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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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**U.S. Citizenship
and Immigration
Services**

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JUN 29 2010

File: [REDACTED] Office: NEWARK FIELD OFFICE Date:

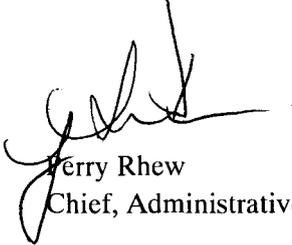
IN RE: Applicant: [REDACTED]

Petition: 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:

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Newark, New Jersey, denied the application for adjustment of status (Form I-485) and certified her decision to the Administrative Appeals Office (AAO) for review. The field office director's decision will be affirmed. The application will be denied.

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

The applicant arrived in New York City from Dakar, Senegal on August 23, 1993. He did not provide a passport or visa and requested asylum in the United States. He was detained in legacy Immigration and Naturalization Services (INS) custody and placed in exclusion proceedings before an Immigration Judge. He was released from INS custody on September 15, 1993 under a bond agreement. On June 15, 1995, an Immigration Judge denied the applicant's request for withholding of removal and asylum and ordered the applicant's removal from the United States. The applicant appealed the Immigration Judge's decision and on October 7, 1996 the Executive Office for Immigration Review (EOIR) dismissed the appeal.

On February 26, 1997, the applicant married a United States citizen who filed a Form I-130, Petition for Alien Relative, in May 1999 on his behalf. The Form I-130 was approved on June 24, 1999 without an interview. On September 13, 1999, the applicant and his United States citizen spouse were interviewed at an INS District Office regarding the applicant's adjustment application and the matter was held for a file review.

On February 20, 2001, the applicant was informed that arrangements had been made for his departure from the United States and he was ordered to report on March 26, 2001 for departure. The applicant did not appear as ordered and a warrant was issued for his arrest. On December 2, 2001, the applicant was apprehended by INS. Counsel for the applicant informed INS that the applicant was married to a United States citizen and had an approved Form I-130 with a May 10, 1999 priority date. The applicant was released and placed under an order of supervision and required to report to a deportation office every 90 days.

On August 30, 2004, the applicant's United States citizen spouse was found dead in Elizabeth, New Jersey, a victim of homicide. Officers from the Elizabeth, New Jersey Police Department interviewed several different individuals in an effort to solve the crime. The applicant was not interviewed by officers of the police department, even though he was married to the deceased. Interviews by detectives from the Elizabeth, New Jersey Police Department apparently did not reveal that the deceased had been married; rather the information revealed: that the deceased had lived on Elizabeth Avenue for the past 15 years; that the deceased's boyfriend (not the applicant) had lived with her from 1997 to 2000 at the Elizabeth Avenue address; and, that the deceased was a prostitute who abused crack cocaine and heroin.

On September 3, 2004, the State of New Jersey issued a death certificate ruling that the death of the applicant's United States citizen spouse was a homicide. The death certificate indicated that the deceased had never been married and identified her address as on Elizabeth Avenue in Newark, New Jersey. On September 22, 2004 the death certificate was amended to reflect that the deceased had been married to the applicant after the applicant provided his marriage certificate to the funeral home which then presented the applicant's marriage certificate to State officials.

A section 245 interview was conducted by United States Citizenship and Immigration Services (USCIS) on October 29, 2004. On September 28, 2005, United States Immigration and Custom Enforcement (USICE) notified the applicant's bond obligor that the applicant had violated the bond agreement due to the applicant's failure to appear as ordered under the terms of the order of supervision. The bond obligor was ordered to surrender the applicant to USICE on May 31, 2005. Service records do not show that the applicant surrendered as ordered. On February 27, 2006 a decision was issued on the Form I-485 denying the application because the applicant was under a final order of deportation/removal.

Counsel for the applicant submitted letters, a May 5, 2008 affidavit signed by the applicant, and a March 6, 1997 affidavit that had been signed by both the applicant and his spouse in an effort to reopen the matter. In the May 5, 2008 affidavit, the applicant declared that he had married his United States citizen spouse on February 16, 1997 and that the couple had lived together as husband and wife until she was killed on August 30, 2004. In the March 6, 1997 affidavit, the applicant and his spouse declared: that the couple met at a party in the United States citizen spouse's apartment building in December 1995; that the couple went together to a New Year's Eve party at the spouse's friend's house in Irvington, New Jersey; that the couple started seeing more of each other; that after eight months of dating they started talking about getting married; and that the couple married on February 26, 1997 and the United States citizen spouse moved into the applicant's apartment.

Counsel for the applicant, submitted numerous letters noting that the applicant was under a final order of exclusion, not a final order of deportation/removal and obtained a reopening of the adjustment matter and a new section 245 interview was scheduled for April 14, 2008. A denial decision was issued to the applicant on August 23, 2008; however, the field office director issued a subsequent decision on January 22, 2010 stating that the January 22, 2010 decision superseded the August 23, 2008 decision.

