

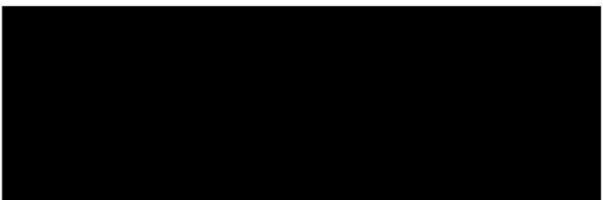


U.S. Citizenship  
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FILE: WAC 08 050 50716 Office: CALIFORNIA SERVICE CENTER Date: OCT 02 2009

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)

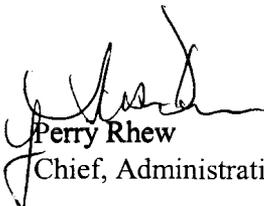
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California 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 provides commercial electronic security. It seeks to extend the employment of the beneficiary as a network systems analyst – security systems. 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 90 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 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). 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 September 25, 2006, the director approved the petitioner’s previous H-1B extension request on behalf of the beneficiary until December 11, 2007. On December 7, 2007, 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 petitioner submitted a table listing the total number of days the beneficiary had spent outside the United States as well as the beneficiary’s passport confirming the beneficiary’s entries and departures from the United States.

In a request for further evidence, the director asked the petitioner to explain and document the reason(s) the beneficiary qualified for an extension of his employment beyond the sixth year limit for H-1B classification. The petitioner responded with the same information previously submitted. The director denied the petition on May 9, 2008, determining that the beneficiary did not fall within an exception to the six-year limit in H-1B classification. The AAO disagrees with the director's ruling.

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 March 10, 2008, to recapture the 90 days he was outside the United States.

The AAO finds that the beneficiary is eligible for an extension of status and to recapture the 90 days he spent outside the United States. The beneficiary's passport indicates that the beneficiary traveled to the Philippines in April 2001, March 20, 2004, and April 21, 2005 and shows the dates the beneficiary re-entered the United States after each of these departures. The petitioner also provided a table detailing the dates the beneficiary left the United States and returned. The petitioner has established the beneficiary's eligibility to recapture the time he spent outside the United States during the validity of the beneficiary's H-1B classification. 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 in this matter has provided sufficient 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.

**ORDER:** The appeal is sustained. The director's order is withdrawn and the petition is approved until March 10, 2008.