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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

D2



Date: **DEC 08 2011** Office: CALIFORNIA SERVICE CENTER FILE:

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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner claims to be a high school, established in 2004 with a gross annual income of \$3.5 million and 25 employees. It seeks to employ the beneficiary as a teacher and to classify her 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, finding that the petitioner sought to extend the validity of the previously approved H-1B petition and the beneficiary's authorized period of stay beyond the maximum six-year period of stay in the United States in a specialty occupation.

The petitioner is seeking the beneficiary's services as a teacher. On Form I-129, the petitioner indicated that it seeks to continue the beneficiary's previously approved employment without change, and extend or amend the stay of the beneficiary in the United States. The petitioner indicated that the beneficiary's H-1B status would expire on September 1, 2006, and that the dates of intended employment were from August 28, 2006 to June 30, 2008. The beneficiary's date of last arrival in the United States was July 28, 2001. The petitioner, through counsel, claims on appeal that the beneficiary was on summer vacation for an aggregate period of two years, time which should be recaptured in order to extend the validity of her H-1B status. Counsel further claims that the petitioner has a pending labor certification pending on behalf of the beneficiary. Although counsel checked box B at section 2 of the Form I-290B, indicating that he would send a brief and/or evidence within 30 days, the AAO has received neither. Accordingly, the record of proceeding is deemed complete as currently constituted.

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 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), 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. The regulations require that the petitioner submit "clear and convincing proof that the alien qualifies" for an exception to the limitation on admission. 8 C.F.R. § 214.2(h)(13)(v). Such evidence may include copies of passport stamps or Form I-94 arrival-departure records, accompanied by a statement or chart of dates the beneficiary spent outside the country. In other words, petitioner must submit consistent, clear and corroborating proof of the beneficiary's departures from and reentries into the United States.

In denying the petition, the director noted that the beneficiary has resided in the United States in H-1B classification since July 28, 2001. In her request for further evidence, the director explained the six-year limitation and evidentiary requirements to establish that the beneficiary is eligible for an exception to the limitation. The beneficiary responded by submitting a list of the beneficiary's summer vacations, unaccompanied by any documentation establishing the accuracy of the periods specified or the beneficiary's whereabouts during those periods.

The director determined that the petition could not be approved for the validity period requested because the beneficiary would exceed the six-year limitation on H-1B status. The petitioner's appeal is not accompanied by any evidence of time spent by the beneficiary outside the United States, or evidence of a pending labor certification application on behalf of the beneficiary.

Upon review of the record, the AAO finds that the petitioner has failed to demonstrate that the beneficiary is eligible to recapture any time in order to extend her H-1B status because there is no evidence of any time spent outside of the United States for the period claimed.

In accordance with the statutory and regulatory provisions previously cited, the judicial decision in *Nair*, and the Aytes memorandum, 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 Aytes memorandum, which concerns the recapture<sup>1</sup> of time, states:

[A]ny days spent outside of the United States during the validity period of an H-1B or L-1 petition will not be counted toward the maximum period of stay in the United States in H-1B or L-1 status, provided that the alien is able to submit independent documentary evidence establishing that he or she was in fact physically outside of the United States during the day(s) for which the alien is seeking recapture. The burden of proof rests with the alien to establish his or her

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<sup>1</sup> In a footnote the Aytes memorandum stated "[t]he term recapture in this memo is used as a short-hand for the period of time spent outside the United States that an alien seeks to have subtracted from their maximum period of stay in H-1B status, as governed by INA § 214(g)(4), in order to have that period of time added back (i.e., "recaptured") when the alien requests an extension of their H-1B status."

eligibility for any recapture benefits. This memorandum supersedes all previous guidance on requests pertaining to "recapturing" time for nonimmigrant workers admitted pursuant to INA § 101(a)(15)(H)(i)(b) and INA § 101(a)(15)(L).

While the Aytes memorandum provides that any time spent outside of the United States during the validity period of an H-1B petition will not be counted toward the maximum period of stay in the United States in H-1B status, it also requires documentary evidence establishing that the beneficiary was outside the United States.

In view of the foregoing, the record contains insufficient evidence to support counsel's assertion on appeal that the beneficiary is entitled to recapture any time in order to extend her H-1B status because there is no evidence of any time spent outside the United States during the validity of her H-1B petition. The petitioner seeks to employ the beneficiary from August 28, 2006 until June 30, 2008. The beneficiary has been in the United States in H-1B status since July 28, 2001. The petition therefore cannot be approved.<sup>2</sup>

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

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<sup>2</sup> Counsel states in the Form I-290B that the petitioner "intends" to file a labor certification application on behalf of the beneficiary, but later also states that one is pending. It is unclear whether a labor certification application was filed and, in any event, whether one is pending.