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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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Services

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FILE: WAC 08 102 50946 Office: CALIFORNIA SERVICE CENTER Date: OCT 08 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)

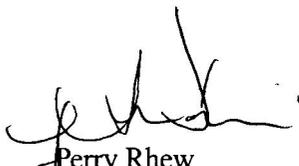
ON BEHALF OF PETITIONER:

[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.

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.

The petitioner provides chiropractic services. It seeks to extend the employment of the beneficiary as an associate chiropractic physician. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 because the beneficiary had remained in the United States in H-1B status for six years and the petitioner had not satisfied the requirements for an extension of stay under the “American Competitiveness in the Twenty-First Century Act,” (AC21) and the “Twenty-First Century Department of Justice Appropriations Authorization Act” (21st Century DOJ Appropriations Authorization Act). The director noted that to be eligible for an extension of stay under these acts, 365 days or more must have elapsed since the filing of the Form I-140, Immigrant Petition for Alien Worker or the filing of the Department of Labor’s (DOL) Form 750, Labor Condition Application (LCA). The director determined that the Form I-140 filed on behalf of the beneficiary was no longer pending.

On appeal, counsel for the petitioner asserts that U.S. Citizenship and Immigration Services (USCIS) records show that the beneficiary’s Form I-485 (LIN 04 119 51688) is still pending. Counsel asserts that neither counsel nor the petitioner was notified that USCIS denied the Form I-485.

Upon review of USCIS records, the AAO finds that USCIS records show that a Form I-140 (LIN 04 119 51653) was filed on behalf of the beneficiary on March 15, 2004 and was denied by USCIS on May 17, 2005 and that the Form I-485 (LIN 04 119 51688) filed by the beneficiary was also denied on May 17, 2005. USCIS records do not show that an appeal was filed in the Form I-140 matter. The AAO observes that it does not have appellate jurisdiction over an appeal from the denial of a Form I-485, application for adjustment of status under section 245(a) of the Immigration and Nationality Act (the Act). 8 C.F.R. § 245.2(a)(5)(ii).

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 § 11030(A)(a) of the DOJ Authorization Act, § 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 11030(A)(b) of the DOJ Authorization Act amended § 106(a) of AC21 to read:

(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.

Section 106(b)(3) of AC21 indicates that the Attorney General [now Secretary, Department of Homeland Security] shall extend the stay of an eligible alien under Section 106(a) until such time as a final decision is made to grant or deny the alien's application for an immigrant visa or for adjustment of status. As the underlying Form I-140 and Form I-485 were denied on May 17, 2005, the beneficiary is not entitled to an extension of stay in one-year increments under AC21. For this reason, the petition must be denied.

The AAO acknowledges counsel's claim that neither he nor the "applicant" received notice of the denial of the Form I-485; however, the petitioner listed the May 17, 2005 denial of the Form I-140 (LIN 04 119 51653) on the instant petition. Thus, the petitioner was aware that a final decision had been made on the Form I-140 petition and the petition underlying the request for an extension of H-1B worker status had been denied. The AAO is not persuaded that neither counsel nor the "applicant" failed to receive notice of the denial of the Form I-485 issued on the same date. The AAO also acknowledges counsel's claim that equitable doctrines should apply in this matter; however, a review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. As addressed above, the petitioner has not met

its burden of proof establishing that the denial was an improper result under the regulation. Accordingly, the petitioner's equitable claim is without merit.

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