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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]
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Office: TEXAS SERVICE CENTER

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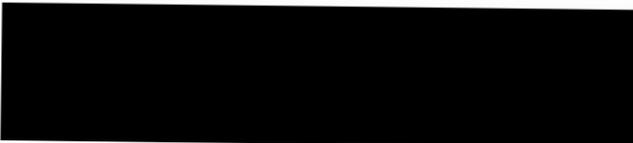
IN RE:

Applicant: [Redacted]

APPLICATION:

Application to Register Permanent Residence or Adjust Status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, utilizing Rules of Alternate Chargeability pursuant to section 202(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1152(b).

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, certified the instant application to register permanent residence or adjust status to the Administrative Appeals Office (AAO) for review. The director determined that the applicant was not eligible to utilize rules of alternate chargeability such that he might be charged to France, rather than his native India. The director's decision will be withdrawn.¹ The matter will be returned to the director to continue the adjudication of the application for permanent resident status filed for the applicant and for his spouse.

The applicant is a citizen of India, born in Shimoga, Karnataka, India on August 24, 1975. He is a process engineer, educated at Indian and United States universities. The applicant seeks to adjust to lawful permanent resident status in the United States based on an approved second preference employment-based visa petition filed on his behalf which has a priority date of February 26, 2004.

The record of proceedings for his wife, [REDACTED] is also before this office. The applicant's wife was born on December 15, 1973 in France, and she seeks to adjust to permanent resident status as the derivative spouse of one seeking permanent residence based on his approved second preference employment-based visa petition.

On April 27, 2007, the applicant and his wife simultaneously filed applications to register permanent residence or adjust status pursuant to section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255.

The director requested that this office review the following issue: whether Citizenship and Immigration Services (CIS) may allow an applicant born in India whose spouse was born in France to utilize the rules of alternate chargeability such that the applicant might be charged to France, rather than to his native India, where both simultaneously filed an application to register permanent residence or adjust status. *See* section 202(b)(2) of the Act, 8 U.S.C. § 1152(b)(2).

With respect to counsel's request for oral argument, the regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

¹ With a view toward ensuring a uniform interpretation of the Immigration and Nationality Act, the AAO consulted with the Department of State in the drafting of this decision. The AAO recognizes that the Secretary of State has primary responsibility for questions of visa chargeability. *See* section 202(b) of the Act, 8 U.S.C. § 1152(b).

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The question in this case relates to the application of the Department of State's alternate visa chargeability rules to an adjustment of status determination that is solely within the purview of the Department of Homeland Security (DHS).

Under federal law, an alien seeking permanent legal status based on an offer of employment must utilize a three-step process involving the Department of Labor (DOL), the DHS Citizenship and Immigration Services (CIS), and the Department of State. *See United States v. Ryan-Webster*, 353 F.3d 353, 355 (4th Cir. 2003). At the end of the process, if the alien is already in the United States, the alien may adjust status to permanent resident status and remain in the United States indefinitely. As will be discussed, the alien may be able to adjust status immediately or may be required to wait years, depending on the visa petition's "priority date," the alien's country of birth, and the applicability of any "alternate chargeability" exceptions under section 202(b) of the Act.

In the first step of the process, the alien must have an offer of employment in the United States and the alien's prospective employer must apply to DOL for "labor certification" using ETA Form 9089, Application for Permanent Employment Certification. *See* 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(l)(3)(i). The DOL certifies an application for labor certification upon making two determinations: (1) there are not sufficient United States workers who are able, willing, qualified, and available for the employment, and (2) "the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1182(a)(5)(A)(i).

In the second step of the process, once DOL has issued a labor certification, the alien's prospective employer files with CIS the labor certification along with an executed Form I-140, Immigration Petition for Alien Worker. *See Ryan-Webster*, 353 F.3d at 356. The Form I-140 petition constitutes a request that the alien named in the Form I-140 petition be classified by CIS as eligible to apply for designation within a specified visa preference category. Section 203(b) of the Act, 8 U.S.C. § 1153. After reviewing the DOL labor certification, CIS will approve the petition if the facts stated in the petition are true and if the alien is qualified and eligible for the requested visa category. Section 204(b) of the Act, 8 U.S.C. § 1154.

Once CIS approves the Form I-140 and classifies the certified alien as eligible, the alien receives a "priority date" based on the date that DOL accepted the Form ETA-750 request for labor certification. *See* 8 C.F.R. § 204.5(d). The Department of State uses the priority date to determine an applicant's place in line for an immigrant visa. Depending on the priority date, an alien may be required to wait years before he or she utilizes the approved visa petition to enter the United States or become a permanent resident.

In the final step of the three-part process, the alien may apply for the visa overseas and enter the United States as an immigrant. Or, if the alien is already in the United States, he or she may apply to “adjust” his or her nonimmigrant status to that of a permanent resident pursuant to section 245 of the Act. Section 245(a) of the Act, 8 U.S.C. § 1255(a), provides:

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 1154(a)(1) of this title or [sic] 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.

