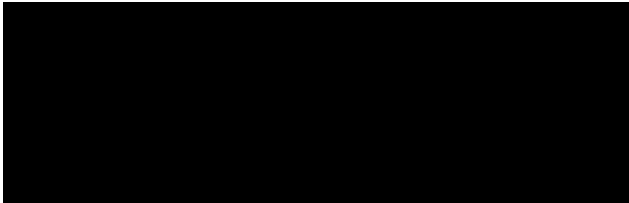




U.S. Citizenship
and Immigration
Services

To:



From: Robert C. Divine *RCD*
Acting Deputy Director

Date: October 18, 2005

Re: [REDACTED] (September 2, 2005)

As Acting Deputy Director I hereby designate the attached decision of the Administrative Appeals Office (AAO) in [REDACTED], as a USCIS Adopted Decision. Accordingly, this decision is binding policy guidance on all USCIS personnel. USCIS personnel are directed to follow the reasoning in this decision in all matters related to the calculation of maximum periods of stay by H-1B nonimmigrants.

Given that the term "period of authorized admission" upon which the AAO relies in *Matter of* [REDACTED] is also found in the L-1 nonimmigrant statute at INA § 214(c)(2)(D), I further direct that the reasoning in that decision be extended to the calculation of maximum periods of stay by L-1 nonimmigrants.

The spouse and minor child of a principal alien who recaptures H-1B or L-1 periods may receive periods of H-4 or L-2 stay coextensive with that of the principal alien.

D2



U.S. Citizenship
and Immigration
Services

FOR PUBLICATION

MATTER OF [REDACTED]

In Visa Petition Proceedings

EAC 04 047 53189

Decided by the Director, Administrative Appeals Office
September 2, 2005

- (1) The 6-year period of authorized admission of an H-1B nonimmigrant accrues only during periods when the alien is lawfully admitted and physically present in the United States.
- (2) The petitioner must submit supporting documentary evidence to meet its burden of proof. 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 by CIS. 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.

ON BEHALF OF PETITIONER:

[REDACTED]

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained. The petition will be approved.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary as a programmer analyst and to extend by 30 days his classification 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 on the ground that the beneficiary had already been employed in the United States for six years, the maximum time allowable in H-1B classification. The director found that the 30 days the beneficiary spent outside the country on a work assignment shortly before the expiration of that six-year period were not interruptive of the beneficiary's employment and did not entitle him to an extension of his H-1B classification for 30 days.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

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 further supported and explained by the court in *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001).

The record shows that the beneficiary entered the United States in H-1B classification on October 4, 1997 and maintained continuous H-1B status until December 10, 2003.¹ On December 9, 2003 the petitioner filed an H-1B extension application with the Vermont Service Center seeking to recapture an additional 30 days – which would extend the beneficiary's H-1B classification to January 9, 2004 – based on time the beneficiary spent outside the United States on a work assignment from September 2 to October 1, 2003. To recapture those days, the service center director stated, the time spent outside the United States must have been interruptive of the beneficiary's employment. Since the beneficiary's time outside the

¹ According to counsel, the extension beyond six years included 65 days that were recaptured, pursuant to rulings of the California Service Center, for time the beneficiary spent outside the country.

United States was on a work-related detail, the director determined that it did not interrupt his employment in the United States. Accordingly, the beneficiary was not entitled to recapture those days and extend his H-1B classification for 30 days until January 9, 2004. 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 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 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 January 9, 2004 for the 30 days he was outside the country from September 2 to October 1, 2003.

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)).

The beneficiary's passport stamps indicate that he arrived at O.C.S.I. Airport in Mumbai, India, on September 2, 2003, after departing the United States, and that he reentered the United States on October 1, 2003. Accordingly, the beneficiary is entitled to an additional 30 days in H-1B classification.

The petitioner bears the burden of proof in these proceedings. *See* 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 until January 9, 2004.