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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]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 23 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, 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.

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 a subsequently filed motion to reopen or reconsider that he has certified to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed and the application will be denied.

The applicant seeks to adjust his status to that of a lawful permanent resident pursuant to section 245of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255. The director initially denied the application because the applicant failed to respond to a request for evidence (RFE). Counsel for the applicant filed a motion to reopen or reconsider the director's decision, which the director has certified to the AAO for review, as he is affirming his original decision to deny the application. On notice of certification, the director notified the applicant that he had 30 days to supplement the record with any additional evidence that he wished the AAO to consider. On notice of certification, neither the applicant nor counsel submits any additional evidence for consideration. We, therefore, find the record complete and ready for adjudication.

A review of the record reveals the following facts and procedural history. The applicant initially entered the United States in 2003 as a J-1 exchange visitor. He subsequently obtained O-1 nonimmigrant status, and is the beneficiary of an approved Form I-140, Petition for Alien Worker. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on April 15, 2008. The director initially denied the application because the applicant failed to submit requested evidence. Specifically, the director requested: evidence that the applicant maintained lawful nonimmigrant status from November 20, 2003 until July 28, 2005; a letter of employment from the applicant's petitioning employer; and evidence that the applicant has been granted a waiver of the two-year foreign residency requirement. On motion, counsel maintains that a response to the director's evidence request was submitted and states further that the applicant's waiver was approved and that the director should be able to locate the waiver within U.S. Citizenship and Immigration Services (USCIS) systems.

In his decision on the applicant's motion, which is the subject of this certification, the director is reopening the proceedings and affirming his decision to deny the application. First, the director notes that counsel's claims regarding the submission of a response to the request for evidence has no merit, as the evidence in the file does not indicate that the service center received a timely submission. Second, although the director acknowledges the late submission of an employment offer letter and finds it sufficient, he does not find persuasive the evidence concerning the applicant's claims of remaining outside of the United States for two years after his period of authorized stay in J-1 status expired, or counsel's claims that the applicant has been granted a waiver of the two-year foreign residency requirement. The director also notes that when the applicant filed his Form I-485 application to adjust status, his waiver application had not yet been approved.

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(e) of the Act, states:

> No person admitted under section 101(a)(15)(J) or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence . . . shall be eligible to apply for . . . permanent residence . . . until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: Provided, That . . . the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the [Secretary of Homeland Security] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the [Secretary of Homeland Security] to be in the public interest. . . .

The applicant's Form I-612 waiver application was initially denied by the California Service Center, and the applicant appealed that decision. In a July 2, 2008 decision, the AAO sustained the applicant's appeal and remanded the matter to the California Service Center to request a waiver recommendation from the Director, U.S. Department of State, Waiver Review Division. As noted by the director in his decision on the applicant's motion, the applicant applied for adjustment of status on April 15, 2008. At that time, the applicant did not have an approved waiver application that would have permitted him to adjust his status to that of a lawful permanent resident, as he was subject to the provisions of section 212(e) of the Act.

We also concur with the director that the record fails to establish that the applicant had resided outside of the United States for at least two years once he finished his studies in J-1 status. Neither the applicant nor counsel addresses the director's findings regarding the inconsistencies in the record concerning the applicant's places of residence from the time he completed his studies in 2003 until his return to the United States as an O-1 nonimmigrant in 2005. Therefore, the applicant is not eligible to adjust his status pursuant to section 245 of the Act, and the director's denial of the Form I-485 was, therefore, the proper result.

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.