

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

LI

[REDACTED]

FILE: [REDACTED]
EAC-05-010-53040

Office: BALTIMORE DISTRICT OFFICE

Date: SEP 26 2005

IN RE: Applicant [REDACTED]

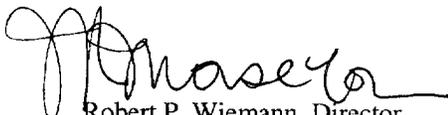
PETITION: Application for Adjustment of Status to that of Person Admitted for Permanent Residence Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application to adjust status was denied by the Director, Baltimore District Office. The case was then certified by the director to the Administrative Appeals Office (AAO). The application will be remanded to the director.

The I-485 Application to Register Permanent Resident or Adjust Status was filed on October 12, 2004. In Part 2, Application Type, stating the grounds of eligibility for adjustment to permanent resident status, the applicant checked block "h," indicating that the application was based on the 2005 DV Diversity Visa Lottery.

The applicant bases her claim of eligibility for adjustment of status under section 245(a) of the Immigration and Nationality Act (the Act) on a notice dated July 21, 2004, apparently from the Kentucky Consular Center of Citizenship and Immigration Services (CIS), stating that the applicant is among those randomly selected and registered for further consideration in the DV-2005 diversity immigrant program for fiscal year 2005 (October 1, 2004 to September 30, 2005).

With the I-485 application, the applicant submitted a Supplement A to Form I-485. The applicant's responses to the questions on that form indicated that the applicant claims eligibility for adjustment of status under section 245(i) of the Immigration and Nationality Act (the Act). *See* 8 C.F.R. § 245.10.

The applicant bases her claim of eligibility under section 245(i) of the Act on a Form ETA 750, Application for Alien Employment Certification, filed on behalf of her husband on December 7, 2000.

As noted above, the I-485 application was filed on October 12, 2004.

In a notice of intent to deny (ITD) dated July 5, 2005, the director informed the applicant of his intention to deny the I-485 application on the ground that the ETA 750 filed on behalf of her husband was not approvable when filed, as required by the regulation at 8 C.F.R. § 245.10(a)(1)(i)(B). The director afforded the applicant a period of thirty days to submit any additional evidence in support of the application.

In response to the ITD, counsel submitted a letter dated August 2, 2005. With the letter counsel submitted a copy of the ETA 750 filed by the applicant's spouse, a copy of a memorandum dated March 9, 2005 by William R. Yates, Associate Director for Operations, CIS, and a partial copy of another memorandum which counsel identifies as a CIS headquarters memorandum issued on June 10, 1999.

On August 29, 2005 the director denied the applicant's I-485 application to adjust status to that of permanent residence. The director also issued on August 29, 2005 an I-290C Notice of Certification certifying the case for review to the AAO. In an attachment to the Notice of Certification the director stated that the applicant had not established that the ETA 750 application for labor certification on behalf of her husband was approvable when filed, and that the ETA 750 therefore could not serve as the basis for the applicant's claim of eligibility to adjust status to that of permanent resident under section 245(i) of the Act.

In the Notice of Certification, the director informed the applicant that she could submit a brief or other written statement within thirty days.

The applicant's file also contains a copy of a service copy of a civil complaint served on CIS Associate Area Counsel, Baltimore, of an action in the United States District Court for the District of Maryland, seeking a writ in the nature of mandamus. The plaintiffs in the action are the applicant and her husband and the defendants are the director of the CIS Baltimore district office and the secretary of the Department of

Homeland Security. The copy in the file does not have a civil action number nor any court receipt. Therefore the copy in the file appears to be a courtesy copy served on CIS counsel prior to any filing with the court. Nothing in the file indicates that the complaint has been filed with the court.

Certifications by district directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Concerning applications to adjust status to permanent residence, the AAO exercises appellate jurisdiction over decisions on "[a]pplications for adjustment of status under part 245 of this title when denied solely because the applicant failed to establish eligibility for the bona fide marriage exemption contained in section 245(e) of the Act . . ." 8 C.F.R. § 103.1(f)(3)(iii)(JJ) (as in effect on February 28, 2003).

