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U.S. Citizenship
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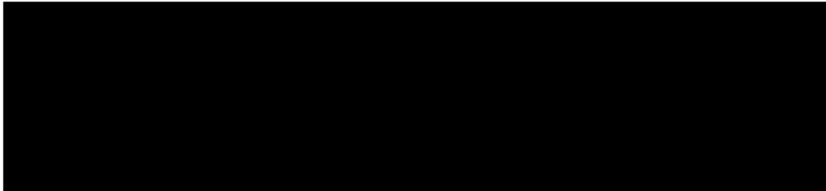
FILE: WAC 06 221 51069 Office: CALIFORNIA SERVICE CENTER Date: **FEB 04 2008**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director 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 a medical practice that seeks to employ the beneficiary as an internist. 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (4) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner filed the instant petition on July 13, 2006 and requested that the beneficiary be granted three years of H-1B status (July 5, 2006 through June 23, 2009). The petitioner submitted evidence claiming that the beneficiary spent 167 days outside the United States since first changing to H visa status on May 1, 2000. The petitioner sought to recapture the time the beneficiary spent outside the United States while in H-4 and H-1B status. The petitioner also sought relief pursuant to the American Competitiveness in the Twenty-First Century Act (AC-21), as amended by the Twenty-First Century DOJ Appropriations Authorization Act (DOJ-21), insofar as the beneficiary's spouse is the beneficiary of an approved Labor Certification application. The director denied the petition, finding the beneficiary ineligible for additional time in H-1B status.

The AAO will first address whether the beneficiary's time in H-4 status must be counted against the maximum six-year limitation on stay provided to H-1B aliens. United States Citizenship and Immigration Services (USCIS) addressed this issue in a memorandum titled, in part, *Guidance on Determining Periods of Admissions for Aliens Previously in H-4 or L-2 status...*, Michael Aytes, Associate Director, Domestic Operations (December 5, 2006). USCIS clarified in the memorandum that any time spent by the beneficiary in H-4 status will not count against the six-year maximum period of admission applicable to H-1B aliens. Thus, the beneficiary is entitled to a full six-year admission period as an H-1B alien.

The record establishes that the beneficiary was in the United States, in H status, from May 1, 2000 through June 22, 2006. During this period, she held H-1B status from June 23, 2003 through June 22, 2006. She held H-4 status from May 1, 2000 through June 22, 2003.

The beneficiary is entitled to an additional 3 years, 1 month and 27 days in H-1B visa status before she reaches the full six-year admission period as an H-1B alien.

The AAO will next consider whether the beneficiary is entitled to recapture any days spent outside the United States. Counsel argues on appeal that the director failed to consider the petitioner's request that all time spent by the beneficiary outside the United States be recaptured and excluded from the calculation of the beneficiary's six-year H-1B period. According to counsel, the beneficiary spent 167 days outside the United States during the six years after she first entered the country in H status on May 1, 2000. As none of the time

spent in H-4 status will count against the beneficiary's maximum period of stay in H-1B status, the AAO will only consider the time the beneficiary spent outside the United States when she was in H-1B status.

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 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. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by the 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 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)).

Counsel claims, and the passport stamps in the record mostly substantiate, that the beneficiary was outside the United States in H-1B status on three different occasions between June 23, 2003 through June 22, 2006.

1. November 12, 2003 – November 17, 2003 (5 days).
2. October 30, 2004 – November 27, 2004 (27 days).
3. March 3, 2006 – March 11, 2006 (7 days).

The AAO reviewed the beneficiary's passport stamps and concludes that the documented absences from the United States totals 35 days. The five-day absence from the United States from November 12, 2003

until November 17, 2003 is not documented in the passport stamps. The beneficiary's passport has one stamp to indicate entry into the United States on November 17, 2003; thus the AAO will count a one-day absence for this trip.

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 status is the 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 she returned from outside the country. When she was outside the United States she was not in any status for U.S. immigration purposes. Thus, the beneficiary interrupted her period of H-1B status when she departed the country, and renewed her period of H-1B status each time she was readmitted in the United States in H-1B status. The beneficiary is entitled to recapture an additional 35 days in H-1B status.

The AAO will now consider the beneficiary's eligibility for an extension of H-1B classification. The regulation at 8 C.F.R. § 214.2(h)(14) provides that: "A request for a petition extension may be filed only if the validity of the original petition has not expired." The regulation at 8 C.F.R. § 214.2(a)(4) provides that: "an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed." On July 13, 2006 the petitioner filed the instant petition to extend the beneficiary's H-1B status. The AAO determines that the beneficiary's period in valid H-1B status, after the recapture of 35 days spent outside the United States, runs until July 27, 2006. Thus, a request for a petition extension may be filed since the validity of the original petition had not expired when the petition was filed on July 13, 2006, and the beneficiary was in lawful status at the time the petition was filed.

As noted above, the AAO finds that the beneficiary is entitled to an additional three years, one month, and 27 days in H-1B status as time previously spent in H-4 status in the United States. Additionally, the beneficiary is entitled to recapture 35 days spent outside the United States in H-1B status, and was in status when the current petition was filed. As such, she is eligible for H-1B status for the entire period of requested stay, and the AAO will withdraw the director's decision to the contrary. The AAO will not address whether the beneficiary is entitled to an extension of stay under AC-21.

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 sustained that burden.

ORDER: The appeal is sustained. The petition is approved.