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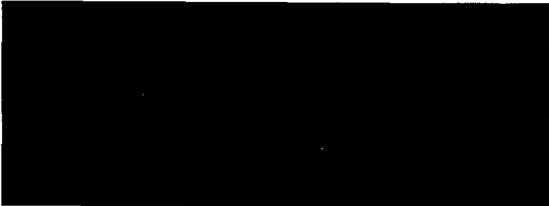


FILE: WAC 03 243 52714 Office: CALIFORNIA SERVICE CENTER Date: **DEC 27 2005**

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:



**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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the service center denied the nonimmigrant visa petition 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 nonprofit elementary school that seeks to employ the beneficiary as an elementary teacher and wishes to continue the beneficiary's previously approved employment without change, and to extend or amend the stay of 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 (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b) from September 2, 2003 to December 2, 2004.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), the validity of petitions and periods of stay in the United States for aliens in a specialty occupation is limited to six years. Furthermore, an alien may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L), 8 U.S.C. § 1101 (a)(15)(H) or (L), unless the alien has been physically present outside the United States - except for brief trips for business or pleasure - for the immediate prior year.

The director denied the petition on the ground that the beneficiary had already been employed in the United States for six years, since September 1, 1997, the maximum time allowable in H-1B classification. The director found that the petitioner failed to establish that the beneficiary qualified for an exemption to the maximum time allowable in H-1B classification under the American Competitiveness in the 21<sup>st</sup> Century Act (the AC21). The director stated that counsel sought to qualify the beneficiary for benefits under the AC21 by submitting a labor certification letter, case number [REDACTED] from the Foreign Labor Certification Office. According to the director, prior to the filing of the instant petition, 365 days or more had not lapsed since the petitioner filed the labor certification; as such, the director concluded that the beneficiary was not eligible for benefits under the AC21.

On appeal, counsel claims that the beneficiary is eligible for benefits under the AC21. According to counsel, the beneficiary's labor certification was filed on December 20, 2002 and with an extension of the beneficiary's H-1B validity period this would create more than 365 days between the filing date of the labor certification and the expiration of H-1B status on February 10, 2004. Counsel also states that the beneficiary is eligible to recapture time spent outside the United States (about 162 days) during her H-1B status since the nature of the beneficiary's employment is seasonal and intermittent: school is not in session during the summer.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation filed on August 26, 2003; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) a letter from the Foreign Labor Certification Office, dated December 20, 2002, indicating a priority date of December 19, 2002 for case number [REDACTED] (5) the director's denial letter; and (6) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

To extend or amend the beneficiary's stay in the United States to December 2, 2004 in the H-1B classification, the petitioner needed to prove that the beneficiary qualifies for benefits under either section 106(a) of the AC21 or the 21<sup>st</sup> Century DOJ Appropriations Act.

Section 106(a) of the AC21 allowed an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six year maximum period when: (1) the alien was the beneficiary of a Form I-140 or an application for adjustment of status; and (2) 365 days or more had passed since the filing of the labor certification that is required for the alien to obtain status as an employment-based immigrant, or 365 days or more had passed since the filing of the Form I-140. Section 104(c) of the AC21 enables H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

On November 2, 2002, the 21<sup>st</sup> Century DOJ Appropriations Act was signed into law. It amended section 106(a) of the AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of the AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any labor certification that is required or used by the alien to obtain status as an employment-based immigrant; or (2) 365 days or more have passed since the filing of the Form I-140. Section 106 of the AC21 allows for H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

Based on the evidence in the record, the beneficiary does not qualify for benefits under section 106(a) of the AC21 or the amended section 106(a) of the AC21.

The instant petition was filed on August 26, 2003. Counsel asserts that the labor certification would have been pending for over 365 days based on the expiration of H-1B status on February 10, 2004; the February 10, 2004 requested ending date of employment reflects the recapture of 162 days spent outside the United States. Counsel's assertion is not persuasive. A recent CIS memorandum discussing section 106(a) of the AC21 indicates that an alien is allowed to obtain an extension of H-1B status beyond the six-year maximum period when 365 days or more have passed since the filing of any application for labor certification that is required or used by the alien to obtain status as an employment-based (EB) immigrant; or 365 days or more have passed since the filing of an employment-based (EB) immigrant petition.<sup>1</sup> The CIS memorandum does not state that it allows for extension of H-1B status beyond the six-year maximum period on the ground that a labor certification would have been pending for over 365 days if the expiration of the requested period in H-1B status reflects the recapture of time spent outside the United States. Thus, the director properly determined that when the instant petition was filed on August 26, 2003, 365 days had not lapsed since the filing of the labor certification (case number 166861) on December 19, 2002.

