

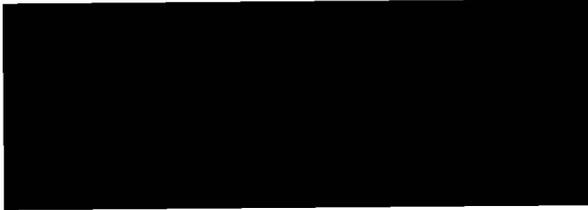
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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 05 069 52767 Office: VERMONT SERVICE CENTER

Date: NOV 02 2006

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:

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be sustained. The petition will be approved.

The petitioner is a software development and consulting firm. It seeks to extend the employment of the beneficiary as a programmer analyst. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 found that the beneficiary had reached the six-year maximum authorized period of admission as an H-1B nonimmigrant and denied the petition. On appeal, counsel asserts that the beneficiary is entitled to recapture 224 days he spent outside the United States during the validity of his H-1B petition.

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: "[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 indicate 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 supported and explained by the court in *Nair v Coultime*, 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). Accordingly, the time that counts toward the maximum six-year period of authorized stay is time that the beneficiary spends in the United States after lawful admission in H-1B status.

The record reflects that, on April 15, 2004, the director approved the petitioner's previous H-1B extension request on behalf of the beneficiary until June 2, 2005. On January 5, 2005, the petitioner submitted the instant H-1B extension request to recapture time the beneficiary had spent outside the United States during the validity of his visa petition. The director asked the petitioner to explain and document why the beneficiary was out of the country and why that time should be viewed as having interrupted his employment in the United States. The petitioner responded that the beneficiary's trips outside the United States were for personal leave, and the extension petition had been filed to recapture the 224 days the beneficiary had spent outside the United States and to extend his H-1B classification. The director denied the petition, stating that

the time spent outside the United States had not been adequately explained. Accordingly, the beneficiary was not entitled to recapture those days and extend his H-1B classification for 224 days. The AAO disagrees with the director's ruling.

The record of proceeding before the AAO contains: (1) Form I-129 with supporting documentation, including a summary of the beneficiary's time spent outside the United States while in H-1B status; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request, including a copy of the beneficiary's passport; (4) the director's denial letter; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

In accordance with the statutory and regulatory provisions previously cited, and the judicial decision in *Nair v. Coultime*, the AAO determines that the time the beneficiary spends in the United States after lawful admission in H-1B status is 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 in the United States. The director should have granted an extension of the beneficiary's H-1B classification until January 13, 2006, for the 224 days he was outside the country while in valid H-1B status.

The AAO finds that the beneficiary is eligible for an extension of status and to recapture 214 days<sup>1</sup> he spent outside the United States. The beneficiary's passport indicates that the beneficiary traveled to India on several occasions between June 3, 1999 and June 2, 2005, and establishes his eligibility to recapture the time he spent outside the United States during the validity of his H-1B petition. Accordingly, the AAO shall withdraw the director's denial of the petition.

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. However, a statement of dates spent outside of the country and accompanied by consistent, clear and corroborating proof of departures from and reentries into the United States is probative. 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)).

The burden of proof in these proceedings rests solely with the petitioner. See Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

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<sup>1</sup> The petitioner requested 224 days. The first documented trip was reduced from the requested 52 days to 42 days, as the beneficiary reentered the United States on October 17, 2000 and not October 27, 2000 as stated by the petitioner.

**ORDER:** The appeal is sustained. The director's order is withdrawn and the petition is approved until January 2, 2006.