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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] OFFICE: TEXAS SERVICE CENTER DATE: JUL 18 2006

IN RE: APPLICANT: [redacted]

APPLICATION: Application to Register Permanent Resident or Adjust Status under Section 245 of the Immigration and Nationality Act; 8 U.S.C. §1255.

ON BEHALF OF APPLICANT:

[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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Texas Service Center. The matter has been certified to the Administrative Appeals Office (AAO) for review. The matter will be remanded for further action consistent with this decision.

The record reflects that the applicant was admitted into the United States with a J-1, Exchange Visitor nonimmigrant visa (J-1 Visa) on July 9, 1992. The applicant's J-1 visa status was extended yearly until June 30, 1996, at which time the applicant completed his medical trainee program, and the applicant's J-1 visa status expired. The record indicates that the applicant was employed in the United States without authorization during the following time periods: December 1996 to August 26, 1998 (Bay View Neurology); January 1997 to June 2001 (Bay View Neurology); July 2001 to March 2002 (Advanced Injury Medical Rehab Center). The record contains documentation indicating that the applicant returned to India in April 2002, and that he lived and worked in India for over two years between June 2002 and July 2004. The record reflects that the medical facility, Advanced Injury Medical Rehabilitation Center, filed a Form I-140, Immigrant Petition for Alien Worker (I-140 Petition) on the applicant's behalf on April 28, 2003. The I-140 petition was approved on July 21, 2004. The applicant was subsequently admitted into the United States as an H-1B nonimmigrant visa holder on July 27, 2004, in order to work as a neurologist for Advanced Injury Medical Rehabilitation Center. The applicant's H-1B visa expires on April 1, 2007. The applicant seeks to adjust his immigration status to that of a lawful permanent resident, and a Form I-485, Application to Register Permanent Resident or Adjust Status (I-485 Application) was filed on October 13, 2004

The record contains a Notice of Intent to Deny (NOID) dated November 28, 2005, and addressed to counsel, notifying the applicant of the Texas Service Center's intent to deny the applicant's I-485 adjustment of status application. The NOID states that the applicant was employed in the United States without authorization, and prior to filing for adjustment of status, and that the applicant was employed while he was an unauthorized alien in the United States. On this basis, the director determined that the applicant was inadmissible to the United States pursuant to section 245(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(c).[1] The director noted in the NOID that upon payment of a $1000.00 penalty fee, the applicant would be eligible to file a supplement to his I-485 application pursuant to section 245(i) of the Act (8 U.S.C. § 1255(i)), and that the applicant could thereby maintain eligibility to adjust his status to that of a lawful permanent resident under section 245 of the Act.[2] The director emphasized in the NOID, that the applicant

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[1] Section 245(c) of the Act states, in pertinent part:

> [O]ther than an alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (A)(v), (A)(vi), (B)(ii), (B)(iii), or (B)(iv) of section 204(a)(1), subsection (a) shall not be applicable to . . . (2) subject to subsection (k), an alien (other than an immediate relative as defined in section 201(b) or a special immigrant described in section 101(a)(27)(H), (I), (J), or (K)) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States . . . . (8) any alien who was employed while the alien was an unauthorized alien, as defined in section 274A(h)(3), or who has otherwise violated the terms of a nonimmigrant visa.

[2] Section 245(i) of the Act provides in pertinent part that:

must file a Supplement A form, and pay a $1000.00 penalty fee in order to be considered for adjustment of his status under section 245(i) of the Act, and the NOID reflects that the director attached a Supplement A form to the NOID. The applicant was given thirty days to respond to the director's NOID, however, the record contains no response to the NOID.

The record contains a final denial decision dated January 3, 2006, in which the director determined that the applicant had failed to respond to the November 2005, NOID. The director determined further that the applicant had failed to file for relief or pay the $1000.00 penalty fee under section 245(i) of the Act. Accordingly, the director found that the applicant was inadmissible to the United States pursuant to section 245(c) of the Act. The applicant's I-485 application was denied accordingly.

The director noted in her decision that, beyond the above regulatory findings, the applicant was also inadmissible to the United States pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. 1182(a)(9)(B), because he had been unlawfully present in the United States between September 1996 and September 1997, and

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(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States--

(A) who--

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of--

(i) a petition for classification under section 204 that was filed with the Attorney General [now, Secretary, Department of Homeland Security, Secretary] on or before April 30, 2001

. . . .

