U.S. Department of Homeland Security
20 Mass. Ave. NW Room A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 04 228 50804 Office: VERMONT SERVICE CENTER Date: APR 26 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 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 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 fashion manufacturer that seeks to extend the employment of the beneficiary as vice-president of international operations and to continue 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 petitioner indicates on the petition that it seeks to extend the beneficiary's H-1B status from September 26, 2004 to September 26, 2005.

The director denied the petition on the basis that the petitioner sought to extend the validity of the beneficiary's petition and period of stay in the H-1B classification beyond the maximum six-year period of stay in the United States. On appeal, counsel contends that the director erroneously denied the petition because the beneficiary is exempt from the six-year limitation in H-1B status pursuant to section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21) and was thereby eligible for a one-year extension of stay under section 106(b) of AC21.

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 as [an H-1B] nonimmigrant may not exceed 6 years." However, section 106(a) of AC21, as amended, removed the six-year limitation on the authorized duration of stay in H-1B visa status once 365 days or more had passed since the filing of a labor certification or immigrant petition on behalf of the alien.

As amended by § 11030A(a) of DOJ21, § 106(a) of AC21 reads:

> (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.*

Section 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

> (b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] 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.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

CIS regulations also affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). Thus, the statute under which the petitioner seeks to qualify the beneficiary for a seventh-year extension clearly requires that 365 days or more have elapsed since the filing of the application for labor certification at the time the maximum period of stay in H-1B visa status is reached.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on July 29, 2004; (2) a letter from the New York State Department of Labor, indicating that the labor certification was filed on September 29, 2003; (3) the director's denial letter; and (4) Form I-290B with attached brief and exhibit.

The director denied the petition, finding that because the beneficiary had already been employed in the United States since April 29, 1998 in H-1B and/or L-1 status, he had reached the maximum six-year period of stay in the United States. The director stated that counsel sought to qualify the beneficiary for benefits under AC21 by submitting a letter acknowledging receipt of an application for alien employment certification, case number [redacted] from the State of New York Department of Labor (NY DOL), on September 29, 2003. According to the director, prior to the filing of the instant petition, 365 days or more had not lapsed since the petitioner filed the labor certification application. As such, the director determined that the beneficiary was not eligible for benefits under AC21.

On appeal, counsel claims that the petitioner seeks to extend the beneficiary's H-1B status as of the date the beneficiary first entered the United States in H-1B status, September 26, 1998. Counsel asserts that the petitioner filed a labor certification application on behalf of the beneficiary with the New York Department of Labor on September 25, 2003 and that, therefore, the beneficiary's labor certification application was filed 365 days prior to the expiration of the beneficiary's authorized period of stay.

Upon a thorough review of the evidence in the record, the AAO finds that the petitioner failed to establish its burden that the beneficiary is eligible to derive benefits from AC21, as amended by DOJ21.

The record reflects that the beneficiary first obtained approval of a change of status request to H-1B status in the United States on April 29, 1998. Although the petitioner states that the beneficiary's first entry into the United States in H-1B status was on September 27, 1998, as reflected by a visa stamp in the beneficiary's passport, the change of status request was granted on April 29, 1998, and the record does not establish that the beneficiary was outside the United States on that date, or how much time the beneficiary spent outside the United States from April 29, 1998 until September 27, 1998. The AAO will accept, for purposes of this adjudication, that the beneficiary's maximum authorized period of stay in H-1B status expired on September 26, 2004, outside the validity date of the beneficiary's most recent H-1B approval notice. The instant petition was filed on July 29, 2004, with a requested start date of

employment of September 26, 2004. Thus, at least 365 days must have passed between the filing of the labor certification application and September 26, 2004. The record reflects that the application for labor certification was filed on September 29, 2003, which is less than 365 days prior to September 26, 2004.

On appeal, counsel asserts that the labor certification was filed on September 25, 2003. Counsel submits a copy of a PS Form 3811 indicating that the labor certification was mailed on September 25, 2003. Counsel asserts that the Department of Labor follows the "mailbox" rule in determining the date of filing of an application or petition. Counsel submits no evidence to support this assertion. Both the letter from the NY DOL and the PS form 3811 indicate that the application for labor certification was filed on September 29, 2003. Regulations relating to the filing of petitions with CIS state that petitions are considered filed when received, not when mailed. 8 C.F.R. § 103.2(a)(7). The unsupported statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

As the record does not establish that the requisite 365 days had passed between the filing of the labor certification application and the expiration of the beneficiary's authorized period of stay, the petitioner has not established that the beneficiary is eligible to extend his stay in the H-1B classification beyond the six-year maximum period.

The AAO notes that, pursuant to § 214(g)(4) of the Act, the beneficiary may be eligible to recapture any time he spent outside the United States during the six years he was in H-1B status. This conclusion 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 (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 further 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 submitted evidence that the beneficiary re-entered the United States twice but did not provide evidence of the beneficiary's departures and how much time he spent outside the United States. Thus, the record as presently constituted, does not establish that the beneficiary is entitled to recapture time spent outside the United States.

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 not sustained that burden.

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