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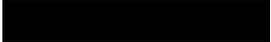


U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: NEWARK DISTRICT OFFICE

Date: FEB 17 2005

IN RE:

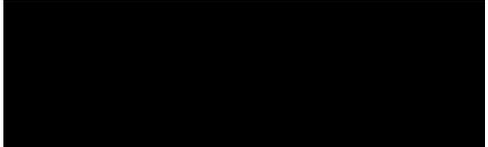
Applicant:



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:



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 for adjustment of status was denied by the Director, Newark District Office. The Director certified the decision to the Administrative Appeals Office (AAO) for review. The decision will be withdrawn and the case will be remanded to the Director.

The applicant [REDACTED] seeks to adjust status as the beneficiary of an approved family-based immigrant petition. 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 does not meet the requirements of section 245(i) of the Act and, accordingly, denied the application for adjustment of status. The Director then certified her decision for review to the AAO.

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:

(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; 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. . . .

Paragraphs (a)(1), (a)(2), and (a)(3) of 8 CFR section 245.10 read as follows:

(a) Definitions. As used in this section the term:

(1)(i) Grandfathered alien means an alien who is the beneficiary (including a spouse or child of the alien beneficiary if eligible to receive a visa under section 203(d) of the Act) 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.

(ii) If the qualifying visa petition or application for labor certification was filed after January 14, 1998, the alien must have been physically present in the United States on December 21, 2000. This requirement does not apply with respect to a spouse or child accompanying or following to join a principal alien who is a grandfathered alien as described in this section.

(2) Properly filed means:

(i) With respect to a qualifying immigrant visa petition, that the application was physically received by the Service 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.

On or about December 29, 2003, the applicant filed Form I-485, Application to Register Permanent Residence or Adjust Status, and Supplement A to Form I-485. Concurrently, [REDACTED] filed Form I-130, Immigrant Petition for an Alien Relative, naming the applicant as the beneficiary. The immigrant petition was approved on July 19, 2004. On July 22, 2004, the director issued a Decision on Application for Status as Permanent Resident, denying the Form I-485. In that notice, the Director concluded that the application for labor certification that formed the basis for the applicant's use of section 245(i) of the Act did not meet the requirements in the regulations to qualify the alien beneficiary, [REDACTED] as a "grandfathered alien." The Director noted that the priority date of the labor certification was canceled because the applicant for the labor certification (a business named [REDACTED]) did not respond to a request for more information from the Department of Labor. Accordingly, the Director found that since the alien did not qualify as a "grandfathered" alien, the applicant is precluded from using section 245(i) of the Act. Since the record reflects that the applicant entered the United States without inspection, the applicant is ineligible to adjust status under section 245(a) of the Act.

Also on July 22, 2004, the Director, Newark District Office, certified her decision to the AAO and provided the applicant with 30 days in which to submit a brief contesting her decision. As of this date, no additional brief or evidence has been submitted.

The issue of the applicant's eligibility to adjust status in this matter hinges on whether or not the applicant meets the requirements of section 245(i) of the Act. On the adjustment of status application, the applicant acknowledges entering the United States without inspection, and, therefore, the applicant concedes that without the exemptions of section 245(i) of the Act, he would be ineligible to adjust status.

In order to qualify under the terms of section 245(i) of the Act, an alien must demonstrate that he or she qualifies as a "grandfathered alien." See 8 CFR 245.10. CIS regulations, cited above, define the term "grandfathered alien" at 8 CFR section 245.10(a)(1). In short, the alien must be the beneficiary of either an immigrant petition or an application for labor certification that was properly filed, as defined at 8 CFR 245.10(a)(2), on or before April 30, 2001. In addition, the immigrant petition or application for labor certification must have been "approvable when filed." See 8 CFR 245.10(a)(3).

In her decision, the Director correctly stated that an alien who is adjusting status using section 245(i) of the Act

must be the beneficiary of an application for labor certification or immigrant petition that was properly filed prior to April 30, 2001, and approvable when filed, to meet the definition of a "grandfathered alien." However, the Director is not correct when she states in her decision that the applicant must show a "priority date" prior to April 30, 2001.

