

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2

FILE: LIN 04 017 53502 Office: NEBRASKA SERVICE CENTER Date: **DEC 04 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved for 74 days.

The petitioner is involved in oil and gas exploration, environmental cleanup, and property restoration. It seeks to extend the employment of the beneficiary as its president and to classify him 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 found that the beneficiary had reached the six-year maximum authorized period of admission as an H-1B nonimmigrant and denied the petition. On appeal, counsel asserts that the beneficiary is entitled to recapture 435 days he spent outside the United States during the validity of his H-1B petition.

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].

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 regulation states, “[a]n 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, “[i]n 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 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 indicate 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 supported and explained by the court in *Nair v. Coultice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by the United States Citizenship and Immigration Services (USCIS) that adopts *Matter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005), available at: <http://uscis.gov/graphics/lawregs/decisions.htm>, as formal policy. See Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005).

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 its burden of proof. *See Matter of Soffci*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO finds that the time that counts toward the maximum six-year period of authorized stay is time that the beneficiary spends in the United States after lawful admission in H-1B status. In this case, the beneficiary would have been admitted to the United States in H-1B status each time he may have 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. If 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 would stop the period that he was in H-1B status, and renew that status with each readmission to the United States. An extension of the beneficiary's H-1B status would be justified for the total number of days that the petitioner proves the beneficiary was out of the country.

Counsel has prevailed on her contention that any of the beneficiary's time outside the United States during the periods of approved H-1B petitions would not count toward the maximum period of stay in H or L status. One issue remains, namely, how much time, if any, should be credited to the beneficiary as established time-out-of-the-country. This is an evidentiary question to be decided by the evidence of record. For reasons discussed below, the AAO finds that the petitioner has established the basis of its extension petition, namely, that the beneficiary should be credited 61 days and that his time in H-1B status and authorized stay should be extended by that amount of time.

The record reflects that the beneficiary has been in the United States in H-1B status from December 8, 1997 through December 8, 2003, and has reached his six year maximum period of stay. The petitioner states that the beneficiary was out-of-the-country for a total of 435 days, from August 2, 1998 until November 27, 2003. In support of that assertion, the petitioner submitted a chart detailing the dates the beneficiary left the United States and the dates of his return, totaling 435 days. The petitioner also submitted a copy of the beneficiary's passport bearing various departure and arrival stamps. Some of the stamps in the passport, however, are illegible. The AAO was able to identify 10 entry dates from U.S. Immigration stamps. No corresponding stamps could be identified for these dates, however, for the beneficiary's departure from the United States, which would establish the total time the beneficiary was outside the United States for these dates. The beneficiary is entitled to recapture 10 days based on these entry stamps.¹ The AAO was able to identify five departure stamps which match entry stamps and coincide with the information provided by the petitioner on its chart summarizing the beneficiary's departure and return to the United States. The beneficiary is entitled to recapture an additional 64 days based on this information.² In total the AAO finds that the beneficiary is entitled to recapture a total of 74 days based upon the current record. The petitioner did not provide any additional information in support of its claim, such as airline-tickets, travel itineraries, etc.

The burden of proof in these proceedings rests solely with the petitioner. *See* 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 for 74 days.

¹ August 24, 1998; October 14, 1999; July 20, 2000; July 12, 2001; September 26, 2001; November 2, 2001; December 23, 2001; March 23, 2002; April 30, 2002; April 30, 2003.

² December 27, 2000 – January 5, 2001; April 19, 2001 – April 29, 2001; May 26, 2002 – June 9, 2002; January 8, 2003 – January 18, 2003; May 28, 2003 – June 13, 2003;