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

U.S. Citizenship and Immigration Services

A1

[redacted]

AUG 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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. Upon review, the AAO dismissed the motion. The applicant now files a second motion to reopen. 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, 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 Jara Riero and Jara Espinol*, 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 Jara Riero and Jara Espinol*, 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 the [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

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[1] The AAO observes that although the applicant refers to [redacted] as the company that filed the Form ETA 750 on his behalf, the company is identified as [redacted]. on its corporate documents and Internal Revenue Service (IRS) Forms. The AAO further observes that an April 20, 2001 letter from the company's prior attorney with the receipt date of April 30, 2001, identifies the company as [redacted] Further, the Department of Labor's Notice of Findings, dated November 24, 2003 which refers to the applicant and the April 30, 2001 date of acceptance for processing, is addressed to [redacted]

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."

The applicant's first motion, a motion to reconsider, was timely submitted on July 7, 2009. The applicant again asserted that the Form ETA 750 filed on April 30, 2001 by [redacted] was meritorious and non-frivolous when it was filed. The applicant also asserted 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 claimed that he had been denied due process.

In a December 2, 2009 letter date stamped as received by the AAO on December 7, 2009, more than six months after the applicant's motion to reconsider was filed, the applicant submitted: a sworn affidavit of the president of [redacted], the sponsoring employer of the April 30, 2001 Form ETA 750; the business card of the president of [redacted] Inc.; and documentation from the Florida Department of State, Division of Corporations showing that [redacted] is a Florida corporation in good standing that had filed an annual report each year from 1995 through 2009. In the November 30, 2009 affidavit, the president of [redacted] declared that [redacted] had made a bona fide offer of employment to the applicant and that a position was available to the applicant when it filed the Alien Employment Labor Certification on April 30, 2001 on behalf of the applicant. The affiant also declared that the company had used the services of an attorney who the company believed was an attorney in good standing and that any wrongdoing or misconduct of the attorney was unknown to the company. The affiant affirmed that the company's offer of employment and the application for Alien Employment Labor Certification filed with the U.S. Department of Labor on April 30, 2001 was, in fact, valid and made in good faith.

On April 6, 2010, the AAO dismissed the motion. The AAO determined that the petitioner had not submitted any new facts for consideration in a motion to reopen. As set out in the AAO's April 6, 2010 decision, the AAO did not find new facts to review that provided a basis for determining that the Form ETA 750 filed by [redacted] was properly filed, meritorious in fact, and non-frivolous. The AAO found that the information in the file showed that the DOL questioned the authenticity of the documents submitted and proposed to deny the matter on the merits for fraud and that 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.

In the same April 6, 2010 decision, the AAO also determined that the applicant in this matter had failed to submit any pertinent precedent decisions to establish that the AAO's initial 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 considered the applicant's claim of ineffective assistance of counsel in filing the initial Form ETA 750 on April 30, 2001 and also considered the applicant's claim that his rights to procedural due process were violated. The AAO found that a review of the record and the adverse decisions indicated that the director and the AAO properly applied the statute and regulations to the applicant's case. The AAO noted that the applicant's primary complaint was that the petition was denied; but that 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 AAO concluded that the record did not support a finding that the Form 750 ETA filed by the Arsh Company on April 30, 2001 was properly filed, meritorious in fact, and non-frivolous.

In the second motion filed by the applicant on May 5, 2010, the applicant asserts that the additional evidence submitted to the AAO on December 2, 2009 was not considered. The applicant asserts that the December 2, 2009 submission included new facts that "unequivocally demonstrate that the application for alien employment certification filed by the [redacted] on April 30, 2001 was, in fact, properly filed, approvable when filed, meritorious in fact, and not frivolous."

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."

Preliminarily, the AAO observes that a motion to reopen must include the additional evidence that comprises the motion. *See* 8 C.F.R §§ 103.5(a)(2) and (3). Regarding the evidence dated December 2, 2009 and received by the AAO on December 7, 2009, more than six months after the applicant filed a motion to reconsider the dismissal of his appeal, the AAO finds this information was submitted untimely. Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that an applicant may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. Even if the evidence had been included in the record and considered by the AAO on a discretionary basis, the evidence submitted in December 2009 is not "new" evidence.

The AAO finds that the affidavit of the [redacted] president, dated November 30, 2009, is an affidavit that could have been prepared and presented in the proceeding before the director, before the AAO on appeal, or before the AAO in conjunction with the first motion, a motion that was made for the AAO to reconsider its decision based on the applicant's claim of ineffective assistance of counsel and violation of his right to due process. The applicant does not explain why the affidavit was previously unavailable and does not explain why it was prepared more than six months after the applicant filed his motion to reconsider.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has had the opportunity not once but on three prior occasions to submit

affidavits and other evidence to support his claim that the application for alien employment certification filed by the [redacted] on April 30, 2001 was, in fact, properly filed, approvable when filed, meritorious in fact, and not frivolous. The AAO will not consider information submitted more than six months after a motion to reconsider is filed. Based upon the evidence in the record, the AAO does not find that the applicant has met the burden of reopening this matter. The motion to reopen will be dismissed.

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 applicant, in this second motion does not request that the prior decision be reconsidered. Further, the applicant does not submit any document that would meet the requirements of a motion to reconsider. The applicant does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. 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.