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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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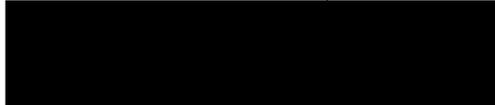


File: WAC 00 226 54668

Office: California Service Center

Date: 15 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:



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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to continue to employ the beneficiary as a software engineer for an additional period of four months. The director denied the petition because the beneficiary has been in the United States in H-1B status in excess of the six year limitation for this classification.

On appeal, counsel states that the beneficiary qualifies for an exception to the six year limitation because he was absent from the United States for a time period equal to that requested. Counsel asserts that the beneficiary is eligible for relief under the American Competitiveness in the Twenty-First Century Act which provides for continued extensions of H-1B status in one-year increments, due to the fact that the beneficiary has had an immigrant visa petition pending for more than one year. Counsel submits a copy of an application for alien employment certification filed in the beneficiary's behalf.

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.

Counsel argues that the beneficiary was absent from the United States for a qualifying period(s) of time. Counsel had forwarded no evidence to support this assertion. It is noted that trips out of the United States for less than one year do not break the continuity of the H-1B classification for calculating the six year period. An H-1B alien may be on vacation, sick leave, maternity or paternity

leave, on strike, or otherwise inactive without affecting his or her status. Finally, the decision in this case is not affected by the American Competitiveness in the Twenty-First Century Act which became effective upon its enactment date of October 18, 2000, subsequent to July 17, 2000, the filing date of this petition.

In this case, the beneficiary had spent over six years in the United States for H-1B classification purposes at the time the visa petition was filed. He is subject to the limitation of stay pursuant to 8 C.F.R. 214.2(h)(13)(iii)(A). The petitioner requested that his status be extended until November 13, 2000. It is found that the director's determination is correct. Granting of the petition as initially requested by the petitioner would have allowed the beneficiary's period of stay in H-1B status to exceed the six year limit.

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.