

identifying data deleted to
prevent disclosure of unwarranted
invasion of personal privacy

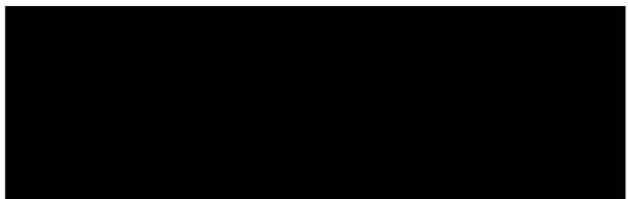
U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Di



FILE: WAC 06 158 51827 Office: CALIFORNIA SERVICE CENTER Date: JUN 25 2007

IN RE: Petitioner: [Redacted]
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:
[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 Director, California Service Center, denied the nonimmigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner provides Internet products and services and seeks to extend the employment of the beneficiary as services architect/consulting engineer. Accordingly, 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 found that the beneficiary had reached the six-year maximum authorized period of admission as an H-1B nonimmigrant and denied the petition. On appeal, counsel asserts that the beneficiary is entitled to recapture the 78 days that he spent outside of the United States during the validity of his H-1B petition.

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: “[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 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).

Accordingly, 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. The record shows that on September 14, 2005, the director approved the petitioner’s previous H-1B extension request on behalf of the beneficiary until June 8, 2006. On April 20, 2006, the petitioner submitted the instant H-1B extension request to recapture time the beneficiary had spent outside of the United States during the validity of his visa petition. The director denied the petition stating that the beneficiary had remained in the United States. The director found that no exception to extend the beneficiary’s time was applicable. The director also found that the petitioner did not submit any documentary proof for the additional days claimed. The AAO disagrees with the director’s ruling.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation, including a summary of the beneficiary's time spent outside of the United States while in H-1B status, a copy of the beneficiary's previous passport, and a chart of his arrival and departure dates from the United States; (2) the director's denial letter; and (3) the Form I-290B and appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

In accordance with the statutory and regulatory provisions previously cited, and the judicial decision in *Nair v. Coultice*, the AAO determines that the time that the beneficiary spends in the United States after lawful admission in H-1B status is time that counts toward the maximum six-year period of authorized stay. The beneficiary in this case was admitted into the United States in H-1B status each time he returned from outside of the country. When he was outside of 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 from the country, and renewed his period of H-1B status each time that he was readmitted into the United States. The director should have granted an extension of the beneficiary's H-1B classification until August 25, 2006, for the 78 days that the beneficiary was outside of the country while in valid H-1B status.

The AAO finds that the beneficiary is eligible for an extension of status and to recapture the 78 days that he spent outside of the United States. The beneficiary's passport and the chart of his arrival and departure dates from the United States indicate that the beneficiary traveled to India from October 13, 2001 to November 10, 2001, from November 23, 2003 to December 14, 2003, and from October 22, 2004 to November 20, 2004, and establish his eligibility to recapture the time that he spent outside of the United States during the validity of his H-1B petition. Accordingly, the AAO shall withdraw the director's denial of the petition.

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 of 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 burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved until August 25, 2006.