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MAR 08 2005

FILE: EAC 04 097 50073 Office: VERMONT 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 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 service center director 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 health benefits management company that seeks to extend the employment of the beneficiary as a programmer/analyst. The petitioner endeavors to classify the beneficiary 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).

The director denied the petition because the beneficiary had already remained in the United States in H-1B status for six years, the regulatory limit on the classification. On appeal, counsel submits a statement.

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A):

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 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The beneficiary in this proceeding was in H-1B status from February 14, 1998 through February 14, 2004, a period of six years, which is the maximum allowed by the regulations. At the time the instant petition was filed, counsel submitted documentation establishing that the beneficiary had been outside the United States for short periods during the six years. Counsel stated that the beneficiary's H-1B status should be extended by the same number of days that he was outside the country. The director determined that time spent outside the country during the validity period of a petition must be counted towards the alien's maximum stay in the United States, unless that time was interruptive of the alien's employment. The director stated that time outside the United States that is considered part of a normal work period, such as weekends and vacations, cannot be considered interruptive of employment, and that the time cannot be reclaimed for purposes of extending the six-year limit. The AAO disagrees with the director.

The regulation states, "An H-1B alien . . . 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." 8 C.F.R. § 214.2(h)(13)(iii). Section 214(g)(4) of the Act states, "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." Section 101(a)(13)(A) of the Act states, "The 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 after admission into the United States.

This premise is further supported and explicated by a federal district court in *Nair v. Coultime*, 162 F.Supp.2d 1209 (S.D. Cal. 2001).

The time a beneficiary spends in the United States is dependent on the period(s) of lawful admission. The beneficiary was admitted to the United States each time he returned from outside the country. The total period for which he could have been in lawful H-1B status in the United States was six years. When he was outside the country, the beneficiary was not in any status for U.S. immigration purposes. By virtue of departing the country, the beneficiary broke the period that he was in H-1B status, and renewed that status with each readmission to the United States. The director should have determined that the petitioner was allowed an extension of the beneficiary's H-1B status for the total number of days that it proved the beneficiary was out of the country.

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.