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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

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 09 2010

IN RE: Applicant: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the application to register permanent residence or adjust status (Form I-485) and affirmed his decision in two subsequently filed motions to reopen or reconsider, the last of which he has certified to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application remains denied.

The applicant seeks to adjust her status to that of a lawful permanent resident pursuant to section 245 of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255. The director initially denied the application, and affirmed his determination when ruling on the applicant's subsequently filed motions, because the applicant did not submit all required documentation to establish her eligibility as of the date she filed her application to adjust status. Specifically, the director noted the lack of the required Visa Screen Certificate (Visa Screen) from The Commission on Graduates of Foreign Nursing Schools (CGFNS) in the record when the adjustment of status application was filed. On notice of certification, the director informed the applicant that she had 30 days to supplement the record with any additional evidence that she wished the AAO to consider. On notice, counsel submits a brief and copies of documents already included in the record.

Section 245(a) of the Act states:

> The status of an alien who was inspected and admitted or paroled into the United States . . . 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.

Section 212(a)(5)(C) of the Act, states:

> Uncertified foreign health-care workers - Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is excludable unless the alien presents . . . in the case of an adjustment of status . . . a certificate from the Commission on Graduates of Foreign Nursing Schools . . . .

A review of the record reveals the following facts and procedural history. The applicant is the beneficiary of an approved Form I-140, Petition for Alien Worker, as a Medical Technologist. On March 5, 2008, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status. On November 17, 2009, the director issued the applicant a Request for Evidence (RFE), asking the application to submit, among other items, her Visa Screen from CGFNS.

In response, counsel submitted "verification that the CGFNS 'Visa Screen' Certificate is in process" in the form of a print out of an electronic message auto reply from CGFNS to the applicant confirming payment. On January 5, 2010, the director denied the application because as of the date that the applicant filed her adjustment of status application, she did not possess the required Visa Screen and was, therefore, ineligible to adjust her status at the time of filing.

Counsel filed the first motion on February 5, 2008. Counsel acknowledged that the applicant was required to have the Visa Screen in order to adjust her status and stated that the applicant had immediately applied for the certificate when she received the RFE in November 2009. Counsel argued that because a visa number was no longer available for the applicant, the adjustment of status application should be reopened and its adjudication held in abeyance until a visa number becomes available again during which time the applicant could obtain the required Visa Screen.

In his March 15, 2010 decision, the director dismissed the applicant's motion pursuant to 8 C.F.R. § 103.5(a)(4) because it did not meet either the requirements of a motion to reopen or a motion to reconsider. Counsel filed a second motion on April 19, 2010, which contained the same arguments as the first motion regarding the director's discretion to reopen the matter and permit the applicant an opportunity to obtain the required Visa Screen until a visa becomes available. On May 26, 2010, the director received a copy of the applicant's Visa Screen, which was issued on April 20, 21010.

Counsel filed a second motion, which is the subject of his certification. On certification, the director reiterates that the adjustment of status application may not be approved because the applicant was not eligible to adjust her status when she filed the application on March 5, 2008 due to her lack of the required Visa Screen. In response to the director's notice, counsel states that the director never stated that the Visa Screen must have been issued prior to the filing of the adjustment of status application, only that it was necessary to adjust status to that of a lawful permanent resident, which would require the availability of a visa number. Counsel notes that when the director issued his RFE in November 2009, a visa was not available for the applicant and one had not become available until September 2010. Counsel contends that when a visa number became available for the applicant in September 2010, all of the necessary eligibility requirements had been met in order for the applicant to adjust her status to that of a lawful permanent resident.

We find no merit in counsel's argument that, because no visa was available to the applicant when the director issued the RFE or at any time until September 2010, the director should have held the adjudication of the applicant's adjustment of status application in abeyance so that she could obtain the required Visa Screen. When she filed her adjustment of status application on March 5, 2008, a visa number was available to the applicant. Therefore, the proper inquiry in this proceeding is whether the applicant was eligible to adjust her status at the time she filed her application on March 5, 2008, and the applicant's eligibility hinges on whether she had been issued the required Visa Screen as that date. The regulation at 8 C.F.R. § 103.2(b)(1) specifically states: "An applicant . . . must establish that . . . she is eligible for the requested benefit at the time of filing the application . . . ." It is undisputed that the applicant is required to have a Visa Screen to adjust her status to that of a lawful permanent

resident. She, therefore, was required to have a Visa Screen that was issued on or before March 5, 2008, the date she filed her adjustment of status application. Without a Visa Screen that was issued on or prior to the filing of the adjustment application, the applicant could not demonstrate that "she is eligible for the requested benefit at the time of filing the application." 8 C.F.R. § 103.2(b)(1).

The director's issuance of an RFE in November 2009 was not done to provide an opportunity for the applicant to apply for the Visa Screen; it was sent pursuant to 8 C.F.R. § 103.2(b)(8)(ii) to determine whether the applicant had inadvertently neglected to submit a Visa Screen that had already been issued. We note that even if the director would have allowed the applicant to submit a Visa Screen that was issued after the filing date of her application, her application would still have been denied. The provisions at 8 C.F.R. § 103.2(b)(8)(iv) place a maximum response time for an RFE of 12 weeks and does not permit the granting of any additional response time. The director's RFE was issued on November 17, 2009, and the applicant's Visa Screen was issued 22 weeks later on April 20, 2010. Thus, the applicant would not have received the Visa Screen in time to meet the maximum 12 week response time and no additional time could have been granted.

It is clear that the applicant did not have the required Visa Screen until April 20, 2010, more than two years after filing her adjustment of status application. Accordingly, the director made no error in his initial decision to deny the application in January 2010. Pursuant to 8 C.F.R. § 103.2(b)(12): "An application . . . shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the application . . . was filed." As the applicant had not obtained a Visa Screen as of March 5, 20008, the date of filing her adjustment application, her application may not be approved.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). As in all proceedings, the applicant bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision to deny the application is affirmed. The application remains denied.