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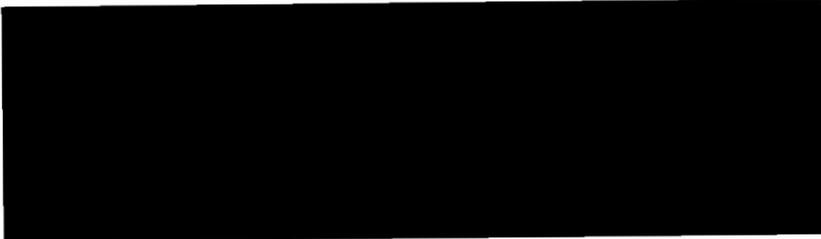
FILE: LIN 05 044 51869 Office: NEBRASKA SERVICE CENTER Date: **JUL 21 2006**

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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary as a programmer analyst and to extend by 127 days 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 on the ground that the beneficiary had already been employed in the United States for six years, the maximum time allowable in H-1B classification. The director found that the 127 days that the beneficiary spent outside the country before the expiration of that six-year period were not entitled to be recaptured as they were brief absences for business or pleasure. Thus, the director concluded that the beneficiary was not entitled to an extension of his H-1B classification for those days.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) the Form I-290B and the brief. The AAO reviewed the record in its entirety before issuing its decision.

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. Coultime*, 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 director stated that the beneficiary entered the United States in H-1B classification on December 6, 1998 and maintained continuous H-1B status until December 6, 2004. On December 1, 2004 the petitioner filed an H-1B extension application with the Nebraska Service Center seeking to recapture an additional 127 days – which would extend the beneficiary’s H-1B classification to April 13, 2005 – based on time the beneficiary spent outside the United States. The service center director did not allow for recapture of the time spent outside the United States as he stated that the absences were brief and were for business or pleasure.

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, if proved, the beneficiary would have interrupted his period of H-1B status when he departed the country, and would have renewed his period of H-1B status each time he was readmitted in the United States. If proved, the beneficiary would be entitled to recapture any time spent outside the United States during the pendency of his H-1B visa status.

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, along with cross-references to the dates on the passport pages reflecting the time the beneficiary spent outside the country. 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 submitted affidavit from the beneficiary indicates that he was outside of the United States on five separate occasions for systems/project implementation. The affidavit is not sufficient evidence in establishing the time spent abroad, however, as the petitioner failed to submit proof of the beneficiary’s departures from and reentry into the United States. Accordingly, the beneficiary is not entitled to additional days in H-1B classification.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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