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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536



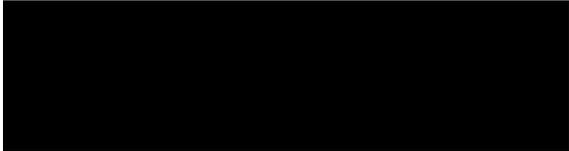
DEC 22 2003

File: WAC 00 018 52917 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)

ON BEHALF OF PETITIONER:



Identifying information related to
this case has been redacted to
prevent an invasion of personal privacy

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software company with 43,800 employees and a gross annual income of \$8.8 billion. It seeks to extend the beneficiary's status for an additional 123 days based on time spent by the beneficiary outside the United States during the time of his H-1B nonimmigrant stay. The director determined that the beneficiary was not entitled to an extension of his H-1B status. In his decision, the director referred to a 1994 Citizenship and Immigration Services (CIS) memo.

On appeal, counsel asserts that the Immigration and Nationality Act (the Act) and Title 8, Code of Federal Regulations, which govern periods of admission for H-1B nonimmigrants support the beneficiary's eligibility for a 123-day extension of his H-1B status.

Pursuant to section 214 (g) (4) of the Act, the period of authorized admission for a H-1B visa holder may not exceed 6 years, with two exceptions mandated by provisions of the American Competitiveness in the 21st Century legislation.¹ Neither the Act nor the regulations provide definitive criteria for calculating the time periods spent outside the United States while in H-1B status and whether these periods of time count or do not count toward the accrual of a six year presence in the United States.

The regulation at 8 C.F.R. § 214.2(h)(13)(iii) does provide guidance on the amount of time a beneficiary must stay outside the United States prior to applying for an extension or another H-1B visa after he or she has spent six years in the United States. The regulation at 8 C.F.R. 214.2 (13)(i)(B) further states that, with regard to individuals seeking a new H-1B visa following a six year stay in the United States as an H-1B beneficiary, brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards the fulfillment of the required time abroad.

The issue in this proceeding is whether the beneficiary is entitled to an extension of his H-1B visa based on his absences from the United States while in H-1B status.

The petitioner, in the addendum to its initial petition, stated that the beneficiary had spent 123 days outside of the United States during his authorized six-year stay in the United States as an H-1B visa holder. The petitioner provided documentary evidence of the beneficiary's entries as a H-1B visa holder into the United States in 1994, 1996, and 1998. The petitioner stated that, since the beneficiary had spent the 123 days outside the U.S., he was eligible for a final H-1B extension until February 29, 2000.

¹ Sections 104 (c) and 106 of AC21 (Pub. L. No. 106-313).

The director denied the petition, referring to 8 C.F.R. § 214.2(h)(12)(ii) and also to a 1994 Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS) memorandum that examined how to calculate the time spent by H-1B and L-1 beneficiaries outside of the United States during their authorized stays in either H-1B or L-1 nonimmigrant status.² The director stated that the petitioner had submitted no evidence to indicate that the three trips outside the United States were other than normal vacations. Based on the CIS memo's interpretation of stays outside the United States, the director determined that the beneficiary had already spent six years in H-1B status and was not eligible for an extension of stay.

On appeal, the petitioner identifies the beneficiary's trips outside the United States as stays in the country of India. Counsel asserts that these periods of time were not periods of admission nor was the beneficiary's authorized time of six years in H-1B status spent while he was outside the United States. Counsel requests that CIS abide by the plain language and plain meaning of the statute that specifies that the six years of H or L time must be "spent" in the United States.

With regard to the procedural guidance for interpreting periods of time outside the United States and how these periods are calculated with regard to the six-year limit for admission as an H or L nonimmigrant, the policy memo previously mentioned by the director states the following:

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 in the United States, provided that the time spent outside of the United States was not interruptive of the alien's employment in the United States. Periods of time spent outside of the United States 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,

² Memorandum from Lawrence J. Weinig, Acting Associate Commissioner, Office of Examinations, *Limitations on Admission of H and L Nonimmigrants*, CO 214h-C (March 9, 1994).

maternity leave, extended medical leave, or long-term details to an employment location outside the United States.

On appeal, the petitioner describes the beneficiary's periods of time spent outside the United States as stays in the country of India. Without more persuasive evidence, the petitioner has not established that these three trips outside the United States would be interruptive of the beneficiary's H-1B status. As such, the beneficiary has reached the end of the validity of his H-1B visa and is not eligible for a further 123-day extension. 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 appeal will be dismissed.

ORDER: The appeal is dismissed.