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<sup>1</sup> See Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by American Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313)*. HQPRD 70/6.2.8-P (May 12, 2005).

As related in the discussion above, the petitioner has not established that the beneficiary is eligible to extend his stay in the H-1B classification beyond the six-year maximum period.

Beyond the decision of the director, the AAO notes that the petitioner also seeks to extend the beneficiary's stay by an additional period of time that the beneficiary spent outside the United States. On appeal, counsel asserts that the beneficiary is eligible to recapture time spent outside the United States (at least 162 days) during her H-1B status since the nature of the beneficiary's employment is seasonal and intermittent. The director did not address counsel's assertion although it had been previously raised in an August 25, 2003 letter as well as the petitioner's August 12, 2003 letter.

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years." [Emphasis added.] The regulation at 8 C.F.R. § 214.2 (h)(13)(iii)(A) states, in pertinent part, that:

An H-1B alien in a specialty occupation . . . 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 . . . . [emphasis added].

Section 101(a)(13)(A) of the Act states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer." The plain language of the statute and the regulations indicates that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is further supported and explained by the court in *Nair v. Coulitce*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001).

On October 21, 2005, Michael Aytes, Acting Associate Director for Domestic Operations, signed a memo entitled, "Re: Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants (AFM Update AD 05-21)." The memo begins, "USCIS Headquarters continues to receive inquiries from the public concerning the proper interpretation of § 214(g)(4) of the Immigration and Nationality Act ("INA") and 8 CFR § 214.2(h)(13), which relate to the maximum period of admission for H nonimmigrants. Petitions for aliens classified as H-1B nonimmigrants who have spent the maximum period of time in the United States permitted by statute in H-1B status may not be approved unless they have remained outside of the United States for the specific period of time referenced in the related regulation."

The record shows that the beneficiary entered the United States in H-1B classification on September 1, 1997. The record reflects that the approval notices have the following validity periods: LIN-97-157-50766 from September 1, 1997 to August 30, 2000; LIN-00-219-51473 from August 21, 2000 to August 20, 2003; and WAC-01-228-56467 from August 15, 2001 to September 1, 2003. An August 12, 2003 letter from the petitioner states that the beneficiary was employed during the regular school year from September to early June of the following year. The petitioner seeks to recapture at least 162 days – which would extend the

beneficiary's H-1B classification to December 2, 2004 – based on time the beneficiary spent outside the United States during the summer school session.

In accordance with the statutory and regulatory provisions previously cited, and the judicial decision in *Nair v. Coultice*, the AAO determines that the time the beneficiary spends in the United States after lawful admission in H-1B status is the time that counts toward the maximum six-year period of authorized stay. The submitted evidence in this case, one arrival/departure card and illegible copies of passport stamps, however, are inadequate to establish the beneficiary's departures from and reentry into the United States.

The AAO notes that the petitioner is in the best position to organize and submit proof of the beneficiary's departures from and reentry into the United States. Copies of passport stamps or Form I-94 arrival-departure records, without an accompanying statement or chart of dates the beneficiary spent outside the country, could be subject to error in interpretation, might not be considered probative, and may be rejected. Similarly, a statement of dates spent outside of the country must be accompanied by consistent, clear and corroborating proof of departures from and reentries into the United States. The petitioner must submit supporting documentary evidence to meet his burden of proof. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petition may not be extended as the submitted evidence is insufficient to establish eligibility to recapture time the petitioner asserts the beneficiary spent outside the United States. The petitioner has failed to submit legible copies of passport stamps or other evidence to establish the beneficiary spent at least 162 days outside the country. For this additional reason, the petition may not be approved.

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 failed to sustain that burden.

**ORDER:** The appeal is dismissed. The petition is denied.