In the instant case, the director denied the beneficiary's application to adjust status to permanent residence on the grounds that the evidence failed to establish that the beneficiary was eligible for adjustment of status under section 245(i) of the Act. The denial decision was not within the appellate jurisdiction of the AAO, because the decision was not based on the failure to establish eligibility for the bona fide marriage exemption of section 245(e) of the Act. *See* 8 C.F.R. § 103.1(f)(3)(iii)(JJ) (as in effect on February 28, 2003). Nor does administrative appellate jurisdiction over the director's decision rest with the Board of Immigration Appeals. *See* 8 C.F.R. § 1003.1(b). The case is therefore one "for which there is no appeal procedure. . ." as described in the regulation at 8 C.F.R. § 103.4(a)(4). Since the case is one described in the regulation at 8 C.F.R. § 103.4(a)(4), the AAO has authority to decide the case on certification by the director, even though the AAO would not have had jurisdiction to decide the case if it had been appealed by the beneficiary. *See* 8 C.F.R. § 103.4(a)(4), (5).

For an alien to be eligible for adjustment of status under section 245(i) of the Act, the alien must be the beneficiary of an immigrant visa petition or a labor certification application that was filed on or before April 30, 2001 and that meets the requirements of the Act and of the regulations. In addition, if the qualifying petition or labor certification was filed after January 14, 1998 and on or before April 30, 2001, the alien must have been physically present in the United States on December 21, 2000. *See* Act § 245(i)(1); 8 C.F.R. § 245.10.

Section 245(a) of the Act provides that:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or may be adjusted by the Attorney

General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

In relevant part, section 245(c) of the Act provides that:

subsection (a) shall not be applicable to (1) an alien crewman; (2) subject to subsection (k), an alien (other than an immediate relative as defined in section 201(b) or a special immigrant described in section 101(a)(27)(H), (I), (J), or (K)) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States; (3) any alien admitted in transit without visa under section 212(d)(4)(C); (4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217; (5) an alien who was admitted as a nonimmigrant described in section 101(a)(15)(S); (6) an alien who is deportable under section 237(a)(4)(B); (7) any alien who seeks adjustment of status to that of an immigrant under section 203(b) and is not in a lawful nonimmigrant status; or (8) any alien who was employed while the alien was an unauthorized alien, as defined in section 274A(h)(3), or who has otherwise violated the terms of a nonimmigrant visa.

In relevant part, section 245(i) of the Act provides:

(I) 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; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000;

may apply to the Attorney General 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:

As used in this section the term:

(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; or

(B) An application for labor certification under section 212(a)(5)(A) of the Act that was properly filed pursuant to the regulations of the Secretary of Labor on or before April 30, 2001 and which was approvable when filed.

(2) *Properly filed* means:

(i) With respect to a qualifying immigrant visa petition, that the application was physically received by [CIS] on or before April 30, 2001, or if mailed, was postmarked on or before April 30, 2001, and accepted for filing as provided in § 103.2(a)(1) and (a)(2) of this chapter; and

(ii) With respect to a qualifying application for labor certification, that the application was properly filed and accepted pursuant to the regulations of the Secretary of Labor, 20 CFR 656.21.

(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 or qualifying application for labor certification, the qualifying petition or application 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 or application 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 regulation at 8 C.F.R. § 245.10(i) states in pertinent part:

The denial, withdrawal, or revocation of the approval of a qualifying immigrant visa petition, or application for labor certification, that was properly filed on or before April 30, 2001, and that was approvable when filed, will not preclude its grandfathered alien . . . from seeking adjustment of status under section 245(i) of the Act on the basis of another approved visa petition, a diversity visa, or any other ground for adjustment of status under the Act, as appropriate.

New Department of Labor regulations concerning labor certifications went into effect in March 2005, but the ETA 750 at issue is governed by the prior regulations. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The most recent codification of the regulations applicable to the ETA 750 at issue in the instant application is found at 20 C.F.R. Part 656 (2004 ed.).

The record in the instant case includes a copy of a Form ETA 750 application for labor certification filed by an employee [REDACTED], on December 7, 2000 on behalf of the applicant's husband, and a copy of a receipt notice sent to counsel by the State of Maryland, Department of Labor, Licensing and Regulation showing the receipt of a labor certification application filed by that employer on that same date. The foregoing documents are sufficient to establish that an application for labor certification was properly filed on behalf of the applicant's husband on or before April 30, 2001.

