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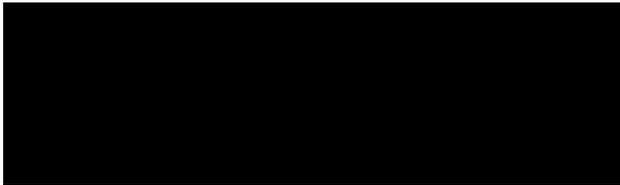
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FILE: EAC 03 141 50464 Office: VERMONT SERVICE CENTER Date: JUN 05 2006

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is an international investment firm that employs the beneficiary as a financial analyst. The petitioner seeks to extend the beneficiary's classification as a nonimmigrant worker in a specialty occupation (H-1B status) 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 on the ground that the beneficiary did not qualify for a one-year extension on his H-1B status under the provisions of the American Competitiveness in the 21st Century Act ("AC21"). The director also determined that the beneficiary could not recapture an additional 91 days for brief trips outside the United States, and extend his H-1B by that amount of time, because the trips were not of sufficient duration as to interrupt his continuous residence in the United States.

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." However, the amended American Competitiveness in the Twenty-First Century Act ("AC21") removes the six-year limitation on the authorized period of stay in H-1B status for certain aliens whose labor certification applications or employment-based immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

Section 106 of AC21, as amended by section 11030(A)(a) and (b) of the 21st Century Department of Justice Appropriations Act, reads as follows:

- (a) **EXEMPTION FROM LIMITATION** – The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(B) of such Act (8 U.S.C. § 1101 (a)(15)(H)(i)(B)), if 365 days or more have elapsed since the filing of any of the following:
 - (1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).
 - (2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

- (b) **EXTENSION OF H-1B WORKER STATUS** – The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one year increments until such time as a final decision is made –
 - (1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

- (2) to deny the petition described in subsection (a)(2); or
- (3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

The regulation at 8 C.F.R. § 214.2(h)(14) further provides that: "A request for a petition extension may be filed only if the validity of the original petition has not expired."

The record of proceeding before the AAO includes (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE with additional documentation; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials.

The record shows that the beneficiary was in H-1B status continuously for six years, from June 15, 1997¹ to June 14, 2003; that the petitioner filed an application for labor certification (Form ETA-750) on behalf of the beneficiary on August 13, 2002; and that the petitioner filed the instant petition (Form I-129) on April 4, 2003 for an extension of the beneficiary's H-1B status from June 15, 2003 until September 12, 2004. Noting that 365 days had not passed from the filing of the labor certification application to the filing of the one-year extension petition under AC21, the director ruled that the beneficiary was not eligible for an extension of stay under section 106 of AC21. The director also ruled that the beneficiary could not recapture 91 days he spent outside the United States – and extend his H-1B status for an additional three months – because the trips were of short duration and thus did not interrupt his U.S. residence.

On appeal counsel asserts that the director erred in finding that the beneficiary was not entitled to recapture 91 days spent outside the United States between 1997 and 2003, and extend his H-1B status by that amount of time, because the applicable standard is not whether the beneficiary's U.S. residence or H-1B employment was interrupted, but whether his continuous physical presence in the United States was interrupted. Every day the beneficiary was not physically present in the United States, counsel contends, he was not in H-1B status. Counsel also asserts that there was no policy at the time the instant petition was filed that prohibited the filing of a seventh year extension petition under AC21 if the application for labor certification had not been pending for 365 days, and that if the petitioner had only requested the recapture of 91 days in its petition – which would extend the beneficiary's H-1B period to September 13, 2003 and past the 365-day threshold of a pending labor certification application – the beneficiary would have fallen out of status before the director's decision was issued on January 14, 2004, and therefore been ineligible for a seventh year extension under AC21.

Citizenship and Immigration Services (CIS) issued a policy memorandum from William R. Yates, Associate Director of Domestic Operations, dated May 12, 2005, entitled "*Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*."² According to this

¹ The petitioner asserts that the beneficiary first entered the United States on July 13, 1997, and that his period in H-1B status should be measured from that date. The immigration stamp cited as evidence by the petitioner, however, is illegible. Thus, the record does not support the petitioner's claim.

² This guidance has been subsequently affirmed by CIS in two policy memoranda from William R. Yates,

CIS interim guidance, a beneficiary is entitled to an exemption from the six-year limitation on H-1B classification and an extension of stay in one-year increments beyond the six-year limit under AC 21 if 365 days have elapsed between the filing of a Form ETA-750 (labor certification) application or a Form I-140 (immigrant) petition and the starting date of the one-year employment period requested in the H-1B extension petition. In the instant petition, the Form ETA-750 application was filed on August 13, 2002, and the starting date of the one-year extension period sought for the beneficiary was June 15, 2003. Thus, the labor certification application had not been pending for 365 days on the starting date of the employment period sought in the Form I-129 extension petition. Accordingly, the beneficiary is not entitled to an exemption from the six-year limitation on H-1B classification and a one-year extension of his classification under AC21.

