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

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[redacted]

FILE: LIN 05 079 52854 Office: NEBRASKA SERVICE CENTER Date: OCT 05 2006

IN RE: Petitioner:
Beneficiary: [redacted]

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:

SELF-REPRESENTED

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 Director, Nebraska Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

The petitioner is a private nonprofit organization operating a system of health services, including a hospital, neighborhood clinics, and a multi-specialty medical practice. It seeks to extend the employment of the beneficiary as a pharmacist. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 stated on the initial Form I-129 petition that the beneficiary had been in "H" status since March 1999. The beneficiary provided a resume listing her employment with the petitioner from July 2001 to the present (the petition was filed January 21, 2005) and with a prior United States employer from September 1998 to June 2001.

On March 23, 2005, the director informed the petitioner that there is a six-year limitation on a beneficiary's stay in H-1B classification. The director noted that the petitioner had indicated that the beneficiary had been in H-1B status since March 1999. The director requested all dates that the beneficiary had been in the United States in "H" classification as well as evidence of the date that she was first given "H" classification. The director also requested evidence of the beneficiary's current licensure and a statement that the petitioner would provide reasonable costs of the beneficiary's return transportation if she is dismissed from employment prior to the end of her authorized stay.

On April 28, 2005, the petitioner provided a copy of the beneficiary's license to practice in the State of Washington as a pharmacist and a statement that the petitioner would be liable for the beneficiary's return transportation if dismissed from her employment prior to the end of her authorized stay. The petitioner noted that other information requested had been previously submitted.

On June 3, 2005, the director denied the petition determining: that the record showed that the beneficiary had held "H" status since March 1999, a time period exceeding the six years maximum allowable period of stay in the United States in "H" status; that the petitioner had not demonstrated that the beneficiary had resided or been physically present outside the United States for the immediate prior year; that although requested to clarify the time periods during which the beneficiary had been in the United States in an "H" classification, the petitioner noted only that the information had been previously submitted; and that in accordance with the regulations regarding eligibility for extensions of stay, the petition could not be approved.

On June 30, 2005, the petitioner submitted a Form I-290B, Notice of Appeal, indicating that the petitioner chose to submit only partial information in response to the director's request for evidence (RFE) because it believed other requested information had already been filed with Citizenship and Immigration Services (CIS). The petitioner also submitted: (1) a Form I-797A, Approval Notice, classifying the beneficiary in H-1B status from July 31, 2004 to March 15, 2005; (2) a Form I-797A, Approval Notice, classifying the beneficiary in H-1B status from July 30, 2001 to July 30, 2004; (3) a Form I-797A, Approval Notice, classifying the beneficiary in H-1B status from March 16, 1999 to January 31, 2002; (4) a copy of a Form I-94, Arrival-Departure Record, showing the beneficiary as being admitted into the United States on March 30,

2000 for a period up to January 31, 2002; (5) a copy of a Form I-94 showing the beneficiary admitted into the United States on March 9, 2004 up to July 30, 2004; and (6) three Forms I-94 provided to the beneficiary in relation to previously approved petitions/applications.

The AAO has reviewed the information in the record in its totality.

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.

Section 101(a)(13)(A) of the Act states: "[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 indicate 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 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 Untied 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). Accordingly, the time that counts toward the maximum six-year period of authorized stay is time that the beneficiary spends in the Untied States after lawful admission in H-1B status.

In the instant matter, the beneficiary was afforded H-1B classification from March 16, 1999 through March 15, 2005, a period of six years. The director noting this time period, asked for evidence to establish the time that the beneficiary had actually spent in H-1B status in the United States in order to determine whether she had reached the six-year limit. As previously indicated, the petitioner failed to provide this information in its response to the director's RFE, but submits the beneficiary's H-1B approval notices and two Forms I-94 on appeal. This documentation, while relevant to the beneficiary's H-1B stay in the United States, is insufficient to prove the actual time period of the beneficiary's physical presence in or out of the United States.

The AAO notes that a petitioner is in the best position to organize and submit the proof of a beneficiary's departures from and re-entry into the United States. The submission of copies of passport stamps or Forms I-94, without an accompanying statement or chart of dates spent out of the country by the beneficiary, would be subject to error in interpretation. Similarly, a statement of dates spent outside of the country must be accompanied by consistent, clear, and corroborating proof of departures from and re-entries into the Untied 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 of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The evidence of record relating to the beneficiary's H-1B stay in the United States consists of two Form I-94s issued to the beneficiary, bearing U.S. admission stamps of March 20, 2000 and March 9, 2004; and a page from her Nigerian passport with a departure stamp of May 4, 2001. While the AAO notes the petitioner's submission of the H-1B approval notices issued to the beneficiary, they do not establish her presence in or the duration of her absence from the United States. The relevant evidence, the Forms I-94 and the beneficiary's passport pages, is not sufficient to establish the periods of the beneficiary's H-1B stay in the United States for the reasons just discussed. The petitioner has failed to establish that the beneficiary has spent less than the six-year maximum on H-1B stays in the United States and thus must reside outside the Untied States for a year before seeking admission as an H-1B nonimmigrant.

The AAO also notes that, on appeal, the petitioner states its belief that the instant petition was denied because it failed to provide a response to all of the information sought by the director's RFE. However, as discussed above, the director denied the Form I-129 extension request because the petitioner failed to provide evidence establishing that the beneficiary had not reached the six-year limit on her H-1B stay in the United States. While pursuant to 8 C.F.R. § 103.2(b)(14), a failure to submit requested evidence that precludes a material line of inquiry is a basis for denying an application or petition, it was not the basis for the director's denial in this matter.

For reasons previously discussed, the petitioner has not established that the beneficiary is eligible for an extension of her H-1B status. Accordingly, the AAO will not disturb the director's denial of the petition.

The burden of proof in this proceeding 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