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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
and Immigration
Services**

A₁

File:

Office: TEXAS SERVICE CENTER

Date:

OCT 13 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the application to register permanent residence or adjust status (Form I-485), and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be denied.

The applicant seeks to adjust his status to that of a lawful permanent resident pursuant to section 245(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255(i). The director denied the application, finding that the applicant was not eligible to adjust his status under section 245(i) of the Act because the immigrant petition filed on his behalf in January 2001 was not approvable when filed. The director certified his decision to the AAO for review, and on notice of certification, the director informed the applicant that he had 30 days to supplement the record with any additional evidence that he wished the AAO to consider. Neither the applicant nor counsel has submitted evidence for consideration. We, therefore, consider the record complete.

A review of the record reveals the following facts and procedural history. The applicant married his spouse, ██████¹ in ██████ on November 27, 2000. On January 30, 2001, ██████ filed a Form I-130, Petition for Alien Relative, on the applicant's behalf. On January 17, 2002, the applicant and ██████- were scheduled to appear for an interview regarding the I-130 petition; however, they failed to appear or provide a reason for their non-appearance. On January 30, 2002, the I-130 petition was denied.

On February 7, 2003, ██████ filed a second I-130 petition on the applicant's behalf. The couple was scheduled to appear for an interview regarding this petition on August 16, 2005; however, they failed to appear or provide a reason for their non-appearance. On August 19, 2005, the second I-130 petition was denied.

On October 28, 2007, ██████- filed a third I-130 petition on the applicant's behalf. This third I-130 petition was denied on May 5, 2010 because ██████- failed to respond to a request for evidence.

The applicant is the beneficiary of a Form ETA 750, Application for Alien Employment Certification (labor certification application), filed on his behalf by ██████ which was certified on May 1, 2006. He is also the beneficiary of an approved Form I-140, Petition for Alien Worker, that ██████ filed on his behalf, and which was approved on July 4, 2006. The applicant seeks to adjust his status based upon the approved I-140 petition, and states that he is eligible to adjust his status pursuant to section 245(i) of the Act as a "grandfathered alien." The applicant contends that the I-130 petition filed on his behalf in January 2001 was approvable when filed.

In his decision on the application, which is the subject of this certification, the director stated that the applicant was not eligible to adjust his status under section 245(i) of the Act because the I-130 petition that was filed on the applicant's behalf in January 2001 was not established to be meritorious and, therefore, not approvable when filed. The director also noted that the

¹ Name withheld to protect the individual's identity.

applicant failed to present evidence that he was physically present in the United States on December 21, 2000, which is a requirement to adjust status pursuant to section 245(i) of the Act. As stated earlier, on notice of certification, neither counsel nor the applicant has supplemented the record with any evidence for the AAO to consider.

Section 245(i) of the INA states, in pertinent part:

(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 on or before April 30, 2001; or
- (ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date

may apply to the [Secretary of Homeland Security] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

The regulation at 8 C.F.R. § 245.10(a) states, in pertinent part:

(1)(i) Grandfathered alien means an alien who is the beneficiary . . . of:

(A) A petition for classification under section 204 of the Act which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed . . .

* * *

(3) Approvable when filed means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act . . ., the qualifying petition . . . was properly filed, meritorious in fact, and non-frivolous ("frivolous" being defined herein as patently without substance). This determination will be made based on the circumstances that existed at the time the qualifying petition . . . was filed. A visa petition that was properly filed on or before April 30, 2001, and was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing, will preserve the alien beneficiary's grandfathered status if the alien is otherwise eligible to file an application for adjustment of status under section 245(i) of the Act.

The record, as presently constituted, does not support a finding that the I-130 petition filed on the applicant's behalf by ██████ in January 2001 was approvable when filed because there is scant evidence that the petition was meritorious in fact and non-frivolous at the time it was filed. A key factor in determining the *bona fides* of a marital relationship is whether a couple intended to establish a life together at the time of the marriage. *See Bark v. INS*, 511 F.2d 1200 (9th Cir.1975). For immigration purposes, evidence of a *bona fide* relationship should demonstrate the emotional ties, commingling of resources, and shared financial responsibilities often associated with a *bona fide* marriage.

When she filed the I-130 petition in January 2001, ██████ did not submit any evidence relating to the *bona fides* of her relationship with the applicant. The supporting documentation that ██████ submitted related to the termination of the applicant's prior marriage and his birth in Egypt, documents which did not relate to the *bona fides* of her relationship with the applicant. Although ██████ has submitted three separate I-130 petitions on the applicant's behalf, she has never appeared for a requested interview, responded to a written request for evidence, or submitted evidence of the *bona fides* of her relationship with the applicant.

In response to the director's request for evidence regarding the applicant's eligibility to adjust his status pursuant to section 245(i) of the Act, the applicant submitted the following documents:

- Copy of a joint bank account statement from Citibank, dated April 21, 2000;
- Copy of a joint credit card account from First Select, dated November 20, 2000;
- Copy of a joint electric bill, dated August 19, 2000;
- Affidavits from the applicant, and his family and friends, attesting to the *bona fides* of the applicant's relationship with ██████; and
- Photographs of the applicant and ██████ on their wedding day.

The joint bank account and credit card statements are not evidence of the *bona fides* of the marriage, as they do not reflect that the applicant and ██████ jointly accessed the accounts and comingled their money, or used either account to pay monthly debts associated with their marriage, such as rent, mortgage, or utility bills. The copy of the electric bill is also insufficient, as it only reflects a one-time statement mailed to the couple two months before their marriage. It does not establish that they resided together at that address or paid their bill with joint funds.

The affidavits of the petitioner and his family and friends also do not establish the *bona fides* of the marital relationship. In his October 20, 2009 affidavit, the applicant states that he and ██████ married because ██████ wanted their relationship to go further and he would not take such a step without marriage. He provides no other specific information regarding his intent in marrying ██████. Similarly, the affidavit of the applicant's two friends and his brother indicate that they attended the couple's wedding, but the affiants provide no probative details regarding their observations of the *bona fides* of ██████ and the applicant's marriage. Finally,

the photographs show only that the [REDACTED] and the applicant were together on their wedding day, but provide no insight into their marital relationship.²

The record does not contain sufficient evidence that the applicant and [REDACTED] had a *bona fide* marriage at its inception. Therefore, the applicant may not adjust his status pursuant to section 245(i) of the Act because he does not meet the requirements of a “grandfathered alien” at 8 C.F.R. § 245.10(a)(1)(i), as the I-130 petition filed on his behalf in January 2001 was not approvable when filed.³

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 that burden. Accordingly, the AAO affirms the director’s denial of the applicant’s Form I-485 application to adjust status.

ORDER: The director’s decision is affirmed. The application is denied.

² We observe that the applicant, his friends, and his brother, indicate in their affidavits that the marriage between [REDACTED] and the applicant broke up. Counsel also indicated in his response to the director’s request for evidence that the couple “divorced prior to completion of the visa application process.” The record does not contain a copy of a divorce decree or an explanation regarding the dissolution of the applicant’s marriage.

³ The director also noted the applicant’s ineligibility to adjust his status pursuant to sections 245(a) and (k) of the Act. We affirm, but shall not discuss, the director’s determinations about the applicant’s ability to adjust his status pursuant to these two sections of law.