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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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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **SEP 28 2010**

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

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.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, initially denied the application to register permanent residence or adjust status (Form I-485) and affirmed his decision in a subsequently filed motion to reopen or reconsider, which he has certified to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The applicant seeks to adjust his status to that of a lawful permanent resident pursuant to section 245 of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255. The director initially denied the application, finding that the applicant was not eligible to adjust his status as a derivative child because he did not meet the requirements of the Child Status Protection Act (CSPA) at section 203(h) of the Act. The applicant filed a motion to reopen or reconsider the director's decision, and the director has certified his decision on the applicant's motion to the AAO for review. 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. On notice of certification, counsel submits a brief and additional evidence.

A review of the record reveals the following facts and procedural history. The applicant was born on March 4, 1988 and is a native and citizen of Ecuador. On November 2, 2006, a petitioner, [REDACTED] filed an I-140 petition on the applicant's father's behalf. The I-140 petition was approved on February 2, 2007, with a priority date of May 12, 2003. According to the Form I-797C Approval Notice, the applicant's father's visa classification was listed as "other worker." On May 1, 2007, visas became available for nationals of Ecuador in the skilled worker category.<sup>1</sup> On November 7, 2007, counsel wrote a letter to U.S. Citizenship and Immigration Services (USCIS) indicating that the Form I-797C Approval Notice should reflect the applicant's father's visa classification as "skilled worker" rather than "other worker." On May 27, 2008, the applicant and his father each submitted an application to adjust status. The director denied the application because the applicant did not "seek to acquire" lawful permanent residence status within one year of a visa number becoming available for him.

On motion, counsel stated that, pursuant to *In re Kim*, an unpublished Board of Immigration Appeals (BIA) decision, the applicant "sought to acquire" lawful permanent residence status within one year of the visa becoming available because, like *Kim*, the applicant had hired an attorney to prepare the adjustment of status application within the one-year timeframe. Counsel also asserted that USCIS should not have considered the applicant's father to be a "skilled worker," because his I-140 petition approval notice had indicated that he was classified as an "other worker," and there were no visas available in the "other worker" category in May 2007.

When deciding the applicant's motion, which is the subject of this certification, the director noted that counsel had submitted a letter requesting a change in the applicant's father's I-140 classification from "other worker" to "skilled worker," and that USCIS records did reflect that the applicant's father's petition was approved for the "skilled worker" category and that the approval notice

<sup>1</sup> Department of State (DOS) Visa Bulletin - [http://travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html).

contained an error. The director stated that, had USCIS considered the applicant's father in the "other worker" category, it would have rejected his adjustment application because a visa number would not have been available at the time of filing. The director also noted counsel's reliance on the BIA's unpublished *Kim* decision, stating that unpublished decisions are not binding on USCIS officers in their administration of the Act and that the BIA's interpretation of the phrase "sought to acquire" "is far more lenient than that of USCIS."

On notice of certification, counsel implies that if USCIS acknowledges that it placed an incorrect classification on the applicant's father's I-140 petition approval notice, then the proper course of action would be to acknowledge that the "other worker" category did not have visas available either in February 2007, the month in which the I-140 petition was approved, or in May 2007, the month in which visa numbers became available in the skilled worker visa classification.

We withdraw the director's decision in this matter, as the director should have rejected the applicant's Form I-485 application to adjust status at the time of filing because a visa was not available. The applicant's father's I-140 petition approval notice (Form I-797C) lists his visa classification as "other worker," and in counsel's November 7, 2007 letter to USCIS, she acknowledges that she checked "other worker" as the requested classification on the I-140 petition. Although counsel states in her November 7, 2007 letter that she intended to check "skilled worker" as the classification, there is no provision in the regulations for changing a visa classification on an I-140 petition once it has been approved; such a change would require the filing of a new I-140 petition to amend the previously-filed Form I-140.<sup>2</sup> Similarly, there is no provision in the regulations for the director to change the requested classification on an I-140 petition once it has been approved and a Form I-797C has been issued. Although the director states in his decision that USCIS records indicate that the applicant's father's classification is "skilled worker" and not "other worker," the Form I-797C indicates that the applicant's father is classified as "other worker." Contrary to the director's assertions, we find the applicant's father's classification to be "other worker," and neither he nor any derivative family members are able to file adjustment of status applications until a visa number become available in the "other worker" classification for nationals of Ecuador.

We do not need to reach the issue of whether the applicant meets the requirements of the CSPA because visa numbers in the "other worker" category for nationals of Ecuador with a priority date of May 12, 2003 were not available in May 2008 when the applicant filed his adjustment of status application, and still have not yet become available as of the October 2010 Visa Bulletin. We, therefore, withdraw the director's decision so that he may reject the applicant's Form I-485, as he filed his application to adjust status when no visa number was available for him.<sup>3</sup>

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<sup>2</sup> At Part 2, box 1 of the Form I-140, a petitioner indicates that it is seeking to amend a previously-filed petition. Counsel for the petitioner should have filed such an amended petition if she had wanted to change the applicant's father's classification from "other worker" to "skilled worker."

<sup>3</sup> The director should also reject the applicant's father's Form I-485, which was filed in May 2008 when a

As in all proceedings, the applicant bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The director's decision is withdrawn and the matter remanded for the rejection of the applicant's Form I-485 application to adjust status.

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visa number was not available for him, as well as the adjustment applications of any other derivative family members who may have filed along with the applicant and his father.