

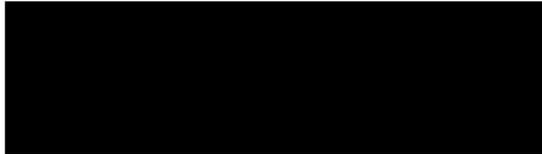
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY



U.S. Citizenship
and Immigration
Services



D2

DATE: **MAY 02 2011**

Office: [REDACTED]

FILE: [REDACTED]

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:

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, [REDACTED] denied the nonimmigrant visa petition. The matter is now before the AAO. The decision of the director will be withdrawn and the matter remanded to the service center for additional action and a new decision.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it provides information technology consulting and project services, that it was established in 2000, that it employs 110 persons, that it has gross annual income of \$17,500,000 and net annual income of \$400,000. It seeks to employ the beneficiary as a computer software engineer from February 1, 2009 to February 1, 2012. Accordingly, the petitioner 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).

United States Citizenship and Immigration Services' (USCIS) records show that the beneficiary has been issued the following approvals for status in the United States:

- An approval for L-1B classification valid from November 7, 2001 to November 6, 2003;
- An approval for L-1B classification valid from November 17, 2002 to November 16, 2004;
- An approval for L-1B classification valid from January 24, 2004 to November 10, 2005;
- An approval for H-1B classification valid from October 22, 2004 to November 8, 2006;
- An approval for L-1A classification valid from September 26, 2005 to September 25, 2008; and
- An approval for L-1A classification valid from August 12, 2008 to July 23, 2010.

On September 19, 2008 the petitioner filed the instant H-1B petition on behalf of the beneficiary. On September 26, 2008, the director denied the petition. The director determined that the record before her showed that the beneficiary initially entered the United States as a nonimmigrant in L-1A status on November 7, 2001 and did not show that the beneficiary had resided outside the United States for the immediate year prior to filing the instant petition. The director acknowledged the petitioner's assertion that the beneficiary had been granted H-1B visa classification from October 22, 2004 to November 8, 2006 but had not worked or traveled on the H-1B visa. The director further acknowledged the petitioner's assertion that the beneficiary is eligible to reclaim his "H" visa and obtain the full six years of H-1B status since he had been counted toward the 2004 quota.

The director, based upon her interpretation of 8 C.F.R. § 214.2(h)(13)(iii)(A), determined that approval of a new H-1B petition for the beneficiary was prohibited because the beneficiary had already spent more than seven years in L and/or H status and the beneficiary had not been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year. The director concluded that the petitioner had not established that the beneficiary had been physically present outside the United States for the immediate prior year following the beneficiary's maximum

period of allowed stay in the United States in H-1B status. Thus, the petition could not be approved. The director stated that USCIS did not dispute that “the beneficiary meets the definition of a specialty occupation.” The director did not discuss the issue of whether the H-1B cap applied to the instant petition.

On appeal, the petitioner again claims that, although the beneficiary had approval to work in H-1B status from October 22, 2004 to November 8, 2006, he did not work or travel on the approved H-1B status; and that the beneficiary was outside the United States from September 1, 2004 to July 8, 2006. The record includes a photocopy of the beneficiary’s passport bearing an arrival stamp in the [REDACTED] on September 1, 2004 and an arrival stamp for entry into India on September 4, 2004. The beneficiary’s passport also shows that he was admitted to the United States on his L-1A visa on July 8, 2006. The record on appeal also includes the beneficiary’s statement listing these entries and the beneficiary’s reference to the particular pages in his passport supporting his statement. Thus, the AAO finds that the beneficiary was outside the United States from September 1, 2004 to July 8, 2006.

The remaining issue to be discussed then is whether the beneficiary is subject to the 2009 cap on H-1B visas.

The AAO observes that generally H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), the total number of H-1B visas issued per fiscal year (FY) may not exceed 65,000. On April 8, 2008, USCIS issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY09, which covers employment dates starting on October 1, 2008 through September 30, 2009. The petitioner filed the instant Form I-129 on September 19, 2008, requested a starting employment date of February 1, 2009.

Section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), provides in pertinent part:

Any alien who has already been counted, within the 6 years prior to the approval of a petition . . . shall not again be counted . . . unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed.

The petitioner asserts on appeal that, as the beneficiary did not work or travel on his H-1B visa issued in October of 2004, he is eligible to reclaim his “H” visa and not be counted toward the 2009 cap for H-1B visas.

