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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

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[REDACTED]

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: **SEP 01 2010**

[REDACTED]

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 certified the decision 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 245(a) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255(a). The director denied the application, finding that an immigrant visa was not available to the applicant. The director certified his decision to the AAO for review, and notified the applicant that he had 30 days to supplement the record with any additional evidence that he wished the AAO to consider. As of this date, the AAO has not received any additional evidence for consideration and we, therefore, consider the record complete and ready for adjudication.

A review of the record reveals the following facts and procedural issues. On July 9, 2007, the company [REDACTED] filed an I-140 petition on the applicant's behalf. On August 7, 2007, the applicant filed a Form I-485 application to adjust his status based upon the pending I-140 petition. On May 27, 2008, U.S. Citizenship and Immigration Services (USCIS) denied the Form I-140 and the petitioner appealed that decision. On May 13, 2009, the AAO dismissed the appeal. On November 27, 2007, [REDACTED] submitted a second I-140 petition on the applicant's behalf, which was approved on June 6, 2008 with a priority date of April 10, 2007.

The director stated in his decision that the Form I-485 could not be approved because an immigrant visa has not been available to the applicant since June 2008, the month in which the second Form I-140 was approved. As noted earlier, the applicant has not submitted any evidence or arguments in rebuttal to the director's notice of certification.

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.

The regulation at 8 C.F.R. § 245.1 states, in pertinent part

(g) Availability of immigrant visas under section 245 and priority dates --

(1) Availability of immigrant visas under section 245. An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. . . .

The regulation at 8 C.F.R. § 245.2(a) states, in pertinent part:

(2) Proper filing of application --

(i) Under section 245 . (A) An immigrant visa must be immediately available in order for an alien to properly file an adjustment application under section 245 of the Act See § 245.1(g)(1) to determine whether an immigrant visa is immediately available.

(B) If, at the time of filing, approval of a visa petition filed for classification under section 201(b)(2)(A)(i), section 203(a) or section 203(b)(1), (2) or (3) of the Act would make a visa immediately available to the alien beneficiary, the alien beneficiary's adjustment application will be considered properly filed whether submitted concurrently with or subsequent to the visa petition, provided that it meets the filing requirements contained in parts 103 and 245. For any other classification, the alien beneficiary may file the adjustment application only after the Service has approved the visa petition.

(C) A visa petition and an adjustment application are concurrently filed only if:

(1) The visa petitioner and adjustment applicant each file their respective form at the same time, bundled together within a single mailer or delivery packet, with the proper filing fees on the same day and at the same Service office, or;

(2) the visa petitioner filed the visa petition, for which a visa number has become immediately available, on, before or after July 31, 2002, and the adjustment applicant files the adjustment application, together with the proper filing fee and a copy of the Form I-797, Notice of Action, establishing the receipt and acceptance by the Service of the underlying Form I-140 visa petition, at the same Service office at which the visa petitioner filed the visa petition

On June 6, 2008, the date on which [REDACTED] second I-140 petition was approved, a visa number was not available to the applicant. A review of the Department of State's Visa Bulletin for June 2008 shows that the second preference employment-based category for nationals of India was current for individuals with priority dates on or before April 1, 2004. The applicant's priority date is April 10,

2007.¹ Therefore, the applicant was not eligible to submit an application to adjust status pursuant to 8 C.F.R. § 245.2(a)(2)(i)(A) in June 2008, and the director's denial of the Form I-485 was the proper result.²

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.

¹ We note that the applicant's priority date is still not be current according to the September 2010 Visa Bulletin - [REDACTED]

² Although the service center director denied [REDACTED]'s first I-140 petition on May 27, 2008, that denial did not become final until May 29, 2009, the date on which the AAO rendered the final agency decision by dismissing the appeal. Accordingly, it was proper for the Form I-485 to remain pending during the appellate review process.