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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:

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Office: NEWARK FIELD OFFICE

Date:

OCT 08 2009

IN RE:

Applicant:

Petition:

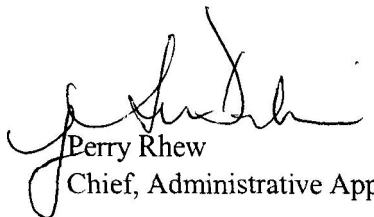
Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant to Section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i)

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Newark, New Jersey, denied the application for adjustment of status (Form I-485) and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be denied.

The applicant is a native and citizen of Mexico who filed this application for adjustment of status to that of a lawful permanent resident based on an approved Form I-140, Petition for Alien Worker. A review of the record reveals the following facts and procedural history.

On June 10, 2009, the applicant testified under oath that he last entered the United States in March 1999, although the applicant's Form I-485 indicated his last entry into the United States was in February 2000. The applicant indicated that prior to his illegal entry into the United States in March 1999, he was apprehended by border patrol agents and returned to Mexico, but after waiting a few days attempted to re-enter and was successful. The director noted that United States Citizenship and Immigration Services' (USCIS) records confirmed that the applicant had attempted to enter the United States without inspection on February 27, 1999, but was caught and returned to Mexico. The director concluded that the applicant's testimony regarding his last entry into the United States provided the best information regarding his last entry into the United States as the testimony was corroborated by USCIS records.

The applicant also testified that he had previously entered the United States in 1994, that he lived in the United States, and that he worked in the United States at a bakery in Denville, New Jersey until December 31, 1997 or 1998. The director noted that on the attachment to the applicant's signed Form ETA 750, Application for Alien Employment Certification, the applicant stated that he had worked at the Denville, New Jersey bakery beginning in February 1996 to June 2000. The record did not include further information regarding the applicant's physical presence in the United States. The director concluded from the applicant's testimony and the start date of employment noted on the Form ETA 750 attachment, that the applicant was in the United States at least by the February 1996 date. The director also concluded based on the applicant's testimony that he remained in the United States until December 31, either in 1997 or 1998.

Based upon the above information, the director determined that the applicant's initial entry into the United States was without inspection and that under the Illegal Immigration Reform and Responsibility Act of 1996, (IIRIRA) the applicant started accruing unlawful presence on April 1, 1997, the effective date of IIRIRA. The director also took the least onerous recollection by the applicant regarding his illegal stay in the United States and determined that the applicant left the United States on December 31, 1997, even though the applicant testified he may have left the United States on December 31, 1998 and even though the applicant had previously stated on the Form ETA 750 attachment that he continued to work in the United States until June 2000. Calculating the applicant's unlawful presence in the United States using the start date of April 1, 1997 and the applicant's December 31, 1997

departure date, the director found that the applicant had accrued 274 days of unlawful presence in the United States.

The director cited section 212(a)(9)(B)(i) of the Act which states, in pertinent part:

Any alien (other than an alien lawfully admitted for permanent residence) who

- (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244a(e) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal

\* \* \*

is inadmissible.

The director concluded that the applicant's departure from the United States after accruing more than 180 days of unlawful presence made the applicant inadmissible into the United States for 3 years and that the applicant's re-entry into the United States less than two years after his first departure was a second violation of the law.

The director considered whether the applicant would be eligible for a waiver of this ground of inadmissibility citing section 212(a)(9)(B)(v) which states, in pertinent part:

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The director noted that the applicant's birth certificate did not list his father and noted that his mother was a citizen of Mexico and that the record did not show that his spouse had any legal status in the United States. The director concluded that the applicant did not have relatives that fulfilled the criteria for the applicant to file a waiver. Based upon this evidence, the director denied the applicant's Form I-485 and certified her decision to the AAO.

On certification, counsel for the applicant requests that USCIS provide any relevant information in its records supporting the applicant's presence in the United States. As referenced above, the director noted in the June 20, 2009 certification decision that USCIS records confirmed that the applicant had attempted to enter the United States without

inspection on February 27, 1999, but was caught and returned to Mexico. The AAO observes that the director used this information to corroborate the applicant's testimony that he attempted to enter the United States in 1999, was caught at the border and returned to Mexico, and successfully re-entered the United States illegally in March 1999. As noted, the director provided the applicant this information in the certification and the applicant had opportunity to rebut the information on certification. *See* 8 C.F.R. § 103.2(b)(16)(i).