An alien is ineligible to adjust status pursuant to section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is seeking to adjust as a preference alien under sections 203(a) or (b) of the Act, CIS consults the current Department of State Bureau of Consular Affairs *Visa Bulletin* to determine whether an immigrant visa is immediately available. An immigrant visa is considered available for accepting and processing the application Form I-485 if the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the *Visa Bulletin*. See generally, 8 C.F.R. § 245.1(g)(1).

Congress has set numerical limits on the annual worldwide level of immigration to the United States as well as specific numerical limitations on individual foreign states. Sections 201 and 202 of the Act, 8 U.S.C. §§ 1151 and 1152. Accordingly, the *Visa Bulletin* further sorts the preference visa categories by the foreign state to which an immigrant is chargeable. As each visa is issued, the Department of State charges that number against the annual number allowed for the foreign state.

Addressing the rules for charging an issued visa against the maximum number allowed per country, section 202(b) of the Act, 8 U.S.C. § 1152, provides that the foreign state to which an immigrant is chargeable shall be determined by the alien's country of birth. Section 202(b) of the Act also provides four exceptions to the country chargeability rule, including an exception that allows for a spouse to utilize the country of birth of his or her spouse to obtain a more advantageous visa allocation.

Specifically, section 202(b)(2) of the Act states:

[I]f an alien is chargeable to a different foreign state from that of his spouse, the foreign state to which such alien is chargeable may, if necessary to prevent the separation of husband and wife, be determined by the foreign state of the spouse he is accompanying or following to join, if such spouse has received or would be qualified for an immigrant visa and if immigration charged to the foreign state to which such spouse has been or would be chargeable has not reached a numerical level established under subsection (a)(2) of this section for that fiscal year;

The Department of State regulation at 22 C.F.R. § 42.12 states in relevant part:

Rules of chargeability. (a) Applicability. An immigrant may be charged to the numerical limitation for the foreign state or dependent area of birth, unless the case falls within one of the exceptions to the general rule of chargeability provided by INA 202(b) and paragraphs (b) through (e) of this section to prevent the separation of families

* * *

(b) Exception for spouse. If necessary to prevent the separation of husband and wife, an immigrant spouse, including a spouse born in a dependent area, may be charged to a foreign state to which a spouse is chargeable if accompanying or following to join the spouse, in accordance with INA 202(b)(2).

Discussing the exceptions to the general rule of chargeability, the U.S. Department of State Foreign Affairs Manual, Volume 9 (Visas), states at section 40.1, note 8:

Foreign State Chargeability Obtained from Derivative Beneficiary

a. An immigrant visa (IV) applicant may derive a more favorable foreign state chargeability from an accompanying alien spouse under INA 202(b)(2) and, at the same time, the spouse may derive preference status from the principal applicant. For instance, the beneficiary of a fourth preference petition, who was born in Mexico for which no fourth preference numbers are available and who is accompanied to the United States by his wife who was born in a third country, may be issued a fourth preference visa chargeable to his wife's country of nationality if fourth preference numbers are readily available. By the same token, if no other visa is immediately available to her, the wife of such alien may acquire fourth preference status based on the husband's fourth preference status. In such cases, both the husband and wife, in a sense, are principal aliens. The

husband is the principal alien for the purpose of conferring a preference status and the wife is the principal alien for the purpose of conferring a more favorable foreign state chargeability.

At section 42.12, note 3.8, the Foreign Affairs Manual, Volume 9, also states:

If One Spouse Confers Preference Status and the Other Confers Derivative Chargeability

When one immigrant visa applicant can confer a more favorable preference status upon another at the same time the other immigrant visa applicant can confer a more favorable foreign state chargeability, both applicants can be considered principal aliens. In such cases, however, both applicants must be admitted to the United States simultaneously. The consular officer, therefore, must issue visas to both applicants simultaneously. For example, if the principal applicant was born in India and the accompanying spouse in France, the principal applicant born in India can be charged to his spouse's country of chargeability (France), even if the priority date is not current for India.

The Department of State regulation at 22 C.F.R. § 40.1(a)(1) states in relevant part:

Accompanying or accompanied by means not only an alien in the physical company of a principal alien but also an alien who is issued an immigrant visa within six months of:

- (i) The date of issuance of a visa to the principal alien;
- (ii) The date of adjustment of status in the United States of the principal alien; or
- (iii) The date on which the principal alien personally appears and registers before a consular officer

Finally, the AAO notes that the regulation at 22 C.F.R. § 40.1(q) states that a “principal alien” means an alien from whom another alien derives a privilege or status under the law or regulations. Accordingly, the Department of State does not limit the term solely to the alien beneficiary of an immigrant visa petition, as the term is commonly used in CIS rules and procedures.

Upon review, the decision of the director will be withdrawn. In accordance with the Department of State's rules, the applicant in the present case may utilize the rules of alternate chargeability so that the visa allocation might be charged to France, rather than to his native India, because he and his wife simultaneously filed applications to adjust status.