The CIS regulations governing section 245(i) of the Act concern the *filing date* of the application for labor certification, and not the *priority date*. See 8 CFR 245.10(a)(3). The regulations provide that the priority date of an application for labor certification is not always the determining date for purposes of eligibility under section 245(i) of the Act. Certain applications for labor certification and/or immigrant petitions may still qualify despite the fact that they have been subsequently withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing which have resulted in a loss of the underlying priority date. In order to adjust status, however, the beneficiary still must meet the eligibility requirements for the relevant immigrant classification and have an immigrant visa number immediately available at the time of filing for adjustment of status. See 8 CFR 245.10(a)(3) and (b)(2).

As set forth in the introductory text to the March 26, 2001, interim rule, CIS has chosen to implement section 245(i) of the Act with an "alien-based reading." Under this reading, an alien is considered to qualify as a "grandfathered alien" as long as he or she meets the terms of section 245(i) of the Act, meaning he or she is the beneficiary of a properly filed application for labor certification or immigrant petition that was filed on or before April 30, 2001 and was approvable when filed. The regulations at 8 CFR 245.10(a)(3) hold that unless that initial immigrant petition or application for labor certification was not properly filed, not meritorious in fact, or was filed frivolously, the fact that the qualifying application for labor certification or immigrant petition is not the instant vehicle for adjustment of status does not alter the fact that the alien is eligible to benefit from section 245(i) of the Act. See *Adjustment of Status to That Person Admitted for Permanent Residence; Temporary Removal of Certain Restrictions of Eligibility*, 66 FR 16383 (March 26, 2001).

The issue before the AAO in the instant case is whether or not the applicant was the beneficiary of an application for labor certification that was properly filed pursuant to Department of Labor regulations prior to April 30, 2001 and was approvable when filed.

In order to qualify as properly filed under 8 CFR 245.10, the applicant must demonstrate that the application for labor certification was accepted pursuant to the regulations of the Secretary of Labor, 20 CFR 656.21. In general, CIS will accept a receipt letter from a state employment agency as evidence that the application was accepted pursuant to the DOL regulations. See Memo from Robert L. Bach, Executive Associate Commissioner, Office of Policy and Programs, to Regional Directors, et al, *Accepting Applications for Adjustment of Status under Section 245(i) of the Immigration and Nationality Act*, 2, (June 10, 1999). The applicant has provided an uncertified application for labor certification and a two letters from the Department of Labor concerning that application. The letters and the application show that the application was filed on November 11, 1997, and therefore, this office will find that the application for labor certification was properly filed.

In order to qualify as approvable when filed, the applicant must demonstrate that the applicant was "properly filed, meritorious in fact, non-frivolous ("frivolous" being defined herein as patently without substance)." See 8 CFR 245.10(a)(3). In general, CIS will accept a receipt letter from a state employment agency as evidence that the application was approvable when filed pursuant to the DOL regulations. *Id.* CIS does retain the prerogative, however, to make a finding that the application was not approvable when filed if it has evidence of a fraudulent or otherwise non-meritorious employment relationship. The evidence in the record provided to the AAO does not contain any evidence the Director has made such a finding.

Therefore, after a review of the evidence in the record, the applicant does meet the definition of a "grandfathered alien" and has overcome the grounds of the Directors' denial.

Apart from the decision of the Director, however, this office notes that there are additional eligibility requirements for a "grandfathered alien" who is the beneficiary of a qualifying application for labor certification or immigrant visa petition that was filed before April 30, 2001. Specifically, the alien must show that he or she is not an inadmissible alien. *See* section 245(a) of the Act. The record transmitted to the AAO is not complete in this aspect. Nor can it be determined from the record that the Director considered this eligibility requirement prior to rendering her decision. For this reason, the record is being remanded to the Director.

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 not met that burden.

ORDER: The Director's decision to deny the petition is withdrawn, and the record is returned to the Director for the purpose of allowing her to verify that the required processing checks concerning the admissibility of the alien have been completed and issuing a new decision.