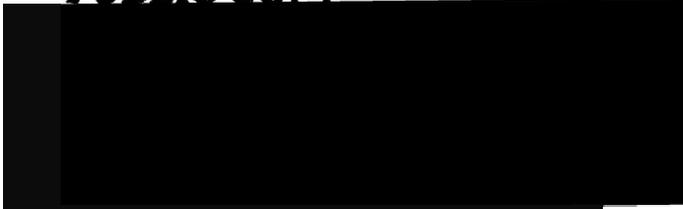


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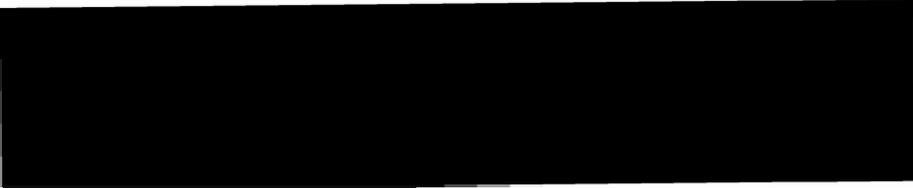
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FILE: WAC 04 118 50031 Office: CALIFORNIA SERVICE CENTER Date: JUN 26 2006

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:



**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.

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 producer of special and digital effects for film production that seeks to continue its employment of the beneficiary as a research specialist. The petitioner, therefore, endeavors to extend the beneficiary's 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; (3) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

According to the petitioner, the beneficiary was in the United States, in H-1B status, from August 10, 1996 through March 18, 2004 (the date the petition was filed). The petitioner filed an application for alien labor certification for the beneficiary on January 22, 2001; it was certified on May 9, 2001.

The petitioner filed the instant petition on March 18, 2004 and requested that the beneficiary be granted an additional year of H-1B status, 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).

The director denied the petition, holding that since the Form I-140, Immigrant Petition for Alien Worker,<sup>1</sup> had been denied, the beneficiary was not eligible for an additional year of H-1B status, as a final decision had been made on the immigrant petition.

On appeal, counsel contends that the petition should be approved, asserting that the petitioner filed a new Form I-140, based upon the certified application for alien labor certification. Although a receipt notice was not provided, counsel provided the Form I-140 receipt number: WAC 04 036 53191. CIS records are consistent with this assertion, and indicate that this petition was filed on November 21, 2003, denied by the service center, and appealed to the AAO. The AAO dismissed the appeal on May 31, 2006.

As a general rule, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that "the period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC-21 removed the six-year limitation on the authorized period of stay in H-1B visa status for aliens whose labor certifications or immigrant petitions remain pending due to lengthy adjudication delays, and DOJ-21 broadened the class of H-1B nonimmigrants able to avail themselves of this provision.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

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<sup>1</sup> Form I-140, WAC 02 092 51837, filed January 18, 2002.

(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).

(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

Section 11030(A)(b) of DOJ-21 amended section 106(b) of AC-21 to state the following:

(b) EXTENSION OF H-1B WORKER STATUS--The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

The director was correct to deny the extension based upon the record before him at the time he reviewed the file. As the Form I-140 had been denied; section 106(b)(1) of AC-21, as amended by 11030(A)(b) of DOJ-21, states that beneficiaries are ineligible to receive extensions after denial of the immigrant petition.

However, it does not appear as though the full record was before the director, as he did not reference the new Form I-140 filing in the denial. As correctly noted by counsel on appeal, the underlying application for alien labor certification remains valid; it was not prejudiced by the denial of the Form I-140. As over 365 have elapsed since the filing of the application for alien labor certification, and a new Form I-140 was filed,<sup>2</sup> the beneficiary continues to qualify for extension of his status.

The requested employment start date in the instant petition was May 5, 2004. As noted previously, the application for alien labor certification was filed on January 22, 2001. The new Form I-140 was filed on November 21, 2003, and was pending at the time the petition was filed. Therefore, the application for alien labor certification was filed more than 365 days prior to the petition's requested employment start date. Thus, the beneficiary is eligible for a seventh year of H-1B status, and the AAO will reverse the director's denial of the petition.

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<sup>2</sup> As noted previously, the AAO dismissed the appeal of the Form I-140 (WAC 04 036 53191) on May 31, 2006. However, the period of employment requested in this petition elapsed during the pendency of that appeal, so its dismissal has no bearing on the outcome of the instant appeal, as no final decision on the Form I-140 was issued during the period of proposed employment.

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.