



U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted



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

26 JUL 2002

File: WAC-01-239-56022 Office: California Service Center Date:

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)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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. Weinman, 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 is an electronics manufacturing business with 251 employees and a gross annual income of \$20 million. It seeks to extend its authorization to employ the beneficiary as an SMT manufacturing engineer for a period of 271 days. The director determined that the beneficiary had completed his six years of L-1 and H-1B status respectively (from January 3, 1996 through January 3, 2002) and was not, therefore, eligible for any further extension of his H-1B status.

On appeal, counsel submits a brief and additional documentation.

Section 214(g) (4) of the Act states that:

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.

Title 8 C.F.R. 214.2(h) (13) (iii) (A) states in part that:

An H-1B alien in a specialty occupation or an alien of distinguished merit and ability 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.

Title 8 C.F.R. 214.2(h) (13) (i) (B) states that:

When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a) (15) (H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad. The petitioner shall provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to spend time abroad.

On March 9, 1994, the Acting Associate Commissioner for Examinations issued a policy memorandum further clarifying the question of whether time spent outside of the United States during the validity period of an H or L petition counts toward the alien's maximum period of time in the United States. The Acting Associate Commissioner stated:

It is the opinion of this office that time spent out of the United States during the validity period of a petition must be counted toward the alien's maximum period of stay, provided that the time spent outside of the United States was not interruptive of the alien's employment in the United States. Specifically, periods of time spent outside of the U.S. which are considered to be a normal part of a work year, such as vacations, holidays, and weekends, do not interrupt the alien's employment in the United States since the alien is expected to be able to take time off during the work year. Likewise, short work details to other countries for the United States employer do not interrupt the alien's employment in the United States since travel is common in many industries.

Examples of periods of time spent outside of the United States which are interruptive of an alien's employment in the United States include, but are not limited to, maternity leave, extended medical leave, or long term details to an employment location outside the United States.

The director denied the petition because the beneficiary had completed his six years in L-1 and H-1B status and was not eligible for any further extensions of his authorized stay.

On appeal, counsel asserts that the Service's prior policy of granting extensions of H-1B or L-1 status only when the absences were "meaningfully interruptive" of the beneficiary's nonimmigrant status is erroneous and contrary to the plain meaning of the statute.

In support of his argument, counsel cites Sandeep Nair and Asha Nair vs. Dona Coultice, et al, 162 F. Supp. 2d 1209 (August 10, 2001). In that case, the United States District Court, Southern District of California, noted that the statute is silent on the issue of how the six-year period set forth at section 214(g)(4) of the Act shall be determined. The court found that the plain language of the regulations at 8 C.F.R. 214.2(h)(13)(iii) compels a conclusion that the six-year period only includes time spent physically present in the United States. The court stated that the Service has, in the past, taken the opposite approach, and tolled the six-year period during an alien's absence from the United

States. The court further stated that, since the Service had failed to provide any explanation for its change in policy, the Service's more recent interpretation of a prior policy or statutory interpretation is accorded less deference. However, the court failed to specify the nature of the purported change in Service policy or interpretation of the statute or regulations. The Service has never had a policy of counting days of physical presence to assess whether an alien has reached the statutory limit on his period of admission as an H-1B. Furthermore, the court made no reference to the Service policy memorandum dated March 4, 1994. In view of the foregoing, it cannot be concluded that the finding in the cited case is relevant to the facts of this case.

In this case, the beneficiary was outside the United States for the following periods during his six years of authorized stay in L-1 and H-1B status:

09/06/98 to 10/02/98	25 days
10/04/98 to 11/06/98	32 days
11/10/98 to 12/04/98	23 days
12/06/98 to 02/15/99	70 days
07/01/99 to 07/20/99	18 days
12/21/00 to 04/04/01	103 days

Total number of days absent: 271 days

The petitioner has provided a photocopy of the beneficiary's Mexican passport and airline ticket stubs to document these dates of arrival and departure. However, neither counsel nor the petitioner has provided any explanation or documentation regarding the reasons for the beneficiary's absences outside the United States. The petitioner has not established that the periods spent outside the United States were interruptive of the beneficiary's employment with the U.S. petitioner. Accordingly, the period of time that the beneficiary has spent outside of the United States will not be considered for purposes of an extension. In accordance with 8 C.F.R. 214.2(h)(13)(i)(B), the petition may not be approved.

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.