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U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 04 017 52902 Office: TEXAS SERVICE CENTER Date: AUG 22 2005

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 documents 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 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 sustained. The petition will be approved.

The petitioner is a developer and publisher of graphic software. It seeks to extend its employment of the beneficiary as a database programmer. The petitioner endeavors to classify the beneficiary 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 the beneficiary had already been in the United States in H-1B status for six years, the statutory and regulatory limit on the classification.

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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's notice of his intent to deny the petition; (3) counsel's response to the director's notice; (4) the director's denial letter; and (3) Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The beneficiary in this proceeding was afforded H-1B classification from October 27, 1997 through October 27, 2003, a period of six years. At the time of filing, the petitioner submitted documentation establishing that the beneficiary had been outside the United States for 17 days during her H-1B employment (March 16-28, 2000 and May 25-29, 2001) and asked that beneficiary's H-1B status be extended by the same number of days. The director determined that time spent outside the country during the validity period of a petition must be counted towards the alien's maximum stay in the United States, unless that time was interruptive of the alien's employment. The director stated that time outside the United States that is considered part of a normal work period, such as weekends and vacations, cannot be considered interruptive of employment, and that the time cannot be reclaimed for purposes of extending the six-year limit. The AAO disagrees with the director.

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).

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 was admitted to the United States in H-1B status each time she returned from outside the country. The total period for which she could have been in lawful H-1B status in the United States was six years. When she was outside the country, the beneficiary was not in any status for U.S. immigration purposes. By virtue of departing the country, the beneficiary stopped the period that she was in H-1B status, and renewed that status with each readmission to the United States. The director should have granted an extension of the beneficiary's H-1B status for the total number of days that the petitioner proved the beneficiary was out of the country, i.e., 17 days.

The AAO notes that a petitioner is in the best position to organize and submit the proof of a beneficiary's departures from and reentry into the United States. The submission of copies of passport stamps or Form I-94 arrival-departure records, without an accompanying statement or chart of dates spent out of the country by the beneficiary, would be subject to error in interpretation and would 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. A petitioner must submit supporting documentary evidence for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.