Counsel does assert, on certification, that the applicant was in Mexico from February 1997 through at least September 1997 and was not in the United States during this time period. Counsel notes that the applicant's spouse stated her belief at the June 10, 2009 interview that the applicant left the United States in 1996<sup>1</sup> and re-entered in 1999. Counsel also submits photocopies of receipts allegedly issued to the applicant including: (1) a receipt dated on February 2, 1997 that is in Spanish but does not include any identifying information other than the applicant's name; (2) a receipt date stamped June 1, 1997 that is in Spanish, and shows a company name and address in Mexico, as well as the applicant's name; and (3) a receipt dated September 9, 1997 that is in Spanish and shows a company name and address in Mexico, as well as the applicant's name. Counsel contends that the director cannot conclude that the applicant was in the United States during this time period as these documents establish that the applicant was in Mexico from February 2, 1997 to September 9, 1997. Counsel also contends that the applicant is protected by section 245(i) of the Act.

Upon review, the AAO does not find that the receipts provided establish that the applicant was in Mexico from February 2, 1997 to September 9, 1997. The receipts are in Spanish and a translation has not been provided. *See* 8 C.F.R. § 103.2(b)(3). Failure to submit certified translations of the documents precludes a determination regarding the probative value of the documents. In addition, the receipts are not originals, but are photocopies and thus would not clearly indicate address alterations or name substitutions as would originals of the receipts; thus, diminishing their evidentiary value. Further, the receipts depict one-time events with no substantive information regarding the circumstances of the events and are thus, insufficient to establish that the applicant was in Mexico throughout the asserted time frame.

The applicant's sworn testimony establishes that he had initially entered the United States in 1994, lived in the United States, and worked in the United States at a bakery in Denville, New Jersey until December 31, 1997 or 1998. Information on the attachment to the applicant's signed Form ETA 750, Application for Alien Employment Certification, indicates that the applicant worked at the Denville, New Jersey bakery beginning in February 1996 to June 2000. As noted above, USCIS records do not include further information regarding the applicant's physical presence in the United States during this time period. Based on the

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<sup>1</sup> The interviewer's typewritten question and answer statement shows that the applicant initialed each of his answers, except for the answer indicating that he left the United States in either December 31, 1997 or December 31, 1998, that he could not remember exactly. Instead of the applicant's initials, the applicant appears to have written in Spanish that his wife thought he left the United States in 1996.

applicant's sworn testimony that he initially entered the United States in 1994, along with the indication on the Form ETA 750 that the applicant was in the United States at least by the February 1996 date, the director concluded that the applicant was in the United States by February 1996. The director also concluded based on the applicant's testimony that he remained in the United States until December 31, either in 1997 or 1998. Taking the less onerous view of the applicant's testimony, the AAO also concludes that the applicant was in the United States in February 1996, began to accrue unlawful presence on April 1, 1997, and **remained in the United States until December 31, 1997. The AAO acknowledges the applicant's wife's recollection of the applicant's departure from the United States in 1996; however, this recollection does not corroborate the applicant's testimony, but rather further confuses the record. The AAO also finds that USCIS records offer some corroboration of the applicant's testimony that he re-entered the United States in March 1999.**

The AAO notes that the applicant bears the burden of proof in establishing eligibility for this benefit. Upon review of the information in the record, the applicant's testimony that he was in the United States in 1994, a statement on a Form ETA 750 that he was in the United States in February 1996 and the applicant's testimony that he left the United States in December 1997 or 1998 offers the best, although inconsistent, information regarding his entries and departures from the United States. The director's conclusion that the applicant began accruing unlawful presence on April 1, 1997 (the effective date of IIRIRA) and continued accruing unlawful presence until his departure on December 31, 1997, a date supplied by the applicant, is proper.

As the director determined, there is no waiver available to the applicant for this ground of inadmissibility because the applicant does not have a qualifying U.S. citizen or lawful permanent relative.

The AAO also notes that adjustment of status pursuant to section 245(i) of the Act is not available to an alien who is inadmissible under section 212(a)(9)(B)(i)(I) of the Act. 8 C.F.R. § 245.10(b)(3); *See also Matter of Lemus-Losas*, 24 I & N Dec. 373 (BIA 2007).

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that he is eligible for adjustment of status. Here, the applicant has not met his burden. Accordingly, the AAO affirms the director's denial of the Application for Adjustment of Status.

**ORDER:** The director's decision is affirmed. The application is denied.