

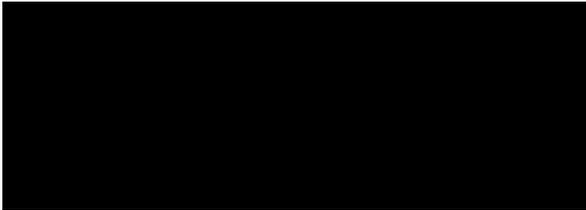
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: APR 11 2005

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 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Nebraska Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a supermarket chain with over 100 stores throughout the Midwest. It seeks to extend its employment of the beneficiary as a systems development manager by 106 days. The director denied the petition because he determined that an extension of the beneficiary's H-1B status would exceed the regulatory six-year limit imposed on the stay of H-1B workers in the United States.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) counsel's appeal of the director's decision. The AAO reviewed the record in its entirety before reaching its decision.

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), defines an H-1B nonimmigrant as "[a]n alien who is coming temporarily to the United States to perform services...in a specialty occupation..." Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) limits the period of authorized admission for such nonimmigrants: "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." This restriction is further explained at 8 C.F.R. § 214.2(h)(13)(iii)(A), which 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.

By the calendar, the beneficiary, who was afforded H-1B status between May 1, 1998 and April 30, 2004, has reached the six-year limit on his authorized stay in the United States. However, at the time of filing, counsel requested that the beneficiary's status be extended for another 106 days, the length of time the beneficiary was outside the United States during the period of his H-1B employment. Counsel submitted a chart outlining the time periods the beneficiary was out of the country, supported by copies of the pages of the beneficiary's passport showing the corresponding admissions stamps and documentation of ticket purchases. The director determined that the time periods the beneficiary had spent outside the United States were comparable to short periods of vacation time that did not terminate or otherwise interrupt employment, and, therefore, counted towards the beneficiary's maximum stay in the United States. He concluded that the beneficiary had reached the six-year limit on his authorized stay as of April 30, 2004. The AAO does not agree.

As noted above, Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), imposes a six-year limit on the "period of authorized admission" of H-1B nonimmigrants. Section 103(a)(13)(A) of the Act, 8 U.S.C. § 1103(A), defines "admission" and "admitted" as "the lawful entry of the alien in the United States after inspection and authorization by an immigration officer." The plain language of the Act, therefore, indicates that the six-year period of H-1B status accrues after admission into the United States. This construction is supported and explained by the Court in *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001).

The AAO concludes that it is only the time that the beneficiary spends in the United States after lawful admission in H-1B status that counts toward the maximum six-year period of authorized stay. When the beneficiary in the instant case was outside the United States, he was not in any status for U.S. immigration purposes. His departures from the United States stopped the clock on the six-year time limit, while his readmissions as an H-1B nonimmigrant restarted it. Accordingly, the AAO finds the documentation submitted at time of filing sufficient to establish that the beneficiary is 106 days short of the maximum limit on his H-1B admission to the United States and withdraws the director's decision.

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 sustained that burden.

ORDER: The appeal is sustained. The petition is approved.