U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: SRC 04 049 50557 Office: TEXAS SERVICE CENTER Date: MAY 09 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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition approved for an additional 182 days.

The petitioner is a corporation that provides aircraft engineering and research and development support to a corporation that manufactures aircraft for a worldwide market. In order to continue employing the beneficiary as a project development engineer specializing in aircraft electrical systems, the petitioner endeavors to continue the classification of 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 record reflects that the beneficiary continuously maintained H-1B classification during the period October 22, 1997 to December 29, 2003. On December 5, 2003, the petitioner filed the instant request for extension in order to continue the beneficiary's employment in H-1B status for the 413-day period of December 29, 2003 to February 14, 2005. Counsel's December 5, 2003 cover letter that was filed with the Form I-129 introduced the extension request as follows:

> [The beneficiary] is currently employed by the Company as a Product-Developer Engineer – Electrical Systems with an H-1B visa valid until December 29, 2003. Because [the beneficiary] is on the sixth year of H-1B visa status, we respectfully request to recapture 413 days of H-1B visa status due to interruptions in [the beneficiary's] employment prompted by required trips abroad on business-related matters. . . .

The director denied the petition on the basis that the beneficiary had already attained the maximum six-year statutory and regulatory limit on the total amount of time that an alien may remain in H-1B status, thus rejecting the petitioner's assertion that the beneficiary's time outside the United States during the period for which H-1B status had been granted did not count towards the time limit. The director stated that time spent outside the United States 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, as may be in cases where the beneficiary's absences from the United States are for "maternity leave, extended medical leave, or long term details to employment locations outside the U. S."

In his brief on appeal, counsel correctly argues that the beneficiary's absences from the United States during the periods covered by an approved H-1B petition should not count against the beneficiary's time 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." [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.]

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 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). 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)).

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 he returned from outside the country. The total period for which he could have been in lawful H-1B status in the United States was six years. When he 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 he was in H-1B status, and renewed that status with each readmission to the United States.

Therefore, counsel has prevailed in his contention that the beneficiary's time outside the United States does not count towards the six-year limit on the time that the statute and regulation places upon an alien's allowable time in the United States in H or L status. Accordingly, extension of the beneficiary's H-1B status would be justified for the total number of days that the petitioner proves the beneficiary was out of the country. However, still to be decided is the extent to which the evidence of record has substantiated the claimed periods of time outside the United States.

The petitioner submitted 44 pages of travel-related documents without cross-referencing their contents to the particular trips to which they relate. These documents include (1) a two-page, four-column table that lists a total of 71 arrival and departure dates for recurring trips to Singapore, Japan, Malaysia, Indonesia, Brazil, Taiwan, Canada, and France during the period June 8, 1998 to November 26, 2003; (2) a one-page three-column table listing the start and end dates of ten trips to Brazil in 2002 and 2003 that was submitted as part of the reply to the director's Notice of Intent to Deny (NOID)[1]; (3) the beneficiary's passport that includes more than 80 stamps in 20 pages; (4) two pages of Easylink car reservation information; (5) 13 pages of flight itinerary information from GTS 3000 Inc.; and (6) ten pages of American Airlines Advantage summaries of flight mileage accrued.

Based upon the evidence of record, the AAO finds that the petitioner has established that the beneficiary was outside the United States for 182 of the 413 days claimed.

The petitioner has not provided travel records that corroborate that the beneficiary was outside the United States for the following Brazil trips listed in the first of the petitioner's two tables listing the beneficiary's absences from the United States: (1) December 18, 1998 to January 8, 1999 (22 days); (2) December 19, 1999 to January 14, 2000 (25 Days); (3) December 19, 2000 to January 12, 2001 (24 days); (4) December 19, 2001 to January 14, 2002 (27 days); (5) December 19, 2002 to January 9, 2003 Brazil (22 days); (6) March 9 to April 4, 2003 (26 days). The record is devoid of passport stamps and travel records regarding the asserted France trips, which the petitioner's first table lists as: (1) July 21-July 27 (6 days); (2) October 1, 2001 to October 4, 2001 (4 days); and (3) November 1, 2001 to November 24, 2001 (24 days).

The AAO discounts the information provided on the Brazil trip listed on the first table for the period June 21 to August 9, 2003 (51 days) as those dates conflict with other travel documents submitted by the petitioner. The GTS3000 documents reflect a trip - July 5, 2003 from Brazil to Miami - booked for that time frame, although, according to the petitioner, the beneficiary was continuously present in Brazil between June 21 and August 9; and none of the records submitted by the petitioner show the booking of a return flight to Brazil between July 5 and August 9, 2003. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO finds unpersuasive the assertions of counsel and the affirmations of the petitioner's Managing Director, Engineering Office and Programs; the petitioner's engineering manager; and two Brazilian corporate officers

[1] The first two of the trips listed here were not included in the first table.

about the total time that the beneficiary worked on details to Brazil. Business records were not provided to substantiate any of these attestations, even though the petitioner acknowledges that there are no Brazilian entry or exit stamps in the beneficiary's passport.[2] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The total days for which the petitioner has failed to establish the beneficiary's presence outside the United States is 231. Accordingly, the beneficiary should be credited with 182 days outside the United States during his periods of H-1B classification.

The burden of proof resides solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. In the present context of establishing a beneficiary's time outside the United States during dozens of trips to eight countries, that burden includes specifically itemizing, for each claimed trip, the particular sections of documentary evidence that is offered to support the beneficiary's presence outside the United States during that particular trip. It is not the role of the AAO to shoulder the evidentiary burdens of aligning trips with supporting documents and reconciling conflicting submissions. A petitioner must submit supporting documentary evidence in a form readily accessible to the AAO's evaluation, or bear the consequence of a decision based on evidence not organized into a coherent showing of its merits. Listing dozens of claimed trips without cross-referencing each trip to the assorted travel records and scores of passport stamps arrival-departure records offered in support misconstrues the different responsibilities of the AAO as an independent evaluator of evidence and the petitioner as the proponent of evidence, and such an unaligned assortment of evidence is not persuasive as so presented.

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 by establishing that the beneficiary was outside the United States for 182 of the 413 days claimed in the petition. Accordingly, the appeal will be sustained, and the petition to extend the beneficiary's stay in the United States in H-1B classification shall be approved for 182 days.

ORDER: The appeal is sustained. The petition is approved, so as to extend the beneficiary's stay in the United States in H-1B classification for 182 days.

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[2] At page 2, subparagraph 7, of his January 14, 2003 letter responding to the NOID, counsel stated: "As a Brazilian national, [the beneficiary's] passport is not stamped during the admission and exit process in Brazil. There is no evidence that passport stamps would have been refused if they had been requested.