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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: SRC 05 024 50920 Office: TEXAS SERVICE CENTER Date: **SEP 26 2006**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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.

[Handwritten signature]

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 virtual (www.) business involved in the sale of computers and peripherals, and providing technical support, training, web design and consulting. The petitioner endeavors to continue the beneficiary's H-1B classification and to 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. The director determined further that the petitioner had failed to establish that any absences from the United States during the period of the beneficiary's H-1B status were interruptive of the beneficiary's stay in the United States.

On appeal, counsel asserts that any absences from the United States during the periods covered by an approved H-1B petition should not counted against the beneficiary's 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.]

Pursuant to Title 8 of the Code of Federal Regulations (8 C.F.R.) section 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.

Section 101(a)(13)(A) of the Act states in pertinent part 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 after admission into the United States. This premise 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 (CIS) that adopts *Matter of I-*, CIS 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*. HQPRD 70/6.2.8, 6.2.12, AFM Update AD 05-21 (October 21, 2005). Specifically, the memorandum provides that:

[T]ime spent outside of the United States during the validity of an H-1B petition may be added back, or “recaptured” to the period of stay allowed as an H-1B without demonstration that the time spent outside the U.S. was meaningfully interruptive. The applicant need only demonstrate that he or she was outside the U.S. for the period of time requested.

The memorandum provides further that:

Henceforth, any days spent outside of the United States during the validity period of an H-1B or L-1 petition will not be counted toward the maximum period of stay in the United States in H-1B or L-1 status, provided that the alien is able to submit independent documentary evidence establishing that he or she was in fact physically outside of the United States during the day(s) for which the alien is seeking recapture. The burden of proof rests with the alien to establish his or her eligibility for any recapture benefits.

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 thus 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 beneficiary’s maximum period of stay in H-1B status. The issue remains, however, of 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’s time in H-1B status and authorized stay should be extended from November 5, 2004 through March 27, 2005.

The record reflects that the beneficiary continuously maintained H-1B classification during the period between November 6, 1998 and November 5, 2004. The petitioner has filed the instant request for extension in order to continue the beneficiary’s employment in H-1B status to March 27, 2005.

As evidence of the beneficiary's presence outside of the United States during the time period in question, the petitioner states in the Form I-129, and in an October 30, 2004, Amended Petition and Extension letter, that the beneficiary was outside of the U.S. due to employment layoffs during the following periods:

February 2 – April 23, 2000.

May 7 – May 19, 2001.

March 5 – March 22, 2002.

April 8 – April 19, 2002.

May 6 – May 17, 2002.

June 3 – June 14, 2002.

The Amended Petition and Extension letter adds that, “[t]he above dates are only estimates because I do not have specific travel records.” The record contains no other information or evidence to establish that the beneficiary was outside of the United States, or that he was readmitted into the United States at any time during the validity period of his H-1B visa.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Documenting the beneficiary's physical absence from the U.S. during the requisite time period is part of that burden. In the present matter, the petitioner failed to submit any documentary evidence to establish that the beneficiary was in fact physically outside of the United States during the time periods claimed in the Form I-129, and in the Amended Petition and Extension letter. Accordingly the AAO finds that the petitioner did not meet its burden, and the appeal will be dismissed.

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