identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D1

FILE: SRC 05 121 51232 Office: TEXAS SERVICE CENTER Date: NOV 0 3 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, 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 sustained. The petition will be approved.

The petitioner is a manufacturer of school buses, commercial buses, and motor homes. It seeks to employ the beneficiary as a manager of product design engineering and to extend by 152 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 reached the six-year maximum period of employment in the United States allowable in H-1B classification. The director found that the 152 days the beneficiary is seeking to recoup for time spent outside the country were not interruptive of his employment in the United States and did not entitle him to an extension of his H-1B classification.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional information; (3) the petitioner's response thereto; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. 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. 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 record establishes that the beneficiary was issued a series of three H-1B approval notices, based on petitions filed by three different employers, with validity periods running cumulatively from April 15, 1999 to April 15, 2005. On March 21, 2005 the petitioner filed a petition with the service center seeking to recapture an additional 152 days for time the beneficiary spent outside the United States in the years 2000, 2002, 2004, and 2005, and continue the beneficiary's H-1B classification until September 13, 2005. The six occasions the beneficiary spent outside the country are listed by the petitioner as follows:

1. March 4 to March 26, 2000 – 21 days,
2. January 24 to February 18, 2002 – 24 days,
3. May 19 to May 27, 2004 – 7 days,
4. September 3 to September 19, 2004 – 15 days,
5. October 13 to November 7, 2004 – 24 days,
6. December 21, 2004 to February 21, 2005 – 61 days.

To recapture those days spent outside the United States, the director stated, the trips must have been interruptive of the beneficiary's employment in the United States. The director cited maternity leave, extended medical leave, and long-term work details as examples of time spent outside the United States that interrupts an alien's employment in the United States, but not vacation time, holidays, and weekends. The director found that the evidence of record failed to establish that the six trips the beneficiary took outside the United States during his period of H-1B status were interruptive of his employment in the United States. Accordingly, the director determined that the beneficiary was not entitled to a 152-day extension of his H-1B classification until September 13, 2005.

The AAO disagrees with the director's ruling. 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.

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)).

Based on the evidence of record – which includes photocopies of passport stamps, Form I-94 records, sales receipts, credit card statements, hotel bills, and airline tickets – the AAO determines that the beneficiary was outside the United States for the time periods claimed in the instant petition. Therefore, the beneficiary is entitled to recapture 152 days and extend the period of his H-1B classification for the time requested – *i.e.*, from April 15, 2005 until September 13, 2005.

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. Accordingly, the AAO will sustain the appeal and approve the petition.

ORDER: The appeal is sustained. The petition is approved until September 13, 2005.