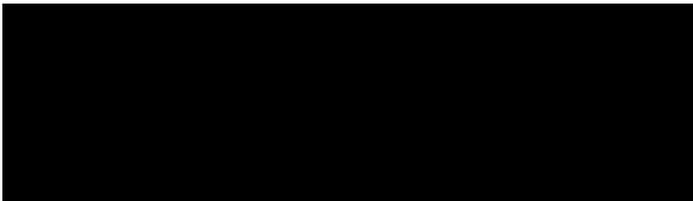
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FILE: LIN 03 274 52487 Office: NEBRASKA SERVICE CENTER Date: **AUG 16 2005**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director approved the nonimmigrant visa petition, valid to October 15, 2005. The petitioner filed a motion to reconsider to amend the validity date to March 1, 2006, to reflect the 138 days the beneficiary spent outside the U.S. while in L-1A status. The director granted the motion and affirmed his previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be approved, valid to October 15, 2005.

The petitioner is a data storage solutions business that seeks to employ the beneficiary as an OEM program manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A):

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.

The record indicates that the beneficiary in this proceeding was afforded L-1A classification on October 15, 1999, and his status was subsequently changed to H-1B classification, valid to October 15, 2005, a total period of six years. On appeal, counsel states that the 138 days the beneficiary spent outside the U.S. cannot be counted in calculating his 6-year limit. The director determined that time spent outside the country during the validity period of a petition must be counted towards the alien's maximum stay in the United States, unless that time was interruptive of the alien's employment. The director stated that time outside the United States that is considered part of a normal work period, such as weekends and vacations, cannot be considered interruptive of employment, and that the time cannot be reclaimed for purposes of extending the six-year limit. The AAO disagrees with the director.

The regulation states, "An H-1B alien . . . 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." 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. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001).

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 or L status. In this case, the record contains a declaration from the beneficiary and a list of his entries into the United States. The petitioner, however, has not submitted corroborating evidence, such as copies of passport stamps or Form I-94 arrival-departure records. For this reason, the requested 138-day extension cannot be granted.

The AAO notes that the petitioner is in the best position to organize and submit the proof of the beneficiary's departures from and reentry into the United States. The submission of copies of passport stamps or Form I-94 arrival-departure records, without an accompanying statement or chart of dates spent out of the country by the beneficiary, would be subject to error in interpretation and would 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. 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)).

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 appeal is dismissed. The petition is approved, valid to October 15, 2005.