U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

APR 06 2010

File: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 08 133 53492

IN RE: Applicant: [redacted]

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the application for adjustment of status (Form I-485) and certified his decision to the Administrative Appeals Office (AAO) for review. The AAO affirmed the director's decision. The applicant subsequently filed a motion to reopen and reconsider. The motion will be dismissed. The AAO's June 11, 2009 decision will be affirmed. The application will be denied.

The applicant is a native and citizen of Brazil who filed this application for adjustment of status to that of a lawful permanent resident under section 245(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1255(i). A review of the record reveals the following facts and procedural history:

The applicant was admitted into the United States on a B-2 nonimmigrant visitor visa on June 9, 1999 valid to December 8, 1999. An extension of the applicant's visitor visa was granted from June 8, 2000 to December 7, 2000. The record does not show that the applicant departed the United States or was granted a further extension on the B-2 visitor visa. The applicant lists employment as a supervisor with [redacted] in Palm Beach Gardens, Florida from 2002 to 2008, on his Form G-325A, Biographical Information sheet. The record includes evidence that the applicant's employer, [redacted], submitted a Form ETA-750, Application for Alien Employment Certification on February 27, 2004 that was certified on March 13, 2007.

The issue in this matter is whether the applicant maintained lawful status, had engaged in employment not authorized by United States Citizenship and Immigration Services (USCIS), and had failed to establish that he was in lawful immigration status at the time of filing the adjustment application on March 18, 2008. The director determined that the applicant was not eligible to apply for adjustment of status pursuant to sections 245(c)(2) and 245(c)(8) of the Act. The director properly considered whether, despite the ineligibility of the applicant based on these sections of the Act, the record included evidence that the applicant was eligible to adjust status pursuant to section 245(i) of the Act.

Section 245(i) of the INA states, in pertinent part: (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 . . . .

> may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

On February 26, 2009, United States Citizenship and Immigration Services (USCIS) denied the applicant's Form I-485 finding the applicant was ineligible to adjust status under the provisions of section 245(i) of the INA. The director determined that the applicant's initial priority date, which is the date that his labor certification was accepted for processing by the DOL, although on April 30, 2001, was not properly filed, meritorious in fact, and not frivolous. The director noted that the Board of Immigration Appeals (BIA) found in *Matter of* [redacted] 24 I&N Dec. 267, 268-269 (BIA 2007) that a visa petition is not "approvable when filed" if it "is fraudulent or if the named beneficiary did not have, at the time of filing, the appropriate family relationship or employment relationship that would support the issuance of an immigrant visa," *Matter of* [redacted] 24 I&N Dec. 267, 268-269 (BIA 2007) quoting an example of the "approvable when filed" standard discussed in the Federal Register 66 Fed. Reg. 16,383, 16,385 (Mar. 26, 2001) (Supplementary Information).

On certification, the applicant asserted that [redacted] labor certification application filed on April 30, 2001 was not denied based on fraud, but rather was denied based on a presumption of fraud by the attorney who filed the labor certification application due to the attorney's conviction of immigration fraud.

The AAO concurred with the director's decision in this matter. The AAO noted that the applicant must establish that the Form ETA 750 filed April 30, 2001 was "approvable when filed" to establish eligibility under section 245(i) of the Act. The regulation at 8 C.F.R. § 245.10(a)(3) states in pertinent part:

> 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 AAO found that the record included no evidence, other than the applicant's assertion, regarding the legitimacy of the Form ETA 750 that was filed on April 30, 2001. Thus, the record did not substantiate that the petition was meritorious in fact when the petition was filed; rather the record includes the DOL's finding on the merits that the "petition cannot be considered certifiable with the documents submitted."

On motion, the applicant again asserts that the Form ETA 750 that was filed on April 30, 2001 by [redacted] was meritorious and non-frivolous when it was filed. The applicant also asserts that he was ineffectively assisted by the attorney who filed the Form ETA 750 as this attorney was convicted of immigration fraud. The applicant also claims that he has been denied due process.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner has not submitted any new facts. Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. The applicant has not submitted further evidence establishing that the Form ETA 750 filed by the [redacted] on April 30, 2001 was properly filed, meritorious in fact, and non-frivolous. The AAO emphasizes that [redacted] withdrawal of the Form ETA 750, does not convert the DOL's finding that the "petition cannot be considered certifiable with the documents submitted" into a petition that was properly filed, meritorious in fact, and non-frivolous. The AAO has no facts to review that provide a basis for determining that the Form ETA 750 filed by [redacted] was properly filed, meritorious in fact, and non-frivolous. Again, the information in the file shows that the DOL questioned the authenticity of the documents submitted and proposed to deny the matter on the merits for fraud. Such a proposed decision is not changed into a decision that the certification is approvable on its merits by the action of [redacted] withdrawing the Form ETA 750 certification. Neither is the applicant's subsequent employer's approved labor certification evidence that the April 30, 2001 filing was properly filed, meritorious in fact, and non-frivolous. The applicant in this matter has also failed to submit any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy based on the evidence of record at the time of the initial decision.

The AAO has reviewed the applicant's claim on motion that the attorney representing him in his initial attempt to obtain labor certification ineffectively assisted him, as the attorney was convicted of immigration fraud. The applicant's claim is not supported by the documentary evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO does not find any evidence of the initial agreement of representation

that establishes that the convicted attorney represented the applicant and the circumstances and promises of the convicted attorney to the applicant, if any. The applicant has not met the first requirement of the three criteria necessary to establish a claim of ineffective assistance of counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved individual setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The AAO notes that the conviction of the applicant's claimed attorney for immigration fraud does not lessen the need for the applicant to support the fact of personal representation and the circumstances surrounding the representation, rather if anything it heightens this requirement.

Although the applicant contends that his rights to procedural due process were violated, he has not shown that any violation of the regulations resulted in "substantial prejudice" to him. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The applicant has fallen far short of meeting this standard. A review of the record and the adverse decisions indicate that the director and the AAO properly applied the statute and regulations to the applicant's case. The applicant's primary complaint is that the petition was denied. As discussed in the AAO's prior decision, the applicant has not met his burden of proof and the denial was the proper result under the regulation. The record does not support a finding that the Form 750 ETA filed by the [redacted] on April 30, 2001 was properly filed, meritorious in fact, and non-frivolous. Accordingly, the applicant's claim on motion is without merit.

The applicant in this matter bears the burden of establishing that the April 30, 2001 labor certification application was meritorious in fact and non-frivolous and thus approvable when filed. The AAO finds that the applicant has not submitted any new facts or any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy or that establishes that the director or the AAO misinterpreted the evidence of record. The evidence fails to satisfy the requirements of a motion to reconsider.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The regulation at 8 C.F.R. § 103.5(a)(4) states: "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decision of the AAO will be affirmed.

ORDER: The motion is dismissed. The decision of the AAO is affirmed. The application is denied.