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**U.S. Citizenship  
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[Redacted]

FILE: [Redacted]  
LIN 02 215 51865

OFFICE: NEBRASKA SERVICE CENTER

Date: **AUG 18 2005**

IN RE: Applicant: [Redacted]

PETITION: Application to Register Permanent Residence or Adjust Status Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT:

[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 employment-based application for adjustment of status was denied by the Director, Nebraska Service Center. The director certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be withdrawn and the application will be approved.

The applicant, [REDACTED] seeks to adjust status as the beneficiary of an approved employment-based immigrant petition pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The applicant seeks to adjust status under the provisions of section 245(a) of the Act, 8 U.S.C. § 1255(a), and use the provisions of section 245(i) of the Act, 8 U.S.C. § 1255(i). The applicant asserts that section 245(c) of the Act, 8 U.S.C. § 1255(c), does not disqualify him from adjustment of status because he meets the requirements of section 245(i) of the Act. The director determined that the applicant has not demonstrated the requisite intent to work for the petitioning employer upon obtaining lawful permanent residence and, in his discretion, denied the application for adjustment of status. The director then issued a notice that he has certified his decision for review to the AAO.

On notice of certification, the applicant, through counsel, has submitted a brief and evidence.

In pertinent part, 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 [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....

[Emphasis added.]

On June 3, 2002, the applicant filed Form I-485, Application to Register Permanent Residence or Adjust Status and Supplement A to Form I-485, based on an approved Form I-140, Immigrant Petition for an Alien Worker, naming the applicant as the beneficiary. The name of the petitioner is SIGCO Sun Products, Inc. and the position sought is an Export Sales Manager. The petition was approved on April 21, 1999.

On March 3, 2003, the director issued a Notice of Request for Evidence containing a list of questions and statements concerning the beneficiary's intent to move from California to Minnesota to take up employment for the petitioner. On September 23, 2003, the director issued another Notice of Request for Evidence wherein the director requested information pertaining to the proffered position and soliciting the petitioner's financial information. On November 25, 2003, the director issued a third Notice of Request for Evidence requesting an amended G-325 concerning the applicant's present employment.

On April 9, 2004, the director issued a Form I-290C, Notice of Certification. On that Notice of Certification, the director first discusses a previous Form I-485 filed by the applicant based upon the instant employment-based immigrant visa petition. The previous Form I-485 was denied by the director and certified to the AAO for review. The AAO upheld the denial<sup>1</sup>. The Form I-290C next addresses the instant application. The

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<sup>1</sup> The Form I-290C notes that the central issue of the initial denial was the applicant's intent to work for the petitioner. In summary, the director declined to exercise his discretion to approve the initial Form I-485 because the record of proceedings contained numerous indicators that the applicant did not demonstrate his intent to go to work for the petitioning employer. The director cited *Matter of Semerjian*, 11 I&N Dec. 751 (Reg. Comm. 1966) as authority. The

director first restates his reasons for determining that the applicant does not possess the requisite intent to work for the petitioning employer. The director then lists discrepancies in the record of proceedings concerning the applicant's residence and dates of employment. The director concludes that the beneficiary does not intend to work for the employer based on the various factors and discrepancies cited.

On certification, the applicant, via counsel, submits a brief and additional evidence.

The issue here is whether the director, acting on behalf of the Attorney General, now Secretary of Homeland Security, properly exercised the discretion accorded to the Attorney General and the Secretary of Homeland Security in making a finding that the applicant does not have the requisite intent to work for the petitioner upon adjustment of status and, as a result, properly denied the instant Form I-485.

As cited previously, section 245(a) of the Act accords the Attorney General, and now the Secretary of Homeland Security, the discretion to grant adjustment of status. While the Attorney General and Secretary of Homeland Security may exercise their authority to grant adjustment of status in their discretion, they may not act in an arbitrary or capricious manner. The actions of an agency must be supported by reasonable and objective criteria. *See for example* Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 302 (1971); Camarena v. Meissner, 78 F. Supp. 2d 1044 (N.D. Cal. 1999); Ortega-Peraza v. Ilchert, No. C-92-4972 MHP, 1993 U.S. Dist. LEXIS 2195 (N.D. Cal. Feb. 26, 1993).

Regarding intent, it is well established that an immigrant must demonstrate a bona fide intent to work in the United States, immediately or in the future, in his qualifying endeavor or a related field. *Matter of Semerjian*, 11 I&N Dec. 751 (Reg. Comm. 1966).

The director noted the following in the Notice of Certification:

- The record contains a North Dakota<sup>2</sup> lease agreement for a period of 6 months. The director cited this as in conflict with the applicant's statement that he has an 18-month lease;
- The applicant's 2002 tax return did not include any earnings other than his earnings from the petitioner. The director cited this as in conflict with the fact that the applicant is the owner of Y.S. Trading Company. The director also noted that the return does not list the profit realized from the sale of the applicant's house in California;
- The director noted that the applicant is the only member of his family living in North Dakota and there is no indication that the [applicant] and his family will be reunited under one household;
- The director noted that the applicant is the owner of a business in California, which he has stated that he cannot sell;
- The director found it unreasonable to conclude that the beneficiary would forego the substantial earnings of his business to obtain a lesser position and significantly lower salary while working for someone else;
- The director expressed concern with the number of employees claimed by the petitioner;

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AAO agreed with the director's findings. Because the instant application is not dependent upon the previous application and is contained in its own record of proceedings, this decision will not take into consideration the facts of the initial Form I-485, or the AAO decision, except to point out differences between the two for the purpose of illustration.

