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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

DV

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FILE: EAC 04 063 51056 Office: VERMONT SERVICE CENTER Date: **MAY 24 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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a software professional services company that seeks to employ the beneficiary as a software engineer. The petitioner, therefore, endeavors to extend the beneficiary's classification 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, based upon her determination that the beneficiary had exhausted the six-year maximum period of authorized H-1B stay, pursuant to 8 C.F.R. § 214.2(h)(13)(iii). According to the director, "[t]here are no provisions for extension beyond this sixth year."

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal, counsel contends that the director erred in denying the petition. Counsel contends that the director committed error in failing to consider the time the beneficiary has spent outside the United States.

According to documentation contained in the record of proceeding, the beneficiary first entered the United States in H-1B status on April 16, 1998. Citizenship and Immigration Services (CIS) records reflect that the following H-1B approval notices have been issued on behalf of the beneficiary: EAC 98 025 53600, valid January 23, 1998 through September 25, 2000; EAC 00 091 52124, valid September 26, 2000 through January 20, 2003; and EAC 03 083 51414, valid January 16, 2003 through April 16, 2004. Although the first petition was approved on January 23, 1998, the beneficiary did not enter the United States, in H-1B status, until April 16, 1998.

As his period of H-1B stay began April 16, 1998, CIS would normally consider the beneficiary's six-year period of stay to have expired on April 15, 2004. Accordingly, the issue before the AAO is whether the beneficiary is entitled to recapture any of the time he spent outside the United States.

The petitioner contends that the director failed to consider the petitioner's request that all time spent by the beneficiary outside the United States be recaptured and excluded from the calculation of the beneficiary's six-year H-1B period. According to the petitioner, the beneficiary spent 56 days outside the United States during the six years after he first entered the country in H-1B status on April 16, 1998. These days should be recaptured, the petitioner asserts, thereby extending the end date of the beneficiary's six-year H-1B period to June 10, 2004.

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 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

immigration officer.” The plain language of the statute and the regulations 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. Coultice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by CIS 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).

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 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 petitioner claims, and the passport stamps in the record substantiate, that the beneficiary was outside the United States on two separate occasions between April 16, 1998, the day he first entered the United States in H-1B status, and April 16, 2004, the date his final H-1B approval expired:

1. December 23, 1998 – January 21, 1999 (30 days)
2. November 29, 2001 – December 27, 2001 (29 days)

These materials document absence from the United States for a total period of 59 days.

In accordance with the statutory and regulatory provisions previously cited, and the judicial decision in *Nair v. Coultice*, 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. Based on the evidence of record, the AAO determines that the beneficiary is entitled to recapture 59 days and extend the maximum period of his H-1B classification for that period of time.

Accordingly, the beneficiary’s period of H-1B status shall be extended through the requested employment end date of June 10, 2004, which is 55 days past the beneficiary’s previous expiration date of April 16, 2004, as that date is within the 59 days allowable for recapture.

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.