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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC-00-227-54117

Office: California Service Center

Date: 14 FEB 2002

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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a rehabilitation facility with 18 employees and a gross annual income of \$935,278. It seeks to continue to employ the beneficiary as an occupational therapist for an additional one year period. The director noted that the beneficiary had been in the United States as a nonimmigrant classified under section 101(a)(15)(H) of the Immigration and Nationality Act (INA) for six years as of May 27, 1999. The director determined that an extension could not be granted because the beneficiary had already been in the United States for a year longer than the allowed six year period.

On appeal, the petitioner argues that the petition should be granted because the beneficiary has had extensive periods of vacation leave during her period of authorized stay.

The record shows that the beneficiary was initially admitted to the United States as an H-1B occupational therapist on May 27, 1993, with stay authorized to April 4, 1996. The beneficiary was subsequently readmitted to the United States on January 12, 1995 with stay authorized to April 14, 1996; on January 14, 1996 with stay authorized to October 18, 1998; on March 14, 1997 with stay authorized to October 18, 1998; on January 3, 1998 with stay authorized to December 31, 1999; and on January 7, 2000 with stay authorized to April 10, 2000.

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), provides, in part, for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h)(15)(ii)(B), an extension of stay may be authorized for a period of up to three years for a beneficiary of an H-1B petition in a specialty occupation. The alien's total period of stay may not exceed six years. In addition, 8 C.F.R. 214.2(h)(13)(iii)(A) indicates that 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) 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 beneficiary has clearly left the United States on several occasions during her period of authorized stay. In a case such as this, the total amount of time that the alien has spent in the classification is determined without regard as to whether or not that time was actually spent in the United States. To do otherwise would not be consistent with the current regulations and would lead to unacceptable reporting and documentation requirements for all concerned.

As the beneficiary has been in the United States in excess of six years and is subject to the limitation of stay pursuant to 8 C.F.R. 214.2(h)(13)(iii)(A), further extension of the visa petition validity may not be granted. Additionally, the beneficiary of this petition must be physically present outside the United States for the immediate prior year before returning to the United States as an H or L nonimmigrant alien.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.