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**U.S. Citizenship
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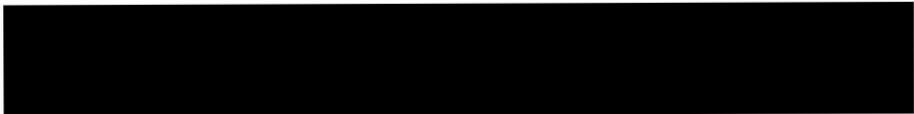
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FILE: SRC 03 213 51644 Office: TEXAS SERVICE CENTER Date: **MAY 04 2006**

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 director of the Texas 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 real estate and investment company that seeks to continue its employment of the beneficiary as an assistant financial manager. The petitioner endeavors to continue the beneficiary's H-1B classification and extend his stay 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 he determined that the beneficiary had already been in the United States in H-1B status for six years, the statutory and regulatory limit on the classification, and that the evidence submitted by the petitioner regarding the beneficiary's absences from the United States during the periods of his H-1B status did not establish that the beneficiary's stay was "interruptive of the beneficiary's stay in the United States."

On appeal, counsel correctly argues that the beneficiary's absences from the United States during the periods covered by an approved H-1B petition should not count against his time in H-1B status.

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, "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 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 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 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-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 failed to establish the basis of its extension petition, namely, that the beneficiary should be credited for 281 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 continuously maintained H-1B classification during the period August 1, 1997 to July 30, 2003. The petitioner has filed the instant request for extension in order to continue the beneficiary's employment in H-1B status for the 281-day period of July 31, 2003 to May 6, 2004.

Documents submitted by the petitioner to substantiate its assertions that the beneficiary was outside the United States for 281 days include copies of the following: (1) a two-page table entitled "Days Absent from the USA for [the Beneficiary]," that contains 43 lines of entries for "Year," "Date Exited," "Date Re-Entered," "Place," and "Days Absent"; (2) the beneficiary's passport that includes 27 pages of entry and exit stamps; (3) 18 pages of the beneficiary's corporate credit card record; (4) a one-page record of transactions in a direct deposit account of the beneficiary for the period November 21, 1998 through December 18, 1998; (5) nine pages of flight mileage

activities by the beneficiary under the American Airlines Advantage Program; (6) three pages of the beneficiary's account and activity summaries under the Marriott Rewards Program; (7) a two-page Hilton Hotel Member Stay record regarding the beneficiary; (8) three airline boarding passes; (9) a bill issued to the beneficiary from the JW Marriott Hotel in Mexico; (10) a bill issued to the beneficiary from the Hilton Internacional De Venezuela; and (11) two pages of miscellaneous receipts.

The petitioner has not identified or cross referenced each of the claimed 43 separate out-of-country periods with whatever entries may support them from among the above listed 67 items of documentary evidence. The burden of proof resides solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Demonstrating the value of voluminous entries towards proving the authenticity of 43 separate periods from two to 16 days is part of that burden. The petitioner has not met that burden.

As the petitioner has not sustained its burden of proof in accordance with section 291 of the Act, 8 U.S.C. § 1361, the appeal will be dismissed.

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