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U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: SEP 01 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

[Redacted]

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Texas Service Center. On the basis of further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition on October 14, 2003. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B), as an outstanding professor or researcher. The Form I-140 petition was filed on October 30, 2000 and initially approved by the Service Center on December 17, 2001. The petitioner employed the beneficiary as an "Assistant Professor of Economics" from the fall of 1997 until May 2002, when the beneficiary resigned her position to pursue employment at another college. For this reason, the director determined that an offer of permanent employment from the petitioner to the beneficiary no longer existed, and therefore revoked approval of the Form I-140 on October 14, 2003.

The director's decision stated: "As a job offer no longer exists, it cannot be found that the position meets all the requirements for the classification."

The regulation at 8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(iii) An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

(A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;

(B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or

(C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

As used in this section, the term "permanent," in reference to a research position, means either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination. 8 C.F.R. § 204.5(i)(2).

Subsequent to approval of the I-140 petition, the beneficiary filed an Application to Register Permanent Residence or Adjust Status, Form I-485, on March 29, 2002. According to a letter from Delmas Crisp, Vice President for Academic Affairs, Wesleyan College, the petitioner "was promoted to Associate Professor and

granted tenure in May 2002.” [REDACTED] letter notes that the petitioner resigned from her position at Wesleyan College in May 2002, and then took a position at Georgia College and State University.

On August 26, 2003, the Service Center issued a Notice of Intent to Revoke the approval of the petition requesting “an offer of employment from an authorized official at Wesleyan College.” We note here that as of August 26, 2003, the beneficiary’s Application to Register Permanent Residence or Adjust Status had been pending for more than 180 days. Therefore, approval of the I-140 petition would remain valid pursuant to the worker portability benefit provided under section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Public Law 106-313, if the beneficiary were to establish that her new job offer at Georgia College and State University is in the same or a similar occupational classification as the job for which the I-140 approval was initially granted.

As a result of AC21, the Immigration and Nationality Act was amended to include the following section:

Section 204(j) of the Act states:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence – A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F) of the Act] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 204(a)(1)(F) of the Act states: “Any employer desiring and intending to employ within the United States an alien entitled to classification under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) may file a petition...for such classification.”

A policy memorandum from Michael Cronin, Executive Associate Commissioner, Office of Programs, entitled *Initial Guidance for Processing H-1B Petitions as Affected by the “American Competitiveness in the Twenty-First Century Act” (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)* (June 19, 2001), states:

The AC21 § 106(c) provides that the certification or Form I-140 approval of an [employment based] immigrant petition shall remain valid when an alien changes jobs, if

- (a) A Form I-485, Application to Adjust Status, on the basis of the [employment based] immigrant petition has been filed and remained unadjudicated for 180 days or more; and
- (b) The new job is in the same or similar occupational classification as the job for which the certification or approval was initially made.

A policy memorandum from William Yates, Acting Associate Director for Operations, entitled *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)* (August 4, 2003), specifically addresses when

revocation of the approval of a petition for an alien who changes employers is permissible. The memorandum states: "If the approval of the Form I-140 is revoked or the Form I-140 is withdrawn before the alien's I-485 has been pending 180 days, the approved Form I-140 is no longer valid with respect to a new offer of employment..." In the present case, however, the Service Center did not revoke approval of the Form I-140 until October 14, 2003, more than eighteen months after the beneficiary's Form I-485 had been pending.

In accordance with section 204(j) of the Act and the above policy memoranda, if an alien is the beneficiary of an approved Form I-140 and is also the beneficiary of a Form I-485 that has been pending 180 days or longer, and if the alien's new job is in the same or a similar occupational classification as the job for which the I-140 petition was filed, then the approved I-140 remains valid with respect to a new offer of employment under the flexibility provisions of section 106(c) of AC21. The August 4, 2003 Yates memorandum requires Citizenship and Immigration Services adjudicators to request evidence establishing "that the new offer of employment is in the same or similar occupational classification as the offer of employment for which the petition was filed."

On appeal, counsel states: "Revoking [approval] of [a] previously approved petition based on the fact that the beneficiary no longer has a current offer of employment from the petitioner and has changed jobs is contrary to...the portability or flexibility provisions of AC21."

In this matter, we find that the director erred by not requesting evidence of a "new qualifying offer of employment" from the beneficiary's current employer establishing that her new job is in the same or a similar occupational classification as the job for which the petition was filed. The record as it is presently constituted does not warrant approval of the petition because it contains no evidence showing that the beneficiary's current employment at Georgia College and State University meets the "same or similar occupational classification" requirement. Without such evidence, it cannot be determined whether the beneficiary qualifies for the job flexibility provision available under Section 204(j) of the Act. For this reason, we conclude that the best course of action is to remand this matter to the director for further action.

Accordingly, this matter will be remanded for the purpose of a new decision. The director must afford the petitioner reasonable time to address the above deficiency and to obtain any further evidence which the director may deem necessary. Upon receipt of all the evidence, the director will review the entire record and render a new decision. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.