

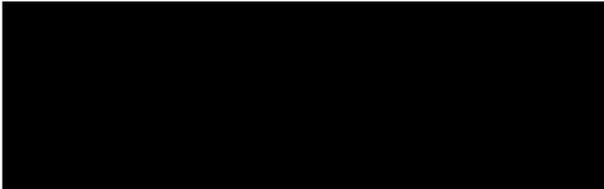
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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U.S. Citizenship
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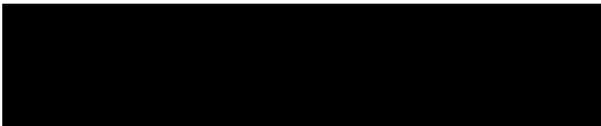


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FILE: EAC 05 116 51134 Office: VERMONT SERVICE CENTER

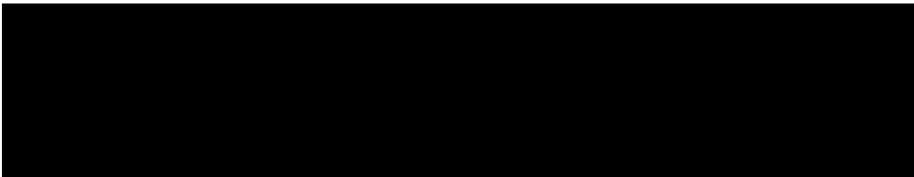
Date: FEB 04 2008

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:

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 of the service center 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 an information technology business that seeks to employ the beneficiary as a software engineer II from February 21, 2005 to October 31, 2006. The petitioner, therefore, endeavors to classify the beneficiary 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 because the beneficiary had already been employed in the United States in "H" or "L" status for six years. The director also determined that the beneficiary was not eligible for benefits under the "American Competitiveness in the Twenty-First Century Act," (AC21) because the petitioner had not submitted any evidence that a labor certification had been filed on the beneficiary's behalf that had been pending 365 days or more at the filing of the instant petition on March 14, 2005.

On appeal, counsel states, in part, as follows:

The Service's finding that [the beneficiary] first had H status within the U.S. as of October 1, 1998 was clearly erroneous. [The beneficiary] did not change to an H status while he was within the United States. He entered the U.S. in a B status on May 25, 1998 and departed on August 25, 1998. The H1B approval notice (LIN 98-213-50487) was issued on August 31, 1998, after [the beneficiary] had already departed the U.S. It therefore could not have effected a change of status, since he was not in the U.S. when it was issued, nor was he in the U.S. when it became effective on October 1, 1998.

Counsel also states that the beneficiary did not enter the United States in H-1B status until February 13, 2000, and will not complete the allowed six years until April 20, 2006. He states further that the entries and exits in the beneficiary's passport clearly shows that the beneficiary will not have spent six years in the United States in H-1B status until April 20, 2006 at the earliest.

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

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) 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.

Citizenship and Immigration Services (CIS) records reflect that the beneficiary in this proceeding was initially approved for H-1B classification valid from October 1, 1998 to October 31, 2000, for the petitioner Unicon International, Inc. The evidence of record contains various photocopies, including photocopies of the beneficiary's passport issued on April 15, 1997, which contains a B1/B2 visa issued on May 21, 1998, an Indian departure stamp of May 25, 1998, a U.S. admission stamp of May 25, 1998, and an Indian arrival stamp of August 25, 1998. This evidence supports counsel's assertions on appeal that the beneficiary "did not change to an H status while he was within the United States. He entered the U.S. in a B status on May 25, 1998 and departed on August 25, 1998." The beneficiary first entered the United States in H-1B status on February 13, 2000.

The regulation states, "An H-1B alien . . . 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." 8 C.F.R. § 214.2(h)(13)(iii). Section 214(g)(4) of the Act states, "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." Section 101(a)(13)(A) of the Act states, "The 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 after admission into the United States. This premise 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 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).

The AAO finds that 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 or L status. In this case, CIS records reflect the beneficiary's date of arrival to the United States in H1B status as February 13, 2000. The record contains a list of dates of the beneficiary's absences from the United States from 2000 to 2005. In accordance with the departure and admission stamps reflected on the photocopied pages of the beneficiary's passports, the beneficiary made the following departures and re-entries: departed March 11, 2001 and re-entered March 25, 2001 (15 days); departed December 3, 2002 and re-entered on January 1, 2003 (30 days); and departed January 21, 2005 and re-entered on February 10, 2005 (21 days). As such, the AAO will credit the beneficiary with a total of 66 days outside the United States.

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 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 April 20, 2006, for the 66 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 the 66 days he spent outside the United States. The evidence of record reflects the beneficiary's initial date of arrival to the United States in H1B status as February 13, 2000, and establishes his eligibility to recapture the 66 days 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. 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 AAO agrees with the director that the petitioner did not establish the beneficiary's eligibility for a one-year extension of stay under AC21. This finding is not contested by the petitioner and will be upheld.

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.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved until April 20, 2006.