



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
EAC 05 186 52938

Office: VERMONT SERVICE CENTER

Date: MAR 10 2008

IN RE:

Petitioner:
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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained with respect to the recapture of days the beneficiary spent outside the United States. The petition will be approved for a period of 158 days.

The petitioner is a web database development and consulting company that seeks to continue its employment of the beneficiary as a software developer. The petitioner, therefore, endeavors to extend the beneficiary's 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that the beneficiary is eligible for additional time in H-1B status, pursuant to the American Competitiveness in the Twenty-First Century Act (AC-21),¹ as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ-21).² In the alternative, counsel contends that the beneficiary is entitled to recapture time spent outside the United States to obtain additional time in H-1B status.

I. The beneficiary is ineligible for benefits under AC-21, as amended by DOJ-21

The AAO will first address whether the beneficiary is entitled to benefits under AC-21, as amended by DOJ-21. The petitioner states that the beneficiary was in the United States, in H-1B status, from April 17, 1999 through March 21, 2005. The instant petition was received at the service center on June 17, 2005.

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC-21 removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays, and DOJ-21 broadened the class of H-1B nonimmigrants able to 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 American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

² Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

- (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(b) 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 first issue is to determine whether the beneficiary's application for alien labor certification had been pending 365 days or more prior to the start date requested on the Form I-129. The petitioner has submitted evidence that the application was filed on May 28, 2004, which is more than 365 days before June 10, 2005, the start date requested on the Form I-129. Accordingly, the beneficiary's application for alien labor certification may be the basis for extending his authorized period of stay in the United States in H-1B status beyond the maximum six-year limit, so long as all other requirements for extension of stay and H-1B classification are met.

According to counsel, the beneficiary departed the United States on March 21, 2005 (his H-1B status was to expire March 22, 2005). However, the instant petition was not filed until June 17, 2005. The petitioner states that it is filing for a continuation of previously approved employment without change, and is requesting approval of the petition only; it is not seeking an extension of the beneficiary's stay. The petitioner requests that the beneficiary obtain his visa at the United States consulate in Dublin, Ireland. The petitioner, therefore, implicitly admits that the beneficiary is not eligible for an extension of stay in H-1B status under section 106(b) of AC-21 as amended by DOJ-21, and instead seeks approval of the petition for new employment solely under section 106(a) of AC-21 as amended by DOJ-21.

The AAO finds that sections 106(a) and 106 (b) of AC-21, as amended by DOJ-21, must be read as a whole. If the petitioner were permitted to petition for the beneficiary under section 106(a) without regard to 106(b), and request overseas processing for the alien who is subject to the limitations of section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), the petitioner would be allowed to request three years of H-1B status, rather than the maximum one-year increment allowed in section 106(b); the petitioner would likewise be allowed to petition

for the alien regardless of whether the labor certification or immigrant petition had been denied, as provided in section 106(b). The alien who has reached the maximum period of stay under section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), would thus be permanently exempt from the stay limitations, regardless of whether the labor certification or immigrant petition was denied. This would be an impermissible reading of AC-21, which was designed to prevent those people already in the United States for six years in H-1B status from having to leave the United States due to delays in the processing of their labor certification applications or immigrant petitions. The AAO finds that the limitations contained in section 106(b) must be read together with section 106(a) of AC-21, as amended by DOJ-21. As the beneficiary is not eligible for an extension of H-1B stay, the petition may not be approved under AC-21, as amended by DOJ-21.

Further, even if section 106(a) were a stand-alone provision, the beneficiary in this case is not a nonimmigrant, and thus would not qualify for eligibility. The beneficiary is no longer in H-1B status. Section 106(a) of AC-21, as amended by DOJ-21, exempts “any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status” from the six-year limitation of stay, when other requirements are met. The beneficiary is no longer in H-1B status and does not qualify for eligibility under section 106(a) of AC-21.

The beneficiary has reached the six-year maximum allowable period of stay as an H-1B nonimmigrant. The petition was filed after the beneficiary’s status expired, and he is not eligible for an extension of stay pursuant to 8 C.F.R. § 214.1(c)(4) and sections 106(a) and 106(b) of AC-21, as amended by DOJ-21. In accordance with the regulation at 8 C.F.R. § 214.2(h)(13)(i)(B), the beneficiary has spent the maximum allowable time in the United States and does not qualify for an H-1B extension.

II. The beneficiary is eligible to “recapture” time spent outside the United States

As noted previously, the petitioner contends that the beneficiary first entered the United States, in H-1B status, on April 17, 1999. As his period of H-1B stay began April 17, 1999, CIS would normally consider the beneficiary’s six-year period of stay to have expired on April 16, 2005. Accordingly, the issue before the AAO is whether the beneficiary is entitled to recapture any of the time he spent outside the United States.

The petitioner contends that the director failed to consider the petitioner’s request that all time spent by the beneficiary outside the United States be recaptured and excluded from the calculation of the beneficiary’s six-year H-1B period. According to the petitioner, the beneficiary spent 158 days outside the United States during the six years after he first entered the country in H-1B status on April 17, 1999. These days should be recaptured, the petitioner asserts, thereby extending the end date of the beneficiary’s period of stay by that length of time.

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 CIS that adopts *Matter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005),³ as formal policy.⁴

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 petitioner claims that the beneficiary was outside the United States on ten separate occasions between April 17, 1999, the day he first entered the United States in H-1B status, and March 21, 2005, the date of his final departure:

1. June 11, 1999 – June 14, 1999 (3 days)
2. July 23, 1999 – August 9, 1999 (17 days)
3. February 22, 2000 – March 8, 2000 (15 days)
4. August 25, 2000 – September 11, 2000 (17 days)
5. December 21, 2000 – January 2, 2001 (12 days)
6. December 12, 2001 – January 6, 2002 (25 days)
7. November 26, 2002 – December 2, 2002 (6 days)
8. December 21, 2002 – January 5, 2003 (15 days)
9. December 6, 2003 – January 8, 2004 (33 days)
10. July 29, 2004 – August 13, 2004 (15 days)

The evidence of record documents the beneficiary’s absence from the United States for a total period of 158 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

³ Available at <http://uscis.gov/graphics/lawregs/decisions.htm>.

⁴ 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 country, and renewed his period of H-1B status each time he was readmitted to the United States. Based on the evidence of record, the AAO determines that the beneficiary is entitled to recapture 158 days and to be granted the maximum period of his H-1B classification for that period of time.

Accordingly, the director shall approve the petition for a period of 158 days.

The burden of proof in these proceedings rests solely with the petitioner. 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 a period of 158 days.