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U.S. Citizenship
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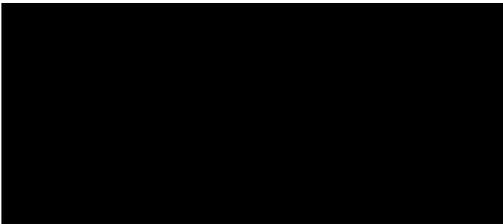


FILE: LIN 03 189 54545 Office: NEBRASKA SERVICE CENTER Date: AUG 31 2005

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:



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, Director
Administrative Appeals Office

DISCUSSION: The director of the Nebraska Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal is sustained. The petition is approved.

The petitioner is a business that owns and operates 129 manufactured housing communities, with 600 employees. It seeks to extend its employment of the beneficiary as an applications programmer by 178 days. The director denied an extension of the beneficiary's H-1B status because he determined that it would exceed the statutory six-year limit imposed on the stay of H-1B workers in the United States.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's approval notice extending the beneficiary's H-1B status for a shorter period of time than that requested by the petitioner; (3) counsel's motion to reopen requesting extension of the authorized period of stay beyond that authorized by the director; (4) the director's letter of denial; and (4) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

Counsel initially submitted the petitioner's appeal on December 17, 2003. On December 18, 2003, the director responded, informing the petitioner that no appeal was needed as the petition had been approved. The director's letter stated that a notice of approval had been mailed as of the same date. Counsel resubmitted the appeal on January 14, 2004 after being unable to confirm the director's December 18, 2003 approval of the additional time requested on behalf of the beneficiary.

The AAO's review of relevant Citizenship and Immigration Services (CIS) databases has identified only the director's July 31, 2003 approval of the instant petition for the period May 29, 2003 to April 9, 2004 and his subsequent denial on November 18, 2003 of the petitioner's motion to reopen that requested an extension of that period to September 5, 2004. It concludes, therefore, that the letter sent to the petitioner on December 18, 2003 referred to the director's July 31, 2003 approval of the petition and, inadvertently, identified the date of approval as December 18, 2003. The AAO will, therefore, consider counsel's appeal, as submitted on December 17, 2003.

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), defines an H-1B nonimmigrant as "[a]n alien who is coming temporarily to the United States to perform services...in a specialty occupation..." Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) limits the period of authorized admission for such nonimmigrants: "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." This restriction is further explained at 8 C.F.R. § 214.2(h)(13)(iii)(A), which states:

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.

By the calendar, the beneficiary, who was afforded H-1B status between April 10, 1998 and April 9, 2004, has reached the six-year limit on his authorized stay in the United States. In his motion to reopen, counsel listed five time periods during which the beneficiary was outside the United States: April 29, 1999 to May

15, 1999; January 8, 2000 to January 20, 2000; January 11, 2001 to February 10, 2001; July 27, 2001 to August 23, 2001; and October 28, 2001 to January 27, 2002. He requested that the beneficiary's status be extended for another 178 days. As proof of the beneficiary's travel outside the United States, he submitted copies of the beneficiary's passport showing admission stamps for the United States, Canada and India. The director, however, found the record lacked the documentation necessary to establish the reasons for the beneficiary's absences from the United States or that his leaves of absence were without pay. Accordingly, he denied counsel's motion and affirmed his previous decision.

On appeal, counsel again requests that the beneficiary's H-1B status be extended by 178 days. He supplements the record with a statement from the beneficiary's younger brother attesting to the beneficiary's travel to India between January 8, 2001 and February 10, 2001; a copy of the beneficiary's Indian marriage certificate dated August 6, 2001; a statement from an Indian hospital indicating that the beneficiary was in India in response to the hospitalization of a family member from October 10, 2001 to February 02, 2002; copies of two of the beneficiary's earnings statements covering one of his periods of travel; and an affidavit from the beneficiary. Counsel also submits a copy of a March 9, 1994 CIS memorandum regarding the effect on time spent outside the United States on the maximum period of stay for H-1B workers and a copy of *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001).

As noted above, Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), imposes a six-year limit on the "period of authorized admission" of H-1B nonimmigrants. Section 103(a)(13)(A) of the Act, 8 U.S.C. § 1103(A), defines "admission" and "admitted" as "the lawful entry of the alien in the United States after inspection and authorization by an immigration officer." The plain language of the Act, therefore, indicates that the six-year period of H-1B status accrues after admission into the United States. This construction is supported and explained by the Court in *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001).

The AAO concludes that it is only the time that the beneficiary spends in the United States after lawful admission in H-1B status that counts toward the maximum six-year period of authorized stay. When the beneficiary in the instant case was outside the United States, he was not in any status for U.S. immigration purposes. His departures from the United States, therefore, stopped the clock on the six-year time limit, while his readmissions as an H-1B nonimmigrant restarted it.

While counsel has submitted a range of evidence that relates to the beneficiary's foreign travel, the beneficiary's passport remains the definitive documentation of the number of days the beneficiary has been outside the United States and by which his H-1B status may be extended. The AAO's review of the passport finds admission stamps to substantiate the following periods of travel claimed by counsel: 16 days between April 29, 1999 and May 15, 1999; 30 days between January 11, 2002 and February 10, 2001; and 28 days between July 27, 2001 and August 24, 2001. It finds, however, that the 91-day absence identified on appeal was, instead, a 68-day absence, with the beneficiary arriving in India on November 26, 2001, rather than on October 28, 2001 and returning to the United States on February 2, 2002, rather than on January 27, 2002. As for the beneficiary's 2000 trip to Canada, his passport contains a Canadian admission stamp dated January 8, 2000, but there is no corresponding legible stamp that documents his return to the United States on January 20, 2000. As a result, the AAO will not consider the beneficiary's claimed time in Canada in determining how many days he spent outside the United States.

The record before the AAO establishes that the beneficiary spent 142 days outside the United States during the period beginning April 10, 1998 and ending on April 9, 2004. Accordingly, he is 142 days short of the maximum limit on his H-1B admission to the United States and may have his stay in the United States extended by that period of time. The director's decision is withdrawn.

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.

ORDER: The appeal is sustained. The petition is approved.