



U.S. Citizenship
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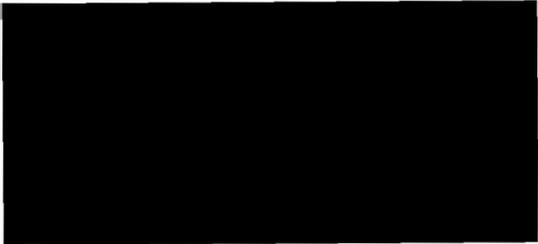
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FILE: LIN 04 198 51969 Office: NEBRASKA SERVICE CENTER Date: **JUL 17 2006**

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. Wieman, Chief
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 an IT consulting and programming firm that seeks to extend the employment of the beneficiary as a senior software engineer and to continue his 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).

The director denied the petition because the beneficiary had already reached the six-year maximum limitation on H-1B status.

On appeal, counsel contends that the director erred in determining that the beneficiary could not recapture the 106 days he had spent outside the United States while in H-1B status. Counsel further asserts that the beneficiary is eligible for an extension of his H-1B status under the American Competitiveness in the Twenty-First Century Act (AC-21), as amended by the Twenty-First Century Department of Justice Appropriations Act (DOJ-21).

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.” However, AC-21 removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

- (a) **EXEMPTION FROM LIMITATION** – The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(B) of such Act (8 U.S.C. § 1101 (a)(15)(H)(i)(B)), if 365 days or more have elapsed since the filing of any of the following:
 - (1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).
 - (2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

Section 11030(A)(b) of DOJ-21 amended section 106(a) of AC-21 to state the following:

- (b) **EXTENSION OF H-1B WORKER STATUS** – The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one year increments until such time as a final decision is made –
 - (1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

- (2) to deny the petition described in subsection (a)(2); or
- (3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

The regulation at 8 C.F.R. § 214.2(h)(14) further provides that: "A request for a petition extension may be filed only if the validity of the original petition has not expired."

The record of proceeding before the AAO includes (1) Form I-129 and supporting documentation; (2) the director's decision; and (3) Form I-290B, an appeal brief, and supporting materials.

In his decision, the director noted that the beneficiary was first accorded H-1B classification on July 7, 1998 and that he would reach his six-year limit on July 6, 2004. In 2002, a petition was filed on the beneficiary's behalf that accorded him H-1B classification until August 26, 2004. At that time, the beneficiary was permitted to "recapture" 32 days he spent outside of the United States during his six years in H-1B status. The petitioner filed the instant petition on June 29, 2004 requesting an extension of the H-1B petition and asking that the beneficiary be allowed to recapture 106 days spent outside the United States between September 29, 1999 and January 4, 2004. The director found that the beneficiary had incorrectly been allowed to recapture the 32 days he spent outside the United States under 8 C.F.R. 214.2(h)(13)(iii)(A).

Service records show that the beneficiary's application for change of status and his H-1B petitioner were approved from July 7, 1998 to July 6, 2001. A second petition was approved from March 10, 2000 to February 6, 2003. **The third petition was valid from February 7, 2003 to August 26, 2004. Counsel asserts that the beneficiary was out of the country for a total of 106 days during his stay in H-1B status, which would extend the validity of his latest H-1B petition to October 20, 2004. On June 29, 2004, based on this calculation, counsel filed the instant request for extension of the six-year limit based on the fact that the petitioner had filed a labor certification application (Form ETA-750) on behalf of the beneficiary on October 3, 2003.**

Prior to its consideration of the petitioner's eligibility to extend the petition under AC21, as amended by DOJ 21, the AAO will consider whether the beneficiary is entitled to recapture any days spent outside the United States. According to counsel, the beneficiary spent 106 days outside the United States during the six years after his first H-1B petition was approved on August 19, 1998. These days should be recaptured, counsel asserts, thereby extending the end date of the beneficiary's six-year H-1B period by 106 days, or to October 20, 2004, by the AAO's calculation. This would also make the beneficiary eligible for a seventh-year extension of his H-1B classification under AC21, counsel contends, because more than 365 days elapsed between the filing of the labor certification application on October 3, 2003 and the end of the beneficiary's H-1B status 106 days later, or on October 20, 2004.

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. 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 (CIS) 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 [REDACTED] 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel asserts that the beneficiary was outside the United States on four different occasions between September 29, 1999 and January 5, 2004. Counsel submits a chart of dates the beneficiary spent outside the United States on these occasions but does not submit any documentation in support of the claimed travel.

These absences from the United States, if properly documented, would total 106 days. 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 beneficiary in this case was admitted to the United States in H-1B status each time he returned from outside the country. When he was outside the United States he was not in any status for U.S. immigration purposes. Thus, the beneficiary interrupted his period of H-1B status when he departed the country, and renewed his period of H-1B status each time he was readmitted to the United States. Based on the evidence before it, however, the AAO is unable to verify that the beneficiary was outside the country on the dates listed in the submitted chart. Therefore, the beneficiary is not entitled to recapture 106 days and to extend the period of his H-1B classification to October 20, 2004. Accordingly, the beneficiary's H-1B classification terminated as of August 26, 2004.

Counsel also asserts that, while the request to recapture was pending, the beneficiary became eligible for a seventh year extension of his H-1B status. The AAO does not agree.

The beneficiary would have become eligible for an extension of his H-1B status under the provisions of AC-21, as amended, on October 3, 2004, i.e., 365 days from the date the petitioner filed the Form ETA-750. However, the beneficiary was no longer in H-1B status on that date. His H-1B status terminated August 26, 2004 as previously discussed. As the beneficiary was not in status on the date he would have become eligible for an extension under AC-21, he cannot benefit from its provisions. See 8 C.F.R. 214.2(h)(14).¹

¹ The AAO notes that, in accordance with a CIS policy memorandum issued by [REDACTED] Associate [REDACTED] on September 23, 2005 – entitled “*Interim Guidance Regarding the Impact of the Department of Labor (DOL)’s PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, Duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6th Year*” – the beneficiary could have been eligible for an exemption from the six-year limitation on his H-1B classification under AC-21, section 106(a), and an extension of his H-1B status for a seventh year under AC21, section 106(b), had the petitioner established the beneficiary's time outside the United

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

States. With the recapture of 106 days, the beneficiary would have been in H-1B status on October 3, 2004, the date on which the labor certification application filed by the petitioner would have been pending 365 days.