

PUBLIC COPY

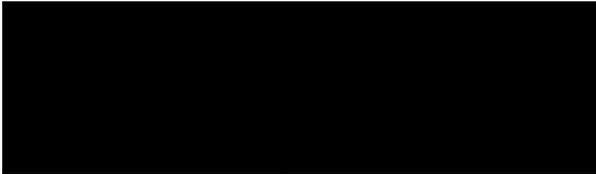
U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DZ



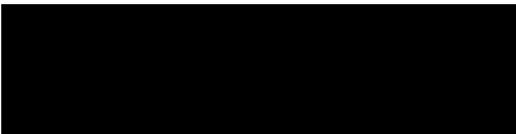
NOV 24 2006

FILE: LIN 00 232 52949 Office: NEBRASKA SERVICE CENTER Date:

IN.RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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 of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director of the Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and, upon consideration of a motion to reopen or reconsider, affirmed its previous decision. The matter is again before the AAO on a second motion to reopen reconsider. The motion will be granted. The previous decision shall be affirmed. The petition will be denied.

The petitioner is a corporation engaged in the business of geotechnical, geological, and environmental consulting. In order to continue to employ the beneficiary as an engineer for a period of three years, the petitioner seeks to extend the beneficiary's classification as a nonimmigrant worker in a specialty occupation 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).

The director determined that the beneficiary had been in H-1B status for a period of more than nine years when the instant petition was filed on August 2, 2000, and that this period had not been interrupted by the beneficiary's residing and being outside the United States for a continuous period of at least one year. Accordingly, the director denied the petition pursuant to 8 C.F.R. §§ 214.2(h)(13)(i)(B) and (h)(13)(iii)(A). The AAO affirmed the director's findings on appeal and in a subsequent motion to reconsider. The instant matter is a motion for the AAO to reconsider its decision on the previous motion.

The regulation at 8 C.F.R. § 214.2(h)(13)(i)(B) states:

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.

The regulation at 8 C.F.R. § 214.2(h)(13)(iii)(A) states:

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.

According to the Form I-797 (Notice of Action) copies in the record, H-1B petitions on behalf of the beneficiary were approved for the following periods: June 24, 1990 to June 23, 1993; June 23, 1993 to June 22, 1996; September 1, 1995 to October 26, 1996; November 19, 1996 to October 1, 1998; and October 1, 1998 to May 15, 2000. On the basis of this information, the director stated:

It is noted from the record that the beneficiary has been in the United States under Section 101(a)(15)(H) of the Act for almost 10 years and has not been outside the United States for an

entire year prior to reentry. Since the beneficiary has remained in the United States in H status for over six years, no further extensions of the petition may be granted.

On appeal, counsel referenced a copy of the beneficiary's passport in asserting that the period from May 7, 1997 to April 12, 1998 was a "period of leave" for the beneficiary that was "essentially one year in duration, and would start a new six-year limit of stay for him as a H-1B beneficiary." Counsel further asserted that the beneficiary was in visitor status from his return from overseas on April 12, 1998 until August 12, 1998, and counsel contended that this time was creditable towards the minimum one year outside the United States that 8 C.F.R. §§ 214.2(h)(13)(i)(B) and (h)(13)(iii)(A) require before an alien can attain H-1B status after exceeding the six-year limitation set forth at 8 C.F.R. § 214.2(h)(13)(iii)(A). Accordingly, counsel contended that the beneficiary was subject to a fresh six-year H-1B status limitation period as of August 12, 1998, and was therefore eligible for the extension petition in question, that was filed less than two years later, on August 2, 2000.

The AAO's January 22, 2002 decision dismissing the appeal relied upon the plain meaning of the language at 8 C.F.R. §§ 214.2(h)(13)(i)(B) and (h)(13)(iii)(A) in concluding that, despite counsel's assertion to the contrary, the beneficiary had not satisfied the aforementioned year-outside-the-United States requirement by the combination of his remaining outside the United States from May 7, 1997 until April 12, 1998, returning to the United States in a visitor status, and not resuming H-1B employment until August 1998.

The subject of the present motion is the February 27, 2003 AAO decision on the petitioner's first motion to reconsider. In affirming the decision it rendered on the appeal, the AAO again determined that the combination of the 1997 and 1998 periods cited by counsel did not amount to the beneficiary's residing and remaining outside the United States for at least one year as mandated by 8 C.F.R. §§ 214.2(h)(13)(i)(B) and (h)(13)(iii)(A).

In reaching its decision on the prior motion, the AAO relied particularly upon this plain and dispositive statement at 8 C.F.R. § 214.2(h)(13)(i)(B): "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." On motion, counsel does not address this conclusive aspect of the decision, which the AAO specifically stated as the reason for affirming its previous decision. Instead, counsel focuses on this additional finding that is not critical to the AAO's decision:

Furthermore, in a letter dated May 28, 2000, the petitioner's president states, in part, as follows:

[The beneficiary] has been working for GN Northern, Inc. since his arrival in this country in May of 1998 . . .

This information conflicts with counsel's assertion that the beneficiary remained in B-2 visitor status until August of 1998 when his H-1B was approved. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence and attempts to explain or reconcile such inconsistencies absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. *Matter of Ho*, 19 I&N Dec. 582. (Comm. 1988).

To rebut this secondary finding, counsel presents a letter from an administrative associate employed by the petitioner. The letter asserts that, contrary to the president's statement, the beneficiary was not working for the petitioner in May 1998. To corroborate her statement, the administrative associate attaches a copy of a document that appears to be the petitioner's May 1998 check register, which does not indicate a check to the beneficiary. It is noted that there is no evidence as to the administrative associate's role in the petitioner's business, and, in particular, no evidence that she is the custodian of the relevant records and therefore the proper and competent person to attest to the authenticity and accuracy of the information which she presents. For this reason alone, the AAO accords no evidentiary weight to the letter and its attachment. Furthermore, the AAO also discounted this additional evidence because it does not explain and resolve the material inconsistency between it and the conflicting statement of the petitioner's president earlier in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

However, even if the AAO were to accept the administrative associate's letter and its attachment at face value, it would make no difference in the outcome of this motion. Whether the beneficiary was in visitor status from April 12, 1998 to August 12, 1998, as counsel asserts, is of no consequence to the validity of the AAO decision on the previous motion. The AAO was correct in affirming its previous decision because that decision was based upon the fact that 8 C.F.R. §§ 214.2(h)(13)(i)(B) and (h)(13)(iii)(A) do not allow counting brief trips to the United States in visitor status as time spent outside the United States. This was a correct determination based on the record then before the AAO, and it remains so regardless of the newly produced evidence from the administrative associate. The earlier decisions in this proceeding all correctly recognized that, by application of 8 C.F.R. § 214.2(h)(13)(i)(B), the period of the beneficiary's presence in the United States in visitor status in 1998 was not creditable for purposes of starting a fresh accounting of time in H-1B status. Accordingly, there are no grounds to disturb the AAO's decision on the previous motion.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The previous decision of the AAO, dated February 27, 2003, is affirmed. The petition is denied.