However, the regulation at 8 C.F.R. § 214.2(h)(8)(ii)(C) provides:

When an approved petition is not used because the beneficiary(ies) does not apply for admission to the United States, the petitioner shall notify the Service Center Director who approved the petition that the number(s) has not been used. The petition shall be revoked pursuant to paragraph (h)(11)(ii) of this section and USCIS will take into account the unused number during the appropriate fiscal year.

The petitioner repeatedly contends both prior to adjudication and again on appeal that the beneficiary neither worked nor traveled under the H-1B visa, which was approved for the period from October 22, 2004 to November 8, 2006. According to the regulation at 8 C.F.R. § 214.2(h)(8)(ii)(C), the approval of the H-1B visa upon which the petitioner relies for eligibility in this matter must be revoked, since the beneficiary never applied for admission to the United States.¹ USCIS records do not indicate that the service center director was notified by the prior petitioner of the beneficiary's failure to use the number allotted under that approved petition. Therefore, although the beneficiary was counted against the cap for H-1B visas in 2004 when he was issued an approval for H-1B classification, his failure to apply for admission to the United States mandates revocation of that petition. That being said, the revocation of that petition returns the beneficiary's number to the pool of unused numbers for fiscal year 2005, thereby rendering him subject to the H-1B cap for fiscal year 2009.

The decision of the director will be withdrawn and the matter remanded so that the director may revoke the approval of the prior H-1B petition in accordance with 8 C.F.R. § 214.2(h)(8)(ii)(C). Thereafter, the director should reexamine the record in the instant petition for evidence demonstrating that the beneficiary is otherwise exempt from the 2009 cap for H-1B visas. Absent evidence to the contrary, the director should deny the instant petition on the basis that the beneficiary is not exempt from the H-1B visa cap under the requirements of section 214(g)(7) of the Act, 8 U.S.C. § 1184(g)(7), because the beneficiary was never in H-1B status and counted toward the cap within the six years prior to the filing of the petition.²

¹ The regulation cited above was in effect in 2004 at the time the prior H-1B petition was filed. At that time, it appeared at 8 C.F.R. § 214.2(h)(8)(ii)(D) (2004).

² It is noted that the director's denial of the petition is based on the conclusion that "the petitioner has not established that the beneficiary has been physically present outside the United States for the immediate prior year following the beneficiary's maximum period allowed to stay in the United States in H-1B status." The AAO would like to address this withdrawn conclusion to the extent that it may be based in part on a misconception regarding the regulatory language at 8 C.F.R. §§ 214.2(h)(13)(i)(B) and (iii)(A).

Although this regulatory language refers to an alien's maxing out of H-1B status in the United States, this phrase should not be mistaken as a regulatory prerequisite to becoming eligible again for another maximum six year period of stay in the United States in H-1B status. The only requirement that an alien must meet to be once again eligible for a full six years in H-1B status is for the alien to have "resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year." 8 C.F.R. § 214.2(h)(13)(iii)(A).

To interpret this regulatory language otherwise would lead to the absurd result of an alien not being eligible again for H-1B classification, even after being absent from the United States for more than one year, if he or she only spent five years and 364 days in the United States in H-1B status. Taking that interpretation, the alien would be eligible for a one day approval but, immediately upon

The AAO also determines that the director improperly stated that USCIS does not dispute that “the beneficiary meets the definition of a specialty occupation.” The AAO finds that the record is insufficient to establish that the proffered position is a specialty occupation and thus the director’s statement to the contrary is withdrawn. The director should also examine the record for evidence demonstrating that the proffered position qualifies as a specialty occupation and, if it does, that the alien is qualified to perform the duties of that specialty occupation.

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 not sustained that burden. The director should issue an appropriate request for further evidence on the issues discussed above and any other issue necessary to establish eligibility for this benefit.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for additional action and entry of a new decision.

admission, would be required to depart the U.S. again before being eligible for another full six year period of stay in H-1B status. Therefore, this phrase in the regulatory language should only be interpreted as detailing the conditions under which an alien who has spent the maximum period of stay in the United States in H-1B status may once again seek an extension, change of status, or readmission to the United States as an H or L nonimmigrant. *See id.*

As such and as the AAO found that the beneficiary resided and was physically present outside the United States for the requisite one-year period, the beneficiary's time spent in the United States in H or L status, i.e., the time to be counted towards the maximum period of authorized admission permitted under sections 214(c)(2)(D) and (g)(4) of the Act, 8 U.S.C. §§ 1184(c)(2)(D) and (g)(4), shall be deemed to have restarted upon the beneficiary's admission to the United States in L-1A status on July 8, 2006.