U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 04 212 52831 Office: VERMONT SERVICE CENTER Date: JAN 24 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
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 sustained. The petition will be approved.

The petitioner is a manufacturer of electronics and communications equipment. It seeks to employ the beneficiary as a product engineer and to extend for a seventh year the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 did not qualify for an exemption from the six-year maximum limitation 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." However, the amended American Competitiveness in the Twenty-First Century Act ("AC21") 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.

Section 106 of AC21, as amended by section 11030(A)(a) and (b) of the 21st Century Department of Justice Appropriations Act, reads as follows:

(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.

(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 request for evidence (RFE); (3) the petitioner's response thereto; (4) the director's decision; and (5) Form I-290B, an appeal brief, and supporting materials.

In his decision the director noted that the petitioner filed a labor certification application (Form ETA-750) on behalf of the beneficiary on October 2, 2003, and its Form I-129 petition for seventh year extension of the beneficiary's H-1B classification under AC21 on July 14, 2004. Since the labor certification application had not been pending for 365 days or more at the time the seventh year extension petition was filed, the director determined that the beneficiary was not eligible under section 106 of AC21 for an extension of stay beyond six years.

The record shows that the beneficiary first entered the United States in H-1B status on August 19, 1998. Citizenship and Immigration Services (CIS) records reflect that the following H-1B approval notices have been issued on behalf of the beneficiary: LIN 98 117 51395, valid from May 9, 1998 to May 1, 2001; LIN 99 238 51587, valid from September 20, 1999 to August 15, 2002; EAC 01 110 52538, valid from April 20, 2001 to February 15, 2004; [1] and EAC 02 283 52475, valid from September 13, 2002 to September 12, 2004. Thus, the beneficiary has been in continuous H-1B status for six years from August 19, 1998, the date of his first entry into the United States in H-1B status, through August 18, 2004. The petition under review in this appeal was filed on July 14, 2004, prior to the expiration of the previous petition, and seeks a one-year extension of the beneficiary's H-1B classification from August 17, 2004 to August 17, 2005.

Prior to its consideration of the petitioner's eligibility to extend the petition under AC21, as amended by the 21st Century Department of Justice Appropriations Act, the AAO will consider whether the beneficiary is entitled to recapture any days spent outside the United States. Counsel argues on appeal 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, despite the fact that the RFE from the service center had specifically advised the petitioner to submit such evidence. According to counsel, the beneficiary spent 93 days outside the United States during the six years after he first entered the country in H-1B status 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 to November 20, 2004. 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 2, 2003 and the end of the beneficiary's H-1B status on November 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:

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[1] This petition was subsequently revoked on October 24, 2002.

> 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 (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)).

Counsel claims, and the passport stamps in the record substantiate, that the beneficiary was outside the United States on ten different occasions between August 19, 1998, the day he first entered the United States in H-1B status, and August 17, 2004, the date his final H-1B visa of record expired:

1. December 17, 1998 – January, 1999 (19 days) – in Jamaica.
2. July 11 – July 13, 2000 (3 days) – in the Bahamas.
3. July 30 – August 1, 2001 (3 days) – in Canada.
4. December 16-29, 2001 (14 days) – in Jamaica.
5. April 15-20, 2003 (6 days) – in Jamaica.
6. September 8-18, 2003 (11 days) – in The Netherlands.
7. October 8-13, 2003 (5 days) – in Jamaica.
8. October 13-17, 2003 (5 days) – in Mexico.
9. January 8-12, 2004 (5 days) – in Mexico.
10. June 24 – July 12, 2004 (19 days) – in Jamaica.

The foregoing documented absences from the United States total 90 days. Counsel also cites another three-day absence from the United States – August 17-19, 1998 in Canada – but that was just prior to the beneficiary's initial entrance into the United States in H-1B status (the beneficiary's H-1B visa was issued

on August 18, 1998 and he entered the United States the following day) and therefore does not count as time spent outside the United States while the beneficiary was in H-1B status.

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 of record, the AAO determines that the beneficiary is entitled to recapture 90 days and extend the maximum period of his H-1B classification from August 17, 2004 to November 15, 2004.

The AAO will now consider the beneficiary's eligibility for a one-year extension of H-1B classification under AC21, as amended by the 21st Century Department of Justice Appropriations Act. As previously noted, the petitioner filed a labor certification application on behalf of the beneficiary on October 2, 2003. On July 14, 2004 the petitioner filed a petition with the Vermont Service Center to extend the beneficiary's H-1B status for an additional year – from August 17, 2004 to August 17, 2005. Since the AAO has determined that the beneficiary's period in valid H-1B status, after the recapture of 90 days spent outside the United States, ran until November 15, 2004, the starting date for the employment period requested in the extension petition should be November 16, 2004. That date was more than 365 days after the labor certification application was filed.

In accordance with a CIS policy memorandum issued by William R. Yates, Associate Director of Domestic Operations, 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 AAO determines that the beneficiary is eligible for an exemption from the six-year limitation on his H-1B classification under AC21, section 106(a), and to an extension of his H-1B status for a seventh year under AC21, section 106(b), because the petitioner filed a labor certification application more than 365 days before the starting date of the employment period sought in the extension petition.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.