The petitioner asserts that the beneficiary took nine trips outside the United States, totaling 91 days, during his period of H-1B status between June 15, 1997 and June 14, 2003. They are listed as follows:

1. August 8-16, 1997 (8 days) – to Canada – on work-related business.
2. January 24-February 8, 1998 (15 days) – to Canada – on work-related business.
3. March 23-April 11, 1999 (19 days) – to Canada and Bangladesh – on personal business.
4. January 8-28, 2000 (20 days) – to Canada and Bangladesh – on personal business.
5. January 19-30, 2002 (11 days) – to Canada – on work-related business.
6. February 6-8, 2002 (2 days) – to Canada – on work-related business.
7. March 18-23, 2002 (5 days) – to Canada – on work-related business.
8. September 1-4, 2002 (3 days) – to Canada – on work-related business.
9. January 8-16, 2003 (8 days) – to Canada – on work-related business.

With respect to the petitioner's claim that the beneficiary is entitled to recapture the days he was outside the United States and extend his H-1B status by that amount of time, the AAO looks first to the regulation at 8 C.F.R. § 214.2 (h)(13)(iii)(A), which contains the following pertinent language:

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 that “[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

dated September 23, 2005 and December 27, 2005, both of which are entitled “*Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*.”

immigration officer.” The plain language of the statute and the regulation indicates 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 further supported and explained by the court in *Nair v. Coultrice*, 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).

In accordance with the foregoing authority, the AAO determines that the time the beneficiary spends in the United States after lawful admission in H-1B status is the time that counts toward the maximum six-year period of authorized stay. The beneficiary in this case was admitted to the United States in H-1B status each time he returned from outside the country. When he was outside 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 the country, and renewed his period of H-1B status each time he was readmitted to the United States. The evidence of record, however, does not clearly establish what days the beneficiary was outside the United States and does not corroborate the dates of any of the nine trips listed above.

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 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 its 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)).

With respect to the first trip outside the country, a stamp in the beneficiary’s passport shows that he was admitted into the United States on August 16, 1997. But there is no evidence in the record as to when the beneficiary departed the United States. Accordingly, the record does not confirm the beneficiary’s claim that he was outside the country for 8 days – from August 8 to 16, 1997.

With respect to the second trip outside the country, a stamp in the beneficiary’s passport shows that he was admitted into the United States on February 8, 1998. But there is no evidence in the record as to when the beneficiary departed the United States. Accordingly, the record does not confirm the beneficiary’s claim that he was outside the country for 15 days – from January 24 to February 8, 1998.

With respect to the third trip outside the country, a stamp in the beneficiary’s passport shows that he was admitted into the United States on April 11, 1999. But there is no evidence in the record as to when the beneficiary departed the United States. Accordingly, the record does not confirm the beneficiary’s claim that he was outside the country for 19 days – from March 23 to April 11, 1999.

With respect to the fourth trip outside the country, a stamp in the beneficiary's passport shows that he was admitted into the United States on January 28, 2000. But there is no evidence in the record as to when the beneficiary departed the United States. Accordingly, the record does not confirm the beneficiary's claim that he was outside the country for 20 days – from January 8 to 28, 2000.

With respect to the fifth trip outside the country, the stamp on the beneficiary's Form I-94 shows that he was admitted into the United States on January 30, 2002. But there is no documentary evidence as to when the beneficiary departed the United States. Accordingly, the record does not confirm the beneficiary's claim that he was outside the country for 11 days – from January 19 to 30, 2002.

With respect to the sixth trip outside the country, there is no documentary evidence as to when the beneficiary either departed or returned to the United States. Accordingly, the record does not confirm the beneficiary's claim that he was outside the country for 2 days – from February 6 to 8, 2002.

With respect to the seventh trip outside the country, an Air Canada ticket identifies the beneficiary as a passenger on a flight from Toronto to New York (LaGuardia Airport) on March 23, 2002. But there is no documentary evidence as to when the beneficiary departed the United States. Accordingly, the record does not confirm the beneficiary's claim that he was outside the country for 5 days – from March 18 to 23, 2002.

With respect to the eighth trip outside the country, there is evidence of a bank transaction in Toronto, Canada, on September 3, 2002, involving a bank card with the beneficiary's name on it. But there is no documentary evidence as to when the beneficiary departed the United States and when he returned to the United States. Accordingly, the record does not confirm the beneficiary's claim that he was outside the country for 3 days – from September 1 to 4, 2002.

With respect to the ninth trip outside the country, a boarding pass in the beneficiary's name identifies him as a passenger on an American Airlines flight from Toronto, Canada, to New York (LaGuardia Airport) on January 16, 2003, and the stamp on the beneficiary's Form I-94 shows that he was admitted into the United States on that date. But there is no documentary evidence as to when the beneficiary departed the United States. Accordingly, the record does not confirm the beneficiary's claim that he was outside the country for 8 days – from January 8 to 16, 2003.

Thus, the record does not substantiate the petitioner's right to recapture any of the 91 days he claims to have spent outside the United States between June 15, 1997 and June 14, 2003.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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