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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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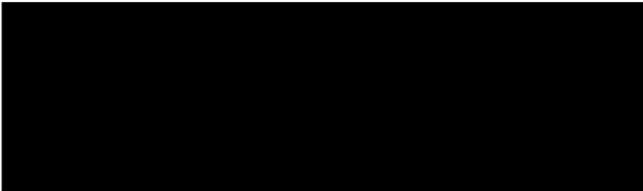


FILE: WAC 08 145 50890 Office: CALIFORNIA SERVICE CENTER Date: **NOV 09 2009**

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)

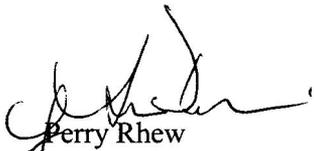
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the AAO. The appeal will be dismissed. The petition will be denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in information systems development and consulting, that it was established in 1978, that it employs 260 persons, and that it has an estimated gross annual income of \$28,500,000. It seeks to extend the employment of the beneficiary as a computer systems analyst from July 11, 2008 to July 10, 2009. Accordingly, 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 record shows that the beneficiary was present in the United States in H-1B status for a total of six years from July 10, 2002 through July 9, 2008. During this time, an Application for Alien Employment Certification (Form ETA 750) was filed on behalf of the beneficiary on November 17, 2004. The petitioner did not file a Form I-140, Immigrant Petition for Alien Worker, until May 11, 2009 (LIN 09 151 51476), more than a year subsequent to the director's decision in this matter and approximately 14 months subsequent to the expiration of the Form ETA 750. USCIS records show that the Form I-140 was erroneously approved on behalf of the beneficiary on May 12, 2009, even though the DOL certification had expired.

On April 21, 2008, prior to the expiration of the beneficiary's H-1B status on July 10, 2008, the petitioner filed the instant petition, requesting a continuation of previously approved employment without change with the same employer and requesting the extension of the beneficiary's stay since the beneficiary now holds this status. The petitioner requested the continuation of the beneficiary's employment in H-1B status from July 11, 2008 to July 10, 2009.

In response to the director's request for further evidence (RFE) regarding an H-1B extension beyond the six-year limit, counsel for the petitioner claimed that as a labor certification had been filed over 365 days ago, pursuant to section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21), a one-year extension is mandatory. Counsel noted the director's observation in the RFE that a Form I-140 had not been filed and asserted that the lack of filing a Form I-140 is irrelevant to the AC21 adjudication of an H-1B extension petition.<sup>1</sup> In a response to the director's second RFE requesting evidence, counsel submitted a copy of the Final Determination issued by the Department of Labor documenting that an Application for Employment Certification had been accepted for processing on November 17, 2004 and that the Form ETA 750 had been certified on June 12, 2007.

On June 11, 2008, the director denied the petition. The director observed that the petitioner's current request to employ the beneficiary as an H-1B nonimmigrant would place the beneficiary beyond the six-year limit. The director noted that the beneficiary's permanent labor certification was certified

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<sup>1</sup> As counsel makes the same arguments on appeal, counsel's arguments will be more thoroughly addressed later in this decision.

on June 12, 2007 and that the validity of the certified application expired on January 16, 2008. The director determined that the petitioner had not filed a Form I-140 prior to the expiration of the validity period of the Form ETA 750 labor certification; thus, the beneficiary was not eligible for an extension of H-1B nonimmigrant status under section 106(a) of AC21 as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21).

The AAO notes that 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] shall not exceed 6 years." However, AC21 removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030A(a) of DOJ21, § 106(a) of AC21 reads:

(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*:

*(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 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] 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.*

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

Subsequent to the enactment and effective date of AC21 as amended by DOJ21 (hereinafter referenced as AC21), the Department of Labor (DOL) issued the “Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,” [69 Fed. Reg. 77326], (Perm Rule) (published on December 27, 2004, and effective as of March 28, 2005). The DOL Perm rule, in general, provides for the revocation of approved labor certifications if a subsequent finding is made that the certification was not justified. It is codified at 20 C.F.R. § 656.32.

DOL issued a second rule, the “Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,” published on May 17, 2007, (72 Fed. Reg. 27904), which took effect on July 16, 2007 (Perm Fraud rule). The DOL Perm Fraud rule, now found at 20 C.F.R. § 656.30(b), provides for a 180-day validity period for labor certifications that are approved on or after July 16, 2007. Petitioning employers have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS. The regulation at 20 C.F.R. § 656.30(b)(2) also established an implementation period for the continued validity of labor certifications that were approved by DOL prior to July 16, 2007; such labor certifications must have been filed in support of an I-140 petition within 180 calendar days after the effective date of the DOL final rule (July 16, 2007) in order to remain valid.