(ii)(C) [m]ay apply to the Attorney General [Secretary] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General [Secretary] may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application

. . . .

(iii) [T]he sum specified herein shall be in addition to the fee normally required for the processing of an application under this section. and

(2) Upon receipt of such an application and the sum hereby required, the Attorney General [Secretary] may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

between September 1997 and April 2002.[3] The director noted that a September 19, 1997, Memo by the Immigration and Naturalization Service (Service, now U.S. Citizenship and Immigration Services, CIS) modified the Service's interpretation of unlawful presence with respect to nonimmigrants by stating that in the case of nonimmigrants that were admitted into the United States for a "duration of status" period of time, unlawful presence accrues only from the date of a Service or Immigration Judge finding regarding the nonimmigrant status violation. The director determined that the guidelines set forth in the September 1997, Memo were not meant to be applied retroactively, and that the memo's intent was for "duration of status" guidelines to be applied subsequent to the issuance of the memo.[4] The director noted further that section 245(i) of the Act did not apply to a ground of inadmissibility under section 212(a)(9)(B) of the Act.

The record contains a Notice of Certification dated January 3, 2006, and addressed to counsel, notifying counsel of the applicant's I-485 application final denial, and certifying the matter to the AAO for review. Counsel was provided with thirty days to provide a brief or other written statement for consideration by the AAO. No brief or statement was received by the AAO. The AAO noted, however, that it was unclear from the record whether counsel had been provided with a copy of the director's Notice of Certification and final denial decision. On May 3, 2006, the AAO therefore faxed counsel a copy of the director's Notice of Certification and final denial decision, and the AAO provided counsel with an additional 30 days to provide a brief and/or evidence in the present matter.

The record reflects that counsel timely responded to the AAO's request for a brief and/or evidence. Counsel asserted in his response that he had not, at any time, been notified of the NOID in the applicant's case, and that, in addition, he had not been notified of the final denial decision and certification of the applicant's case to the AAO. In response to the information provided to counsel by the AAO, counsel submitted a new I-485 application, a Motion to Reopen and a Form I-290 AAO appeal, with payment.[5] Counsel asserts that the applicant is eligible for adjustment of status pursuant to section 245(i) of the Act grandfathering provisions, and pursuant to section 245(k) of the Act. In addition, counsel asserts that the director erred in finding that the applicant is inadmissible under section 212(a)(9)(B) of the Act.

The AAO notes that the final denial decision in the present matter rests primarily on the finding that the applicant is inadmissible under section 245(c) of the Act because he engaged in unauthorized employment, and on the finding that the applicant failed to file a Supplement A form with penalty fee, pursuant to section 245(i) of the Act, despite being given an opportunity to do so when the director issued a NOID. Counsel asserts, however, that he was never notified or sent a NOID or final denial decision in the applicant's case. Counsel bolsters his assertion by submitting e-mail inquiry and AILA liaison evidence demonstrating counsel's numerous efforts to find out the status of the applicant's I-485 application. The AAO additionally notes that although the NOID and Notice of Certification with final denial decision contained in the record are addressed to counsel, the record contains no certified mail receipt or other evidence to establish that the NOID

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[3] The AAO notes that section 212(a)(9)(B) was created through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Section 212(a)(9)(B) of the Act, went into effect on April 1, 1997, and no period of time prior to April 1, 1997 counts towards "unlawful presence" for section 212(a)(9)(B) purposes.

[4] It is noted that the director provided no independent authority for her Memo guidelines interpretation.

[5] It is noted that immigration application and motion to reopen, and payments therefore are not filed or accepted at the AAO. The AAO therefore returned the I-485 application(s) and payment to counsel.

and Notice of Certification with final denial decision were sent to counsel. Indeed, the AAO itself faxed a copy of the Notice of Certification with final denial decision to counsel in May 2006 because it was unsure whether the Notice and decision had been provided to counsel.

8 C.F.R. § 103.2(b)(19) provides that:

> An applicant or petitioner shall be sent a written decision on his or her application, petition, motion, or appeal. Where the applicant or petitioner has authorized representation pursuant to Sec. 103.2(a), that representative shall also be notified.

The circumstances in the present matter indicate that counsel may not have been notified of the NOID or final denial decision and Notice of Certification in the applicant's case. On this basis, the AAO finds it necessary to remand the present matter to the director for re-adjudication of the applicant's eligibility for adjustment of status under section 245 of the Act.

DECISION: The matter will be remanded for further action consistent with this decision.