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FILE: EAC 09 209 51681 Office: VERMONT SERVICE CENTER Date: AUG 14 2009

IN RE: Petitioner: [Redacted]  
Beneficiaries: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

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.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center recommended the limited approval of the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO) pursuant to 8 C.F.R. § 103.4(a). The decision of the director will be withdrawn in part and affirmed in part, and the petition will be approved.<sup>1</sup>

The petitioner is a provider of products and services to the oil and mining industries that seeks to continue to employ the beneficiary as a PROACT-engineer trainee for a period of five months. The petitioner, therefore, endeavors to continue to classify the beneficiary as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

The petitioner filed the instant petition on July 24, 2009, and requested an extension of H-3 status for the beneficiary, valid from August 1, 2009 until January 1, 2010. The petitioner submitted evidence claiming that the beneficiary spent 345 days outside the United States since first being admitted to the United States in H-3 status on September 8, 2007. The petitioner sought to recapture this time the beneficiary spent outside the United States while in H-3 status. The director denied the request to recapture, stating the provision is not applicable to H-3 nonimmigrants. However, the director recommended the approval of the extension of the petitioner's H-3 classification since the beneficiary had not reached the maximum allowable time in H-3 status.

It is noted that the beneficiary's initial H-3 classification was approved for a two year period, valid from August 1, 2007 until July 31, 2009, the maximum period permitted by the regulations. *See* 8 C.F.R. § 214.2(h)(13)(iv). Due to what appears to be a delay in visa issuance by the Department of State, however, the beneficiary was not initially admitted to the United States in H-3 status until September 8, 2007. Based on this delayed admission date, the director recommended that the extension petition be approved for an additional 38 days, valid until September 7, 2009. As this determination is clearly based on the time the alien spent or rather did not spend in the United States prior to his initial admission date, it contradicts the director's own statement that a recapture of time provision does not apply to H-3 nonimmigrants.

Either the recapture provision does not apply at all or it applies to all time spent outside the United States during the validity period of the prior, approved petition. The recapture provision may not be selectively applied to only the initial period during which the alien beneficiary was applying for a visa to be admitted to the United States. Therefore, while the director's ultimate conclusion is correct regarding the beneficiary's eligibility for H-3 classification, as discussed in greater detail below, the decision is incorrect with regard to the recapture provision and the calculation of the period of time in H-3 status for which the beneficiary remains eligible. The AAO therefore withdraws this part of the director's decision.

The regulation at 8 C.F.R. § 214.2(h)(13)(iv) states, in pertinent part, that:

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<sup>1</sup> Pursuant to 8 C.F.R. § 103.4(a)(2), the director correctly informed the petitioner that it was permitted to submit a brief to the AAO within 30 days from the date of the certification notice. For the purpose of taking action favorable to the petitioner, however, the AAO hereby suspends the 30-day period for the submission of a brief pursuant to 8 C.F.R. § 103.4(a)(3).

An H-3 alien participant . . . who has spent 24 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/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 two-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States.

As previously discussed, the record shows that the beneficiary initially entered the United States in H-3 classification on September 8, 2007. The record also shows that the beneficiary spent a total of 383 days outside of the United States during the validity period of the initial H-3 petition approval, valid from August 1, 2007 until July 31, 2009.<sup>2</sup>

In accordance with the statutory and regulatory provisions previously cited, the AAO concludes that the time the beneficiary spends in the United States after lawful admission in H-3 status is the time that counts toward the maximum two-year period of authorized stay pursuant to that status. The beneficiary in this case was admitted to the United States in H-3 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-3 status when he departed the country, and renewed his period of H-3 status each time he was readmitted in the United States. The director should grant an extension of the beneficiary’s H-3 classification until the end date requested, January 1, 2010, pursuant to the time he spent outside the United States.

Upon review of the evidence contained in the record, the director's ultimate eligibility determination is found to be correct. The Vermont Service Center will issue the appropriate approval notice, valid from August 1, 2009 until January 1, 2010.

**ORDER:** The decision of the director is withdrawn in part and affirmed in part. The petition is approved, valid from August 1, 2009 until January 1, 2010.

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<sup>2</sup> The petitioner provided copies of the passport stamps, Form I-94 arrival-departure records, and an accompanying chart of dates indicating the amount of days the beneficiary spent outside the country, which totaled 345 days from the when the beneficiary was first admitted to the United States in H-3 status on September 8, 2007. In addition, as the approval notice had a start date of August 1, 2007 and as the beneficiary was not admitted into the United States in H-3 classification until September 8, 2007, an additional 38 days spent outside the United States should be added to the 345 days claimed by the petitioner, making the total 383 days.