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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**

A<sub>1</sub>

[Redacted]

File: [Redacted] Office: TEXAS SERVICE CENTER

Date:

SEP 01 2010

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:

[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 certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn in part and affirmed in part. The application will be denied.

The applicant seeks to adjust his status to that of a lawful permanent resident pursuant to section 245(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255(i). The director denied the application, finding that the applicant was not eligible to adjust his status under sections 245(a), (c), (i) or (k) of the Act, and certified his decision to the AAO for review. 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, counsel submits a brief and additional evidence.<sup>1</sup>

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 July 15, 1999, with authorization to remain in the United States until August 16, 1999. On April 30, 2001, the applicant was listed as the beneficiary on a Form ETA 750, Application for Alien Employment Certification (labor certification application), filed on his behalf by [REDACTED]. On June 7, 2001, Flippo's attorney of record received a letter from the Virginia Employment Commission (VEC), notifying him that it had received the labor certification. On May 16, 2002, the VEC sent a second letter to Flippo's attorney of record, notifying him that further action was required by Flippo in order to continue processing the labor certification application. The letter noted "DEFICIENCIES," and provided Flippo a period of 45 calendar days to complete the requested action or the processing of the application would be canceled.<sup>2</sup> The applicant is the beneficiary of an approved Form I-140, Petition for Alien Worker, and he seeks to use the April 30, 2001 processing date on the labor certification application to adjust his status pursuant to section 245(i) of the Act.

The director determined that the applicant was not eligible to adjust status under section 245(i) of the Act for two reasons. First, the labor certification application filed by [REDACTED] was for a beneficiary named [REDACTED] which is not the applicant's correct name. Second, the director noted that the labor certification application was not approvable when filed because the May 12, 2002 letter from the VEC stated that there were deficiencies.

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<sup>1</sup> The applicant is seeking to adjust his status pursuant to section 245(i) of the Act. As neither the applicant nor counsel argues that the applicant is eligible to adjust his status pursuant to section 245(a) or (k) of the Act, we shall affirm but not discuss the director's findings regarding the applicant's ineligibility to adjust his status under these sections of law.

<sup>2</sup> The record does not include an attachment to the May 16, 2002 letter describing the deficiencies.

On notice of certification, counsel submits copies of numerous documents to establish that the applicant has used variations of his name, including the name [REDACTED]. Counsel states that the labor certification application filed by Flippo was, in fact, for the applicant. Counsel states that the only document required to establish that a labor certification application is approvable when filed is the receipt from the employment commission. Counsel states that the June 7, 2001 letter from the VEC does not indicate any deficiencies in the filing of the labor certification application and that it was, indeed, approvable when filed and, therefore, can be used to establish eligibility for adjustment of status under 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.

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 . . . application for labor certification, the qualifying . . . 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 . . . 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.

Preliminarily, we withdraw the director's determination that the labor certification application in the name of [REDACTED] does not pertain to the applicant. On appeal, counsel provides numerous documents establishing that the applicant has used variations of his name, [REDACTED], throughout his lifetime. In addition, the biographic information provided in the labor certification application corresponds to the applicant's documentation. Accordingly, we find that the labor certification application with a processing date of April 30, 2001 pertained to the applicant, and we withdraw the director's findings to the contrary.

We do, however, concur with the director that the applicant is ineligible to adjust his status pursuant to section 245(i) of the Act because the labor condition application with a processing date of April 30, 2001 was not approvable when filed. As noted earlier, on May 16, 2002, the VEC sent a letter to [REDACTED] attorney of record, notifying him that further action was required by [REDACTED] in order to continue processing the labor certification application. The letter noted "DEFICIENCIES," and provided [REDACTED] a period of 45 calendar days to complete the requested action or the processing of the application would be canceled. There is no evidence that Flippo or its attorney responded to the May 16, 2002 notice regarding the deficiencies. Contrary to counsel's assertion, the mere filing of a labor certification application does not make it "approvable when filed." It is clear from the May 16, 2002 letter, that the VEC found the labor certification application to be deficient. Although we do not know what deficiencies the VEC found, this letter does not support a finding that the labor certification application was properly filed, meritorious in fact, and non-frivolous.<sup>3</sup> Counsel's assertion that the labor certification application was approvable when filed is not persuasive in light of the evidence in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner'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). The director's denial of the Form I-485 was, therefore, the proper result.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that he is eligible for adjustment of status. Here,

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<sup>3</sup> We note that a letter written in support of the applicant's employment as a [REDACTED] [REDACTED], Virginia, appears fraudulent. The letter, which is dated June 21, 2000, states that the applicant had been working as a Warehouse Manager "for the past 3 years"; however, the applicant did not enter the United States until July 15, 1999 and was allegedly attending university in Bolivia until 1998. The applicant, therefore, could not have worked as a [REDACTED] Virginia as early as June 1997.



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the applicant has not met his burden. Accordingly, the AAO affirms the director's denial of the applicant's Form I-485 application to adjust status.

**ORDER:** The director's decision is withdrawn in part and affirmed in part. The application is denied.