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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, DC 20536

OCT 28 2003

File: LIN 02 018 53334 Office: NEBRASKA SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:

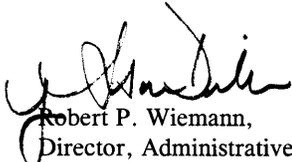
INSTRUCTIONS:

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 nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Denver architectural firm that seeks to extend the beneficiary's H-1B status for a period of three months beyond the six-year maximum limit in that status. The director denied the petition, finding that the petitioner had not established that the time the beneficiary spent outside the United States interrupted his H-1B status.

On appeal, counsel asserts that any time spent outside the United States does not count toward the six-year maximum limit in H-1B status. Counsel states that the approximately three months of total time the beneficiary has spent outside the United States should not be included in his total time in H-1B status.

The issue in this proceeding is whether the petitioner has established that the time the beneficiary spent outside the United States during the validity period of his H-1B visa was interruptive of the beneficiary's employment. Guidance on this matter is found at 8 C.F.R. §214.2(h)(13)(i)(B):

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.

Further instruction is found at 8 C.F.R. §214.2(h)(13)(iii)(A):

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.

Additional information on this issue is found in a memo dated

March 9, 1994, signed by Lawrence J. Weinig, Acting Associate Commissioner for Examinations.¹

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

The record reflects that the beneficiary departed the United States several times during the validity of his H-1B status. He spent no more than one month outside the United States during any given trip, and his total time outside the United States was about three months. The record contains no information regarding the nature of these departures; thus, the record does not establish that they were interruptive of the beneficiary's employment.

Counsel for the petitioner asserts that no time spent outside the United States during the validity period of an H-1B petition should count toward the maximum of six years allowed in this status. Counsel cites *Nair v. Coultice*, 162 F.Supp. 2d 1209 (S.D. Cal. 2001) in support of her position. While 8 C.F.R. § 103.3(c) provides that Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), precedent decisions are binding on all CIS employees in the administration of the Act, federal district court decisions are not similarly binding. As there is no precedent, binding decision that contradicts the above-mentioned memo, the AAO must follow the memo's instruction.

¹ Memorandum from Lawrence J. Weinig, Acting Associate Commissioner, INS Office of Examinations, *Limitations on Admission and H and L Nonimmigrants*, CO 214h-C and 214L-C (March 9, 1994).

The record does not contain any evidence that the petitioner may extend the beneficiary's H-1B status for any other reason, such as eligibility under the provisions of §104 or §106 of the American Competitiveness in the Twenty-First Century Act. Accordingly, it is concluded that the petitioner has not demonstrated that the beneficiary is eligible for an extension beyond the maximum six-year limit on H-1B validity.

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 director's decision will be affirmed.

ORDER: The director's decision denying the petition is affirmed.