



U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

81

FILE: WAC 08 142 51394 OFFICE: CALIFORNIA SERVICE CENTER DATE: **NOV 18 2009**

IN RE: Petitioner:
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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 dismissed. The petition will be denied.

The petitioner avers that it is a telecommunications and software development company that was established in 1999 and currently has 189 employees. It seeks permission to employ the beneficiary as a senior software quality assurance engineer and, therefore, 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, who had already spent six years in the United States in H-1B status, had not remained outside of the United States for the required one year before the filing of the petition. On appeal, counsel submits a brief and contends that the beneficiary had the necessary one year of physical presence outside of the United States before his last entry in H-4 status in June 2008.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's denial decision; and (3) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the petition, which the service center received on April 14, 2008, counsel stated in her cover letter that the beneficiary had been in the United States in H-1B status for six years prior to his return to China on March 26, 2007. Counsel submitted a letter from the beneficiary's alleged employer in China as verification of the beneficiary's physical presence outside of the United States for one year. According to counsel the beneficiary would have "left the US for over 1 year when the subject petition is approved and be entitled to another 6-year H-1B per 8 CFR 214.2(h)(13)."

On July 29, 2008 the director denied the petition. The director noted that the beneficiary had entered the United States as an H-4 dependent on two occasions: from August 30, 2007 until September 9, 2007; and from January 22, 2008 until February 15, 2008. The director also noted that the beneficiary's last entry into the United States was on June 16, 2008. The director found that the beneficiary failed to submit documentary evidence to substantiate his physical presence outside of the United States for one year and, therefore, declined to find that the beneficiary was eligible to be granted H-1B classification again.

On appeal, counsel disagrees with the director's conclusions. Counsel reiterates that the beneficiary left the United States on March 26, 2007 and confirms that the beneficiary took two trips to the United States during the dates mentioned in the denial letter, the first of which lasted for 10 days while the other trip was, according to counsel, 22 days in duration. According to counsel, "a new H petition can be approved for him after 04/28/2008 – 1 year after 3/26/2007, without counting the 32 days of his brief trips to the U.S." In support of her arguments, counsel submits a copy of the beneficiary's passport, which contains his entry and exit stamps from Chinese immigration authorities, another copy of the beneficiary's employment letter, the beneficiary's apartment lease, and other documentary evidence.

The regulation at 8 C.F.R. § 214.2(h)(13)(i)(B) discusses an H-1B nonimmigrant's requirement to remain physically present outside of the United States for at least one year after having spent the maximum allowable time in H-1B status and states, in pertinent part:

When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) . . . of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad. . . .

Pursuant to 8 C.F.R. § 214.2(h)(13)(iii)(A), which provides for the limitation on admission for an H-1B nonimmigrant worker:

An H-1B alien in a specialty occupation or an alien of distinguished merit and ability 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.

Counsel argues on appeal that the beneficiary would have satisfied the regulation at 8 C.F.R. § 214.2(h)(13)(iii)(A) as of April 28, 2008 because that date would have accounted for the beneficiary's one year of physical presence in China since March 26, 2007 plus the 32 days that he spent visiting his spouse in the United States while she was working in H-1B status.

The AAO will first address counsel's calculations of the beneficiary's absences from China. The beneficiary's trip from August 30, 2007 through September 9, 2007 was for 10 days as counsel claims. However, the beneficiary's trip from January 22, 2008 until February 15, 2008 was for 24 days, not 22 days as counsel claims. Therefore, having returned to China on March 26, 2007, and having spent 34 days in the United States visiting his spouse, the beneficiary would have been physically present outside of the United States for the required one year as of April 30, 2008.

Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1). Here, the petitioner filed the petition on April 14, 2008, 16 days prior to when the beneficiary would have had his one year of required physical presence outside of the United States. Although counsel states on appeal that the beneficiary would have satisfied his physical presence outside of the United States by the time the petition was approved, it is the date that the petition is filed that determines when eligibility has been established. As stated, the petition had a receipt date of April 14, 2008, which was 16 days before the beneficiary would have satisfied the regulatory requirement of 8 C.F.R. § 214.2(h)(13)(iii)(A). For this reason, the petition may not be approved.

Counsel states on appeal that the director did not issue a Request for Evidence (RFE) and, therefore, the petitioner was not given an opportunity to provide further evidence before the petition was denied. The regulation at 8 C.F.R. § 103.2(b)(8) does not require the director to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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