In this matter, the AAO finds that more than 365 days elapsed from the date the petitioner filed the labor certification application (November 27, 2004) to the date the petitioner filed the Form I-129, request to extend the employment of the beneficiary (April 21, 2008). The AAO also notes, however, that the labor certification application filed by the petitioner was approved on June 12, 2007. The effective date of the DOL Perm Fraud rule, as set out at 20 C.F.R. § 656.30(b)(2), is July 16, 2007 and as is further explicated in the Perm Fraud rule, the validity of labor certification applications approved prior to that date expire within 180 calendar days after the effective date of the DOL Perm Fraud rule, if not filed in support of a Form I-140. As such, the AAO finds that the petitioner’s labor certification application filed on November 27, 2004 expired or ceased to be valid on January 13, 2008.

Counsel asserts that the DOL regulation cited above is not applicable to AC21. Counsel avers that once 365 days have elapsed from the filing of a labor certification application, section 106(b) mandates an exemption from the six-year limitation of the H-1B cap and a one-year extension of the beneficiary’s stay. Counsel contends that the petitioner’s lack of filing an I-140 petition is irrelevant under the statute and that USCIS reliance on the DOL regulation limiting the validity of a labor certification to a period of 180 days for purposes of filing an immigrant visa petition is beyond USCIS jurisdiction. Counsel avers that by incorporating DOL’s Perm Fraud rule into AC21, “then, in almost every case, only the *same* employer who filed the labor certification application could

petition for post-sixth year extensions.” Counsel argues that this is an impermissible limitation on the individual worker’s right to change jobs. Counsel observes that USCIS has not issued a regulation incorporating DOL’s rule into AC21 and that prior policy guidance indicates that a request for an H-1B extension beyond the 6-year limit should not be denied on the sole basis that an I-140 petition has not yet been filed.<sup>2</sup>

The AAO does not find counsel’s assertions persuasive. As a threshold issue, the AAO is not persuaded that incorporating DOL’s Perm Fraud rule into AC21 would eviscerate or otherwise make ineffective the portability provision of section 105 of AC21. The AAO acknowledges counsel’s assertion that requiring a petitioner to file the pertinent petition or application within 180 days of the approval of the labor certification application would mean that a worker would lose eligibility for extensions pursuant to AC21 if the worker wished to change jobs because of a new employer. Counsel’s argument is without merit, however. If the employer that filed the labor certification truly intends to employ the beneficiary at some point in the future, it will comply with DOL requirements and timely file an immigrant petition with USCIS. *See generally* 72 Fed. Reg. 27904, 27925, 27939. As an immigrant petition is for prospective employment, there is no requirement that the employer employ the beneficiary at the time the labor certification application or immigrant petition is filed. As such, where or for whom the beneficiary works during the time the permanent residence application is pending is generally irrelevant, unless it indicates in some way that the labor certification employer does not truly intend to permanently employ the beneficiary or that the beneficiary does not intend to work for that employer once lawful permanent resident status has been granted. Therefore, it is not evident that DOL’s Perm Fraud rule prevents aliens from porting to another employer under section 105 of AC21 during the time their lawful permanent resident applications are pending with either DOL or USCIS.

Moreover, section 105 of AC21 merely enables an H-1B beneficiary to begin working for a new petitioner during the time the H-1B petition for new employment is pending with USCIS. DOL’s Perm Fraud rule does not restrict or make ineffectual this statutory benefit. Provided the requirements of section 105 of AC21 are met and the beneficiary is otherwise eligible for H-1B status, the beneficiary is still permitted to change jobs and begin working for another employer during the time the new H-1B petition is pending. It is noted, however, that section 105 of AC21 does not guarantee an approval of the petition, nor does it make the beneficiary exempt from the six-year maximum period of stay permitted for H-1B nonimmigrants. In addition, even if a beneficiary becomes in some way ineligible for the benefits of the nonimmigrant portability provisions of section 105 of AC21, he or she still may be or may become eligible to port to a same or

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<sup>2</sup> The AAO acknowledges that, while USCIS has not addressed this issue by promulgating a regulation, it has issued policy guidance on this issue as it relates to DOL’s Perm Fraud rule. *See Supplemental Guidance Relating to Processing Forms I-140, Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) Title IV of Div. D. of Public Law 105-277, HQ 70/6.2 AD 08-06 (May 30, 2008).*

similar position with another employer pursuant to section 204(j) of the Act, 8 U.S.C. § 1154(j), the statutory provision intended to provide "Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence."