In the February 11, 2008 Notice of Certification, the director concluded that based on the plain language of section 202(b) of the Act and the regulations which govern the alternate chargeability exception for a spouse, only the alien spouse who is accompanying the principal beneficiary on an approved preference petition may qualify for an exception to the general rules of chargeability. Thus, in this instance, the director concluded that only the applicant's wife could derive an alternate country of chargeability from her husband, the principal alien. The director found that the applicant could not himself utilize the rules of alternate chargeability.

In the brief dated February 28, 2008 submitted in response to the Notice of Certification, counsel asserted that the applicant may utilize the rules of alternate chargeability and that he is chargeable to France, his wife's native country in lieu of his native India.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO's *de novo* review authority. *See*, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted in response to the notice of certification.²

It is a well-accepted tenet of immigration law that an alien adjusting status to permanent residence in the United States is in a position equivalent to an applicant requesting issuance of an immigrant visa overseas. *See Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999), *Matter of Tausinga* 16 I&N Dec. 758, 761 fn1 (BIA 1979)(in which the Board states that an "applicant for adjustment of status is in a comparable position to an applicant before an American consular officer abroad seeking issuance of an immigrant visa.") "An alien seeking to adjust his status to that of a lawful permanent resident is assimilated to the position of an applicant for entry into the United States." *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir., 2007); *Palmer v. INS*, 4 F.3d 482, 484 (7th Cir.1993) (citing *Pei-Chi Tien v. INS*, 638 F.2d 1324, 1326 (5th Cir.1981)); *Yui Sing Tse v. INS*, 596 F.2d 831, 834 (9th Cir.1979).

Further, according to section 202(b) of the Act, it is the Secretary of State who is directly charged with administering visa chargeability. Thus, the AAO must consult the U.S. State Department regulations and the Foreign Affairs Manual when interpreting section 202(b) of the Act. According to the Foreign Affairs Manual, despite the fact that the applicant is the principal beneficiary on the approved preference petition in the record, his wife may confer derivative chargeability to him, as they applied for admission as permanent

² The record in this case provides no reason to preclude consideration of any of the documents newly submitted in response to the notice of certification. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

residents simultaneously. *See* 9 FAM § 40.1 N8 and 9 FAM § 42.12 N3.8. The AAO finds that both husband and wife in this matter may be considered principal aliens, *provided that* they are each eligible and adjust status simultaneously.³ *See Id.* *See also* 22 C.F.R. § 40.1(a)(1) and (q).

On April 27, 2007, the applicant and his wife each filed the Form I-485, Application to Register Permanent Residence or Adjust Status. The U.S. Department of State Bureau of Consular Affairs *Visa Bulletin* for April 2007 reflects that during that month, in the second preference, employment-based category, chargeability for all areas were current except India, Mexico, the Philippines and mainland China. *See* http://travel.state.gov/visa/frvi/bulletin/bulletin_3169.html (accessed February 21, 2008). As the applicant may utilize rules of alternate chargeability as specified above, he is chargeable to his wife's native country France, provided that the director determines that he and his wife are otherwise eligible to adjust to permanent residence simultaneously. As such, a visa was immediately available to him and to his wife when they filed applications to register permanent residence or adjust status in April 2007. *See* 8 C.F.R. § 245.1(g)(1).

³ For CIS purposes, there are a limited number of scenarios that could arise in adjustment of status proceedings under the alternate chargeability exception of section 202(b)(2) of the Act. For purposes of these illustrations, the husband will be the alien beneficiary of an employment-based, second preference immigrant visa petition (EB2) and the wife will be the alien deriving status through her spouse. Additionally, the scenarios will be based on the current *Visa Bulletin* for April 2008, which lists an EB2 priority date of "December 1, 2003" for India and "Current" for France.

First, as in the present case, if the husband (India) and wife (France) are in the United States and filing their I-485 applications at the same time, the husband can be the principal alien for the purpose of conferring preference visa status and the wife can be the principal alien for the purpose of conferring a more favorable foreign state chargeability.

Second, if the husband (India) is in the United States filing an I-485 and the wife (France) is overseas, then the wife could not be the principal alien for the purpose of conferring chargeability and CIS would charge the husband's visa to India. While the applicant might argue that the wife would be following to join, the claim is speculative and the spouses would not be admitted simultaneously.

Third, if the advantageous country of birth were reversed with the husband (France) in the United States filing an I-485 and his wife (India) overseas, CIS would charge the husband's visa to France and then the wife could follow to join, charged to France as well. If the wife picked up her visa more than six months after her husband adjusted, then she could not be considered following to join and her visa would be charged against India.

The decision of the director as stated in the February 11, 2008 Notice of Certification will be withdrawn. The matter will be returned to the director that he might continue the adjudication of the Forms I-485 filed by the applicant and by his wife.

ORDER: The decision of the director is withdrawn. The matter is returned to the director to continue the adjudication of the application to register permanent residence or adjust status.