In the January 22, 2010 decision, the field office director found the following factors to be pertinent to whether a favorable exercise of discretion was warranted in the matter. The field office director observed that the New Jersey authorities investigating the homicide of the applicant's spouse would have been made aware of the applicant and interviewed the applicant in their effort to solve the homicide of his claimed wife. The field office director noted the applicant's May 5, 2008 affidavit wherein he had declared that he had kept in touch with the deceased's family to this date. The director found, however, that evidence did not exist from the New Jersey authorities that the deceased's family knew of the applicant's existence.

The director also observed that the applicant had not surrendered to the custody of USICE on May 31, 2005 as he had been ordered to do.

The field office director further observed that the applicant had been arrested on December 6, 2006 by the Bloomfield Police Department and charged with 2C:28-4A, "knowingly gives or causes to be given false information to any law enforcement officer," and 2C:29-3B(4), "hindering own apprehension or prosecution." The field office director noted that the applicant pled guilty to violating New Jersey State Statute 2C:29-3B(4), "hindering own apprehension or prosecution," on January 9, 2007.

The field office director concluded that based on these factors the applicant did not warrant a favorable exercise of discretion in regards to his adjustment of status application. The field office director found: that the applicant had a flagrant disregard for the laws governing the United States; that he failed to comply with an order to appear before INS; that although agreeing to obey federal, state, and local laws and ordinances and to notify USCIS of any arrests or convictions, the applicant failed to notify USICE of his December 6, 2006 arrest and his January 9, 2007 conviction; and that the applicant was not residing in a bona fide marital relationship with his deceased spouse and that the marriage was entered into to circumvent immigration laws and obtain an immigration benefit.

The field office director certified her decision to the AAO for review. In response to the certification, counsel for the applicant presented a brief and provided additional documentation.

Counsel for the applicant asserts that the applicant's February 26, 1997 marriage was valid at the time of its inception. Counsel notes that the Form I-130 was approved and that the couple was not asked for further evidence or scheduled for a "Stokes" interview. Counsel contends that USCIS had five years between the adjustment of status interview and the applicant's spouse's death in which to question the marriage and that its failure to do so precludes USCIS from relying on evidence that is not germane to ascertaining the intent of the parties at the time of the marriage. Counsel claims that USCIS impermissibly denied the application by failing to afford the applicant or the applicant's counsel an opportunity to review the results of the investigation conducted by USCIS and to rebut any derogatory evidence obtained.

Counsel asserts that the applicant has been prejudiced and denied due process of law because of the unreasonable delay between the government's decision to hold the applicant's file for review after the September 13, 1999 adjustment interview and the denial of adjustment of status more than ten years later. Counsel contends that adjustment of status should have been granted in the exercise of discretion and notes: that the applicant has always complied with USCIS requests for information; that contrary to the director's claim, the applicant has always appeared as required by the deportation, detention and removal office; that the applicant's only conviction was for a traffic infraction when he gave his brother's license to a law enforcement officer at a traffic stop; and that the applicant did not marry to circumvent immigration laws or to wrongfully obtain an immigration benefit. Counsel reiterates that neither the applicant nor his counsel was given a

copy of the report or witness statements relied upon by USCIS to question the bona fides of the applicant's marriage.

Counsel provides the applicant's February 16, 2010 affidavit wherein the applicant declares: that he met his United States citizen spouse at a party on December 31, 1996 hosted by his friend; that the couple dated for about two months and were married on either February 16, 1997 or February 26, 1997;¹ that his spouse's daughter who was about 13 when he started dating her mother in January 1997 lived with his spouse's sister, [REDACTED] that the couple rented a studio apartment when they married; that his spouse worked as a home health aide; that she left their marital home in Newark in the summer of 2003; that he did not know that his spouse used drugs or was a drug addict and that she certainly was not a prostitute; that on August 31, 2004 he received a phone call from his spouse's mother who told him that his spouse had been murdered; and that on September 3, 2004 while he was at his spouse's mother's house, his spouse's sister showed him the death certificate that said his spouse had never been married. The applicant further declares that he has always complied with the orders of supervision and has never failed to appear in connection with any order of supervision. The applicant also indicates that his arrest and conviction in January 2007 was for a traffic offense and he did not believe that he had to disclose traffic violations to the deportation unit.

Counsel also submits the disposition of the applicant's arrest and conviction for "hindering own apprehension or prosecution" and asserts that under New Jersey law, this offense is a disorderly persons offense and not a crime. Counsel also provides undated photographs with captions identifying the applicant and various individuals as well as dated photographs (September 9, 2004) showing the applicant beside an open casket.

Section 245 of the Act provides in pertinent part:

(a) 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) . . . 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

¹ The applicant refers to the date of the marriage as February 16, 1997 in one place on the affidavit and as February 26, 1997 in another place on the affidavit. The marriage certificate shows the date of the marriage is February 26, 1997.

(3) an immigrant visa is immediately available to him at the time his application is filed.

(Emphasis added).