The regulation at 8 C.F.R. § 245.10(a)(3) defines the phrase "approvable when filed" as an application or petition which as of the date of filing was "properly filed, meritorious in fact, and non-frivolous ('frivolous' being defined herein as patently without substance)." The "properly filed" element of this definition is satisfied in the instant case by the receipt notice mentioned above. The third element, that the application be "non-frivolous," does not appear to be at issue in the instant petition. Nothing in the copy of that ETA 750 in the record in the instant application raises any indication that it is frivolous. In fact, the ETA 750 appears to contain all the information required by applicable Department of Labor regulations.

The second element of the definition of "approvable when filed" is that the application be "meritorious in fact" as of the date of filing. 8 C.F.R. § 245.10(a)(3). That element is not further defined in CIS regulations, nor does that phrase appear in the applicable Department of Labor regulations.

In a memorandum dated March 9, 2005 to CIS regional directors and other CIS officials, William R. Yates, Associated Director for Operations presented operational directives to CIS officials adjudicating applications to adjust status under section 245(i) of the Act. Concerning the use of the memorandum, the memorandum states as follows:

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications for adjustment of status. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law of [sic] by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Memo. from William R. Yates, Associate Director for Operations, to Regional Directors, *et al.*, *Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act*, Part 5 (March 9, 2005) (available at <http://uscis.gov/graphics/index.htm>; *path* Immigration Laws, Regulations and Guides; Immigration Handbooks, Manuals and Policy Guidance; Immigration Policy and Procedure Memoranda; *topic category* Adjustment of Status).

Although the Yates memorandum is not a binding interpretation on the AAO, it represents an official CIS analysis of the proper considerations in adjudicating applications for adjustment of status under section 245(i) of the Act. Concerning the meaning of the phrase "approvable when filed," the memorandum quotes from the regulatory definition discussed above. The memorandum then states the following:

Absent evidence of fraud, when a qualifying application for labor certification (Form ETA-750) is properly filed and accepted by the United States Department of Labor in accordance

with 20 CFR 656.21, USCIS will consider the requirements of 8 CFR 245.10 related to “properly filed” and “approvable when filed” to have been met for grandfathering purposes under section 245(i). Also, as already provided under 8 CFR 245.10(i), the denial, withdrawal, or revocation of a qualifying application for labor certification, that was properly filed on or before April 30, 2001 and was approvable when filed, will not preclude its grandfathered alien (including the grandfathered alien’s dependent spouse or child) from seeking adjustment of status under section 245(i) of the Act on any proper basis, if so qualified.

Memo. from William R. Yates, *supra*, Part 3. C.

The Yates memorandum therefore states that when a labor certification application has been properly filed and accepted for filing by the Department of Labor, those facts will be sufficient to establish that the application was approvable when filed, unless evidence exists of fraud. The reference in the Yates memorandum to acceptance for filing by the Department of Labor presumably refers to acceptance by the appropriate state labor or employment office where a petitioning business is located, since the state labor or employment offices receive labor certification applications on behalf of the United States Department of Labor. See 22 C.F.R. §§ 656.3, 656.21(a) (1994 ed).

The statutory authority for the CIS regulation containing the “approvable when filed” requirement applicable to labor certification applications is section 245(i)(1)(B) of the Act which provides for eligibility to adjust status to an alien who is the beneficiary of “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 [April 30, 2001].” Act § 245(i)(1)(B)(ii). Since the statute references the Department of Labor regulations, it is appropriate to consider those regulations when interpreting the meaning of the term “approvable when filed” in the CIS regulation at 8 C.F.R. § 245.10(a)(1)(i)(B) and (a)(3).

The Department of Labor regulations provide for the amendment of a labor certification to reflect the appropriate prevailing wage, if the local state employment office finds that the wage offered on the ETA 750 is lower than the prevailing wage for the occupation and geographical area. The regulation at 22 C.F.R. § 656.21(e) states as follows:

The local office shall calculate, to the extent of its expertise using wage information available to it, the prevailing wage for the job opportunity pursuant to Sec. 656.40 and shall put its finding into writing. If the local office finds that the rate of wages offered is below the prevailing wage, it shall advise the employer in writing to increase the amount offered. If the employer refuses to do so, the local office shall advise the employer that the refusal is a ground for denial of the application by the Certifying Officer; and that if the denial becomes final, the application will have to be refiled at the local office as a new application.