Regardless, unless the DOL regulations on the validity of labor certifications are deemed to be ultra vires and/or otherwise contrary to the plain language of the Act, USCIS must take into consideration these regulations when evaluating the *bona fides* of labor certifications certified by DOL. An "administrative agency's regulations are presumed valid and, unless they are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute." *Travelers Ins. Co. v. Kulla*, 216 Conn. 390, 399 (1990) (citing *Phelps Dodge Copper Products Co. v. Groppo*, 204 Conn. 122, 128 (1987)). Therefore, based upon the supplemental information in DOL's Perm Fraud rule as well as the plain language of 20 C.F.R. § 656.30, a labor certification that is invalid may not provide the basis for an approval of a petition described in section 204(b) of the Act to accord the alien a status under section 203(b) of the Act. *See generally* 72 Fed. Reg. 27904, 27925, 27939. Therefore, it follows, for the reasons discussed *infra*, that a labor certification that is invalid may not provide a basis for an AC21 based exemption to section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4).

The primary issue in this matter revolves around the definition of the term "deny" as it is used in section 106(b)(1) and 106(b)(2) in AC21, as amended by DOJ21. The statute itself does not provide a definition of the term "deny," and the congressional record also fails to directly define this term. Therefore, an analysis of the plain language of the statute and, failing that, the congressional intent behind the statute, must be undertaken to determine whether the statute incorporates the term "valid" or "invalid" or "expired" as those terms relate to a labor certification that is being used as a basis to extend an alien's stay under section 106(b)(1).

Again, sections 106(b)(1) and 106(b)(2) use only the term "deny" when outlining the parameters of the factors involved in the extension of an alien's stay under AC21. Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991). We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

As the plain meaning of the word "deny" does not by its own definition incorporate the term "invalid" or "expired" when referring to a labor certification that forms the basis for an extension of

an alien's stay based on an exemption under subsections 106(b)(1) and (2), the AAO must therefore examine the legislative intent in enacting AC21 and the subsequent amendment of AC21 by DOJ21 to ensure that a literal application of the statute will not produce a result demonstrably at odds with the intent of its drafters. *See Samuels, Kramer & Co. v. CIR*, 930 F.2d 975, *cert. denied*, 112 S. Ct. 416. Senator Leahy and Representative Smith (TX), sponsors of the DOJ21, but not of AC21, both made comments stating that § 11030A of DOJ21 permits H-1B aliens who have labor certification applications caught in lengthy agency backlogs to extend their status beyond the sixth year limitation. 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002); *accord* 148 Cong. Rec. S11063 (daily ed. Nov. 14, 2002). Representative Smith also noted that AC21 was put in place to recognize the lengthy delays at the legacy Immigration and Naturalization Service (INS) in adjudicating petitions and that DOJ21 addresses the lengthy processing delays at DOL. Representative Smith observed that the DOJ21 legislation allowed those who are about to exceed their six years in H-1B status to not be subject to the additional requirement of having to file the immigrant petition by the end of the sixth year, which he noted "is impossible when DOL had not finished its part in the process." 148 Cong. Rec. H6745 (daily ed. Sept. 26, 2002). Thus, the legislative history of DOJ21 underscores the legislative concern regarding the lengthy processing delays occurring at DOL. More importantly, the main purpose of the legislative change appears centered on providing an additional means by which aliens may remain in the United States and continue to work during the time their application for permanent resident status is pending.

Therefore, contrary to the assertions of counsel, the legislative history of DOJ21 does not in any way reflect an intent to indefinitely extend an alien's stay in a temporary, nonimmigrant status once DOL finishes its part, i.e., adjudicating the labor certification application, in the employment-based immigrant visa process. Rather, as noted above, the law was designed to permit H-1B nonimmigrants to continue their stay in the United States and work in H-1B status as long as there was a pending and ongoing process to obtain lawful permanent resident status in the United States.<sup>3</sup> To interpret this statutory provision otherwise and provide a means by which an alien can remain indefinitely and thereby permanently in the United States in a temporary, nonimmigrant status is demonstrably at odds with the Act as a whole as well as with the clear intent behind the drafting of section 106 of AC21 as amended by DOJ21.

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<sup>3</sup> The AAO notes that an "extension of stay" must be distinguished from an extension of H-1B status, which occurs through a "petition extension." Although those seeking H-1B status are currently permitted to file one form to request a petition extension, extension of stay, and change of status, they are still separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). The AAO observes that in general, according to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21. On the other hand, the title of section 106(b) of AC21 reads "Extension of H-1B Worker Status." In this situation, where the title uses the word "[s]tatus" and the text uses the word "stay," the text of the statute prevails. The title of a statutory section is not controlling, and where it is contrary to the text of the statute, the text is controlling. *Immig. and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 308-309 (2001).