Adjustment of status is, therefore, a matter of administrative grace, not mere statutory eligibility. *Matter of Marques*, 16 I. & N. Dec. 314, 315 (BIA 1977). The applicant has the burden of demonstrating that discretion should be exercised in his favor. *Matter of Patel*, 17 I. & N. Dec. 597, 601 (BIA 1980); see also *Matter of Leung*, 16 I. & N. Dec. 12 (BIA 1976), *Matter of Arai*, 13 I. & N. Dec. 494 (BIA 1970). Where adverse factors are present, it may be necessary for the applicant to offset those factors by a showing of unusual or even outstanding equities. *Matter of Arai*, 13 I. & N. Dec. at 496. Favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of administrative discretion. *Id.*

The statements regarding the homicide investigation of the applicant's spouse, referenced by the director in the January 22, 2010 decision, were not part of a USCIS investigation related to the applicant's immigration status but rather were part of the investigation conducted by the Elizabeth, New Jersey Police Department in an effort to solve the homicide of the applicant's United States citizen spouse. Although the field office director did not provide the names of the detectives conducting the investigation, the field office director clearly stated that the statements were statements from the Elizabeth, New Jersey Police Department's investigation.

The AAO acknowledges counsel's assertion that the applicant's February 26, 1997 marriage was valid at the time of its inception and that the Form I-130 was approved and that the couple was not asked for further evidence or scheduled for a "Stokes" interview. However, the validity of the Form I-130 is not before the AAO. Rather, the AAO has examined the record to determine whether the applicant's statements provided to legacy INS and USCIS provide a clear understanding of the applicant's character and whether based on the totality of the evidence in the record he warrants a favorable exercise of discretion.

In that regard, the AAO finds that the applicant has provided inconsistent sworn statements to USCIS in an effort to establish the bona fides of his marriage to the United States citizen. It is the inconsistent statements that the AAO finds as a significant adverse factor. Relying only on the applicant's statements, the AAO observes: that the applicant does not consistently refer to the date of his marriage; that the applicant provides different accounts of how the couple met and how long the couple dated; and that the applicant provides different accounts of how long the couple resided together. The AAO is particularly concerned with the applicant's failure to disclose in his May 5, 2008 affidavit to USCIS that his spouse had moved out of the claimed marital home in the summer of 2003. The AAO finds that the applicant's change in his story when confronted with negative information demonstrates the applicant's willingness to provide false information to the USCIS in order to obtain an immigration benefit.

The inconsistency in the applicant's testimony is a significant adverse factor. Moreover, USCIS records show that the applicant was ordered to report on March 26, 2001 for departure but that the applicant did not appear as ordered and a warrant was issued for his arrest. Subsequently, on December 2, 2001, the applicant was apprehended by INS and when released was placed on a monitoring order. This incident demonstrates that the applicant did not comply with legacy INS orders. Further, on September 28, 2005, USICE notified the applicant's bond obligor that the applicant had violated the bond agreement due to the applicant's failure to appear as ordered under the terms of the order of supervision. The bond obligor was ordered to surrender the applicant to USICE on May 31, 2005. Service records do not indicate that the applicant surrendered as ordered. This incident presents a second time when the applicant failed to comply with USCIS orders. Thus, the applicant's statement that he always complied with Service orders does not comport with the evidence in the record. The applicant's failure to comply with all United States government orders demonstrates a disregard for United States law and is a significant negative factor when determining whether the applicant warrants a favorable exercise of discretion. The AAO also acknowledges counsel's assertions that the applicant has always complied with USCIS requests for information and that the applicant has always appeared as required by the deportation, detention and removal office. However, without documentary evidence to support a claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In addition, the applicant failed to report his arrest and conviction to his deportation officer. As his arrest and conviction involved an incident that appears to have been motivated to further avoid an investigation into his immigration status and the applicant failed to report this incident to his deportation officer, the AAO finds this is an additional negative factor.

The AAO acknowledges counsel's assertion that the applicant has been prejudiced and denied due process of law because of the unreasonable delay between the government's decision to hold the applicant's file for review after the September 13, 1999 adjustment interview and the denial of adjustment of status more than ten years later. Counsel asserts that the applicant's rights to procedural due process were violated; however, the delay has not 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. The applicant's primary complaint is that the field office director denied the application. The AAO observes that the field office director's delay in reaching a decision in this matter has provided the applicant with the only positive factor to consider when exercising favorable or unfavorable discretion.

Although the applicant's long residence in the United States may be considered a positive factor, the evidence shows that the applicant has resided in the United States in violation of the immigration laws and has shown a disregard for these and other laws of the United States. The AAO concurs with the field office director that the applicant has not demonstrated "unusual or even

outstanding equities" that outweigh the adverse factors present in this case. The applicant has not presented evidence of other family ties to the United States.

In proceedings for adjustment of status under section 245 of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the field office director's decision denying the application will be affirmed.

ORDER: The field office director's decision is affirmed.