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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC-00-228-52280 Office: Vermont Service Center Date: 0 7 JAN 2002

IN RE: Petitioner: [redacted]
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)

Public Copy

IN BEHALF OF PETITIONER:

[redacted]

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, Examinations, on appeal. The appeal will be dismissed.

The petitioner seeks to continue to employ the beneficiary for an additional eight-month 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 July 18, 2000. The director determined that an extension could not be granted because the beneficiary had already been in the United States for the allowed six-year period.

On appeal counsel states that this extension should be allowed because the beneficiary was out of the United States for a total of 252 days during the six year period. Counsel argues that the statute and regulations are predicated upon physical presence, not whether or not absences are "meaningfully interruptive."

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.

In a case such as this, the total amount of time that the alien has spent in the classification is determining 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.

Counsel asserts on appeal that, pursuant to the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396), the stay of nonimmigrant aliens in H-1B status can be extended in one-year increments if they are the beneficiaries of an employment-based petition for lawful permanent resident status, pending the adjudication of such petitions. However, this provision pertains only to petitions filed after October 17, 2000, the date of enactment of the legislation. In this case, the petition to extend the beneficiary's H-1B status was filed on June 17, 2000. Therefore, the provision cited by counsel does not pertain to this beneficiary.

As the beneficiary has spent six years in the United States in H-1 classification 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 one 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.