22 C.F.R. § 656.21(e) (1994 ed.)

The foregoing regulation therefore indicates that even though a Form ETA 750 application for labor certification may not initially state a rate of offered pay which would equal or exceed the appropriate prevailing wage, a process exists by which the local state employment office must advise the employer of the appropriate prevailing wage and allow the employer an opportunity to amend the application to increase the amount offered.

In the CIS regulatory definition of “approvable when filed,” 8 C.F.R. § 245.10(a)(3), the element of “meritorious in fact” should be read in conjunction with the Department of Labor regulation discussed above. The element of “meritorious in fact” therefore would reasonably include not only Form ETA 750 applications which would have been immediately approvable on the date of filing, but also those which would be approvable pursuant to amendments to the Form ETA 750 as allowed by Department of Labor regulations. Moreover, the fact that the DOL regulations allow amendments to the offered wage suggests that state employment offices do not evaluate the prevailing wage applicable to a labor certification as of the date of its filing, but as of the date when the state employment office begins to consider the application. *See generally* Employment and Training Administration, U.S. Department of Labor, *Permanent Labor Certification*, <http://workforcesecurity.doleta.gov/foreign/perm.asp> (accessed September 23, 2005). If that is so, an employer might have no reasonable basis to state an offered wage which is at least equal to the prevailing wage, since the applicable prevailing wage may change after the ETA 750 is filed but before the state employment office begins to consider the application.

For the foregoing reasons, the policy guidance in the March 9, 2005 memorandum of William R. Yates appears to be a reasonable interpretation of the CIS regulatory language requiring that for a labor certification to serve as a qualifying application for purposes of section 245(i) of the Act, it must have been approvable when filed. That is, if an ETA 750 was accepted for filing by the appropriate state employment office, it will be considered to have been approvable when filed, unless evidence exists of fraud.

In the instant case, the record contain evidence that the Form ETA 750 on behalf of the applicant’s husband was accepted for filing by a state employment office prior to the eligibility date of April 30, 2001 as specified in section 245(i) of the Act, and the record contains no evidence of fraud. Therefore the evidence in the record is sufficient to establish that the ETA 750 filed on December 7, 2000 on behalf of the applicant’s husband was approvable when filed. The evidence therefore establishes that the applicant is a grandfathered alien as defined in the regulation at 8 C.F.R. § 245.10(a) and that the applicant therefore satisfies the requirements of section 245(i)(1)(B) of the Act

In his decision, the director made no reference to the regulatory definition of “approvable when filed” at 8 C.F.R. § 245.10(a)(3). As the basis for denying the application, the director stated that the applicant had not established that the ETA 750 application for labor certification on behalf of her husband was approvable when filed. The director found that the Maryland Department of Labor, Licensing and Regulation had issued a written request to the employer for a change to that ETA 750 concerning the offered wage so as to comply with the prevailing wage. The director found that the ETA 750 therefore was not approvable when filed and that accordingly it could not serve as the basis for the applicant’s claim of eligibility to adjust status under section 245(i) of the Act. For the reasons discussed above, the assertions of counsel and the evidence in the record are sufficient to overcome that portion of the director’s decision.

Apart from the decision of the director, however, this office notes that there is an additional eligibility requirement for a “grandfathered alien” who is the beneficiary of a qualifying application for labor certification or immigrant visa petition that was filed after January 14, 1998 and on or before April 30, 2001. The alien must show that he or she was physically present in the United States on December 21, 2000.

The requirement for physical presence in the United States as of December 21, 2000 is based in section 245(i)(1)(C) of the Act, which refers to the date of the enactment of the LIFE Act Amendments of 2000. The calendar date of the date specified by the statute is found in the regulation at 8 C.F.R. § 245.10(a)(1)(ii), which states in pertinent part: “If the qualifying visa petition or application for labor certification was filed