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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 102 54188 Office: VERMONT SERVICE CENTER Date: APR 05 2004

IN RE: Petitioner: [redacted]
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:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner is a graphic design business that seeks to employ the beneficiary as its art director. The petitioner 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 director denied the petition reasoning that the record contained no evidence that the beneficiary fulfilled the requirements of sections 104(c) or 106 of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21).

On appeal, counsel indicates that the director's denial of the petition is not in accord with Congressional intent. Counsel had indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. As of this date, however, the AAO has not received any additional evidence into the record. Therefore, the record is complete.

Section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application of status has been adjudicated. As the above statute indicates, the beneficiary must be eligible to adjust status <u>except for the per-country limitations</u>. (Emphasis added.) The petitioner, however, has provided no evidence of an approved I-140 petition on behalf of the beneficiary.

Under section 106(a) of AC21, an H-1B nonimmigrant may obtain an extension of H-1B status beyond the six year maximum period when: (1) the alien is the beneficiary of an employment based immigrant petition or an application for adjustment of status; and (2) 365 days or more have passed since the filing of the labor certification application (Form ETA 750) that is required for the alien to obtain status as an employment based immigrant, or 365 days or more have passed since the filing of the employment based petition (Form I-140).

Here, the petitioner failed to submit any evidence that the beneficiary of is a beneficiary of an I-140 petition or an application for adjustment of status. Counsel only submits a copy of an unendorsed labor certification application that it allegedly filed on the beneficiary's behalf.

The AAO notes that on November 2, 2002, the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act) was signed into law. Part of this Act amended section 106(a) of AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of any application for labor certification (Form ETA 750) that is required or used by the alien to obtain status as an employment based immigrant; or (2) 365 days or more have passed since the filing of the employment based immigrant petition (Form I-140).

The beneficiary may also not derive benefits from the amendment to section 106(a) of AC21 by the 21st Century DOJ Appropriations Act. The provisions of the 21st Century DOJ Appropriations Act went into effect on November 2, 2002. A petitioner must establish that the criteria for benefits under the 21st Century

DOJ Appropriations Act were met when the I-129 petition was filed. *See* 8 C.F.R. § 103.2(b)(12). Here, the petitioner filed the I-129 petition on January 31, 2002, a date prior to the enactment of the 21st Century DOJ Appropriations Act. Accordingly, the filing of a labor certification application on the beneficiary's behalf cannot be the basis for extending her authorized period of stay in the United States in H-1B status beyond the maximum six year limit. The beneficiary is, therefore, ineligible to extend her H-1B status beyond the six-year limit because she does not meet the provisions of section 106(a) of AC21.

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 not sustained that burden. Accordingly, the decision of the director will not be disturbed.

**ORDER**: The appeal is dismissed. The petition is denied.