The AAO acknowledges counsel's assertion that a denial of a labor certification differs from that of a labor certification application that has expired and that only a formal individualized decision to deny the labor condition application extinguishes eligibility for post-sixth year extensions. Counsel avers that, as an "automatic expiration" of a labor certification application is not a reasoned, individual determination by DOL to deny the application, it is not applicable when adjudicating an extension of stay pursuant to AC21. The AAO disagrees. For the reasons discussed, giving the words "deny" or "denied" their ordinary meaning and construing the terms in relation to the intent of the statute and the Act as a whole, the terms "deny" or "denied" incorporate the meaning of the terms "invalid" and "expired." Both a denial issued through an individualized decision as well as an expiration of the validity of a labor certification result in the invalidity of the labor certification and are evidence that DOL has completed its process of adjudicating the labor certification application and that the beneficiary's application process for obtaining lawful permanent resident status in the United States by way of that labor certification has ended.

Thus, whether the validity of a labor certification application is terminated by a denial or by regulatory expiration, the lack of a valid labor certification application precludes USCIS from further processing petitions or applications dependent upon those labor certification applications. Again, to accept counsel's contrary interpretation, USCIS would be required to indefinitely extend an individual's stay in the United States in one-year increments once a labor certification had been approved, even if the labor certification expired according to DOL regulations or was otherwise considered invalid. To reiterate, nothing in the AC21 or DOJ21 legislative history serves to suggest that Congress intended that petitioners on behalf of individual aliens retain the ability to have those aliens remain in the United States indefinitely, e.g., for twenty or thirty years, simply by failing or choosing not to file an immigrant petition on their behalf. Rather, the legislative intent reflects only a desire to shield individual aliens from the inequities of government bureaucratic inefficiency and does not include a mandate for an infinite extension of stay in a nonimmigrant status when the petitioner fails to file an immigrant petition for the beneficiary.

Of significant import when considering the legislative intent regarding the impact of AC21, the AAO observes that when DOJ21 amending AC21 was passed, the DOL regulations pertinent to this matter, 20 C.F.R. § 656.32 and 20 C.F.R. § 656.30(b) had not been codified. Thus, when Congress used the word "denied" to indicate the completion of DOL processing, DOL had not set forth a process to "revoke" approved labor certification applications (20 C.F.R. § 656.32) and had not enacted rules governing the term of validity of an approved labor certification application (20 C.F.R. § 656.30(b)). It thereby follows that Congress was unaware of and did not foresee DOL's use of additional terms when describing the DOL administrative process, thus Congress would not have contemplated the use of or rejection of those terms. As Congress was not aware of such regulations the rationale set forth in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) does not apply.

As observed above, using counsel's reasoning, an individual's stay in H-1B status would be almost completely unrestricted once 365 days had elapsed since the filing of the labor certification

application, provided the labor certification was subsequently approved and as long as the petitioner did not file an immigrant petition on behalf of the individual. Once these conditions were met, the individual's stay would absurdly result in continuous one-year extensions with no requirement that the petitioner ever file any petition that would ultimately result in the beneficiary obtaining lawful permanent resident status in the United States. To avoid this incongruous outcome, the AAO has applied the most reasonable interpretation of the term "deny" such that it complies with and complements Congressional intent in establishing an exemption from the maximum six-year stay in H-1B status. As such, USCIS must consider the validity of the DOL labor certification application when adjudicating an AC21 H-1B extension petition, as without a valid labor certification upon which to base a petition described in section 204(b) of the Act to accord the alien a status under section 203(b) of the Act, the approval of an employment-based immigrant petition is proscribed.

Finally, it is noted that current USCIS policy is in accord with this statutory interpretation of AC21 as amended by DOJ21. Specifically, to assist USCIS adjudicators when considering an extension of stay under AC21 section 106(a), in light of the DOL regulations, USCIS recently issued guidance on this issue. In pertinent part, USCIS expressly stated:

USCIS will *not* grant an extension of stay under AC21 § 106(a) if, at the time the extension request is filed, the labor certification has expired by virtue of not having been timely filed in support of an EB immigrant petition during its validity period, as specified by DOL. USCIS sees no reason to consider a labor certification that has expired through the passage of time differently than one that had been denied or, for that matter revoked. In addition, the filing of an immigrant petition with an expired labor certification would result in the automatic rejection, or if accepted in error, denial of that EB immigrant petition, which in turn, acts as a statutory bar to the granting of an extension beyond the 6-year maximum.

*See Supplemental Guidance Relating to Processing Forms I-140, Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) Title IV of Div. D. of Public Law 105-277, HQ 70/6.2 AD 08-06 (May 30, 2008).*

Accordingly, the director did not err as a matter of law or policy in concluding that the beneficiary is not exempt from the maximum six-year period of stay permitted for H-1B nonimmigrants under section 214(g)(4) of the Act. Therefore, the appeal is dismissed. The petition is denied.

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.

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

**FURTHER ORDERED:** Upon review of USCIS records, the AAO observes that USCIS improperly approved two subsequently filed Forms I-129 (WAC 08 201 50087 and WAC 09 174 51744) and the Form I-140 (LIN 09 151 51476) previously referenced. In light of this discussion and USCIS guidance, the director should review the approvals for possible revocation.