



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: FEB 18 2014 OFFICE: CALIFORNIA SERVICE CENTER

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California 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.<sup>1</sup>

On the Form I-129 visa petition, the petitioner describes itself as a "Design & Manufacture Automation Assembly Systems" firm. In order to employ the beneficiary in what it designates as a "Mechanical Project Engineer" position, the petitioner seeks to classify him 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, finding that the beneficiary has spent five years in the United States in a specialized knowledge capacity, and has not resided and been physically outside the United States for the immediate prior year as required by 8 C.F.R. § 214.2(l)(12).

On appeal, counsel asserted that the beneficiary is entitled to recapture days during which he was approved for L-1B nonimmigrant status but was absent from the United States, and, further, that for H-visa status, the status for which the instant visa petition was filed, the allowable maximum is six years.

The AAO notes that, 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] shall not exceed 6 years." 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) and/or (L) of the Act unless the alien has resided and been physically present outside of the United States, except for brief trips for business or pleasure, for the immediate prior year.

*See also Matter of Safetran*, 20 I&N 49 (Comm. 1989) ("[I]t was the intent of the regulation[s] to include both periods of time as an 'H-1' and as an 'L-1' [in calculating the period of stay].")

The regulation at 8 C.F.R. § 214.2(l)(12)(i) states, in pertinent part:

*Limits.* An alien who has spent five years in the United States in a specialized knowledge capacity . . . under section 101(a)(15)(L) . . . of the Act may not be readmitted to the United States under section 101(a)(15)(L) and/or (H) of the Act unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year.

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner filed three L-1B visa petitions that were approved for employment of the beneficiary. One visa petition, [REDACTED] was approved for employment from February 1, 2008 to January 31, 2011. Another, [REDACTED] was approved for employment from February 1, 2011 to January 31, 2013. The third is [REDACTED], which was approved for employment from February 1, 2013 to June 29, 2013. The L-1B visa category is for intracompany transferees to serve in a specialized knowledge capacity as described in 8 C.F.R. § 214.2(l)(1)(B).

On appeal, counsel asserted that, as the beneficiary had not yet exhausted the allowable five years of L-visa status when the decision of denial was issued, the beneficiary was then eligible for a year of H-visa status pursuant to the six-year limit permitted by 8 C.F.R. § 214.2(h)(13)(iii)(A).

Counsel provided evidence pertinent to periods of time the beneficiary was absent from the United States during his previously approved L-1B status. Counsel also provided a chart which counsel asserted shows the periods during which the beneficiary was absent from the United States. The AAO has considered the chart and the evidence provided by counsel, and compared it to USCIS computer records, and determined that, after the commencement of the period of approved L-visa status on February 1, 2008, the beneficiary did not enter the United States until February 10, 2008, such that he was absent during the first nine days of the period of approved L-visa status. The AAO further finds, based on that evidence and USCIS computer records, that the beneficiary made the following departures and entries from and into the United States, resulting in the following periods of absence.

<u>Departure</u>	<u>Entry</u>	<u>Absence</u>
	February 10, 2008	9
May 29, 2008	June 17, 2008	18
December 16, 2008	December 27, 2008	10
January 2, 2009	January 24, 2009	21
March 9, 2009	March 27, 2009	17
June 8, 2009	June 25, 2009	16
December 26, 2009	January 6, 2010	10
May 30, 2010	June 6, 2010	6
December 23, 2010	January 5, 2011	12
June 8, 2012	June 19, 2012	10
August 14, 2012	August 20, 2012	5
November 20, 2012	November 27, 2012	6
December 18, 2012	December 25, 2012	6
Total days absent from the United States during approved L-visa status:		146



Therefore, subtraction of the 146 days from the five years and 149 days during which the beneficiary was in approved L-visa status shows that the beneficiary has been in the United States in L-visa status for at least five years.

The regulation at 8 C.F.R. § 214.2(l)(12)(i) states that an alien who has spent five years in the United States in L-1B status, as the beneficiary in the instant case has, may not be readmitted to the United States under section 101(a)(15)(L) and/or (H) of the Act unless the alien has resided and been physically present outside the United States for the prior year, which the instant beneficiary has not. Pursuant to 8 C.F.R. § 214.2(l)(12)(i), therefore, the instant visa petition may not be approved.

Counsel's assertion that the beneficiary had not yet exhausted five years of L-1B status when the decision of denial was issued is correct. Based on the evidence submitted and USCIS records, the AAO finds that the beneficiary exhausted the allowable five years of L-1B status on June 26, 2013. The decision denying the instant visa petition was issued on June 21, 2013.

While the beneficiary did not exhaust his allowable five-year period in L-1B status prior to the time the director's decision was issued, the subsequent exhaustion of those five years renders the instant visa petition unapprovable. The AAO will not remand this matter to correct an error which, by the subsequent exhaustion of the allowable five years, has been rendered harmless.

Approval of the instant visa petition is barred by 8 C.F.R. § 214.2(l)(12)(i). The appeal will be dismissed and the visa petition denied for this reason.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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