<sup>2</sup> The record demonstrates that the applicant's residence in North Dakota is within commuting distance of the proffered position in Minnesota.

- The director expressed concern with the fact that until recently, the petitioner has not had a position of Export Sales Manager;
- The director expressed concern with the fact that the applicant was a shareholder of two of the companies that offered letters of experience on his behalf;
- The director reiterated his concern that it is not reasonable that an individual would go from owning his own business to working in a lesser compensated position in another company; and,
- Finally, the director expressed concern with the fact that the petitioning company does business with a company where the applicant once held the post of President.

In a section entitled "Conclusion," the director asks "why would [the applicant] take a drastic reduction in executive power and monetary compensation to 'start life over again' and supposedly retire as a [sic] Export Sales Manager with the petitioning company." The director again points to the separation of the applicant's family. The director then addresses issues relating to the applicant's move from California to North Dakota, including the fact that the applicant did not use a moving company and questions the extent of the applicant's apartment furnishings. The director then cites inconsistencies regarding the applicant's start date of employment with the petitioner and the residential address of the applicant's wife.

On certification, the applicant, via counsel, submits a brief dated May 6, 2003, rebutting many of the statements in the director's decision. The applicant states that *Matter of Patel*, 19 I&N, Dec. 774 (BIA 1988), requires CIS to presume in favor of legality when reviewing the facts of a case. In addition, the counsel cites *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988), for the proposition that CIS decisions cannot be conclusory, speculative, or equivocal. Rather, CIS conclusions must be based on objective supporting evidence.

Specifically, counsel notes:

- In *Matter of Semrjian*, supra, the application was approved based on the fact that the applicant went to work for the petitioner. Unlike in the prior Form I-485, the facts of the instant case now match the facts of *Semrjian*;
- CIS does not dispute that the applicant has moved to North Dakota and begun employment with the petitioner;
- The beneficiary did not move to North Dakota and begin working sooner because he had intended to not move until CIS approved the application and the job was a certainty;
- The CIS assumptions regarding his tax returns and his spouse's tax returns are incorrect. Counsel submits the applicant's spouse's 2002 tax returns; and,
- The director's conclusion regarding the separation of the applicant's family does not acknowledge the fact that many families live apart for various work and life issues. Counsel submits documentation to support this claim.

At the outset, the AAO finds that many of the factors listed in the director's notice of certification are not material to the adjudication of the applicant's Form I-485 or germane to the exercise of his discretion. While the AAO recognizes that the director must examine the entire record of proceeding in making a determination to approve an application in his discretion, the AAO cannot find any relevance to some of the factors cited by the director such as the applicant's failure to use a professional moving company, the nature of his apartment furnishings, or the length of the applicant's lease. Basing a determination, even in part, on these factors raises the issue of whether the decision could be viewed as arbitrary or capricious. Moreover, the question of the residence of the applicant's family does not necessarily raise suspicion regarding the applicant's intent. Counsel's point that many families separate due to work/life reasons, as supported by the documentation provided upon appeal, is well taken. As demonstrated by the documentation, it is not uncommon for spouses to reside separately for a period of time due to work.

The AAO also questions the director's raised concerns regarding the petitioner. The director specifically notes concern over the facts that the petitioner has not had an Export Sales Manager and the varying statements regarding the number of the petitioner's employees. The director also raised an issue regarding the employment letters and the applicant's relationship to one of the businesses that submitted a letter. While these are legitimate areas of concern and inquiry, the director makes no specific findings about the proffered position, the credibility of the applicant's documentation of his experience, the viability of the petitioner, or the validity of the job offer. The director has not sought to revoke the petition's approval, as would be expected if the bona fides of the petition were found deficient. Moreover, the director notes some discrepancies regarding the date on which the applicant began working for the petitioner, but does not draw any conclusion as to how that might be relevant in the instant proceedings. For example, the director does not use these discrepancies to question the applicant's claims that he has moved to North Dakota and started working for the petitioner. Rather, these critical facts are conceded by the director.

As to the director's central point, that it is not reasonable to conclude that the applicant would give up his own business and significant income to earn less income while working for someone else, the AAO finds the director's concerns to be a reasonable line of inquiry. As such, his decision to deny the application cannot be labeled arbitrary or capricious. Nevertheless, the applicant has consistently offered the same compelling explanations, which cannot be ignored. The applicant states he will be able to maintain his current business by working 4 to 8 hours a week from North Dakota while at the same time maintaining his new responsibilities. As such, he is not technically giving up his business. As to the issue of why he would make this choice at all to incur the inconveniences of moving and separation, the applicant responds that it consistently has been his primary intention to obtain permanent residence for himself and his family. The AAO finds these explanations reasonable.

In *Matter of Arias*, supra, CIS is precluded from making decisions that are based on conclusory, speculative, or equivocal reasoning. Rather, CIS must draw its conclusions based on objective, competent evidence. The AAO finds that the director's conclusion that the applicant does not have the intent to work for the petitioner is refuted by the fact that the applicant has moved and is now working for the petitioner. The applicant has further addressed the director's concerns with reasonable explanations and, in some cases where applicable, supporting evidence. The AAO did dismiss a prior appeal, in part, citing the fact that applicant had not begun employment with the petitioner, as a significant factor. In the intervening time, the applicant has entered into employment with the petitioner. As such, the AAO finds insufficient proof in the record of proceeding for the premise that the beneficiary has no intent to go to work for the petitioner upon adjustment of status. Conversely, the AAO finds that the fact that the applicant has moved and begun working to be sufficient proof of his intent.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The acting director's decision to deny the petition is withdrawn and the application is approved.