

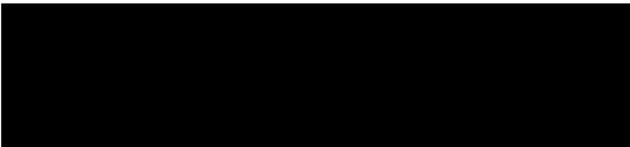
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



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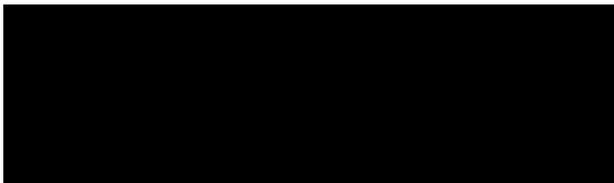
File:  Office: TEXAS SERVICE CENTER

Date: SEP 07 2010

IN RE: Applicant: 

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:



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, initially 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. The director has certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. 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 ultimately denied the application, finding that the applicant was not eligible to adjust his status under section 245(i) of the Act, and he 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, neither the applicant nor counsel submits evidence for consideration. We, therefore, consider the record complete.

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's visa on September 13, 2000, with authorization to remain until March 12, 2001. On February 12, 2001, the applicant submitted a Form I-539, Application to Extend Nonimmigrant Status, which was approved on November 5, 2001. The applicant's nonimmigrant stay in B-2 status was extended until December 4, 2001.

The applicant claims that he was the beneficiary of a Form ETA 750, Application for Alien Employment Certification (labor certification application), filed on his behalf by [REDACTED] before April 30, 2001. On May 25, 2001, [REDACTED] attorney of record received a letter from the New Mexico Department of Labor. According to the letter, "appropriate action is required . . . before subject application for alien certification can be processed." [REDACTED] was instructed to provide its proposed advertisement and internal job posting by July 8, 2001. On July 10, 2001, the New Mexico Department of Labor notified [REDACTED] that it had not received a response to its May 25, 2001 letter, and it assumed that [REDACTED] did not intend to pursue the labor certification application. The New Mexico Department of Labor closed its file relating to the labor certification application filed by Taj Mahal on the applicant's behalf.

The director initially denied the application on July 31, 2009, determining that the applicant was not eligible to adjust status under section 245(i) of the Act because there was no evidence that the labor certification application that was prepared by [REDACTED] on the applicant's behalf was filed on or before April 30, 2001.

The applicant's counsel filed a motion to reopen or reconsider the director's initial denial of the application. Counsel stated that the evidence in the record, which included the Federal Express receipt, an affidavit of [REDACTED] attorney of record, the attorney's cover letter to the New Mexico Department of Labor, and the May 25, 2001 letter from the New Mexico Department of Labor, established that the applicant was the beneficiary of a labor certification application that was properly filed and approvable when filed prior to April 30,

2001. Counsel stated that the New Mexico Department of Labor does not issue acknowledgement receipts as evidence of filing.

In his decision on the applicant's motion, which he certified to the AAO for review, the director again noted that the evidence regarding the processing date of [REDACTED] labor certification application was deficient. The director stated further that, even if the applicant could establish that the labor certification application was filed on or before April 30, 2001, it was not approvable when filed because the New Mexico Department of Labor's May 25, 2001 letter indicated that appropriate action was required before the application could be processed. The AAO affirms this basis of the director's decision.

As stated earlier, on notice of certification, neither counsel nor the applicant has supplemented the record with any evidence for the AAO to consider.

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.

Besides the fact that the labor certification application was not approvable when filed, the applicant failed to present sufficient evidence that he was the beneficiary of a labor certification application that was filed on or before April 30, 2001.

The Federal Express receipt that was submitted on motion contains a handwritten notation that states "4/18/01 9:09AM [REDACTED]" In his August 24, 2009 affidavit, [REDACTED] attorney of record states that he was retained on April 6, 2001 to prepare a labor certification application on the applicant's behalf. He states further: "It is my understanding based on the airway bill that the application was received [by the] New Mexico [D]epartment of Labor on April 18, 2001." Counsel maintains that [REDACTED] did not wish to pursue the application further, which caused the New Mexico Department of Labor to close its file.

The Federal Express receipt with the handwritten notation, the attorney's cover letter to the New Mexico Department of Labor, and the attorney of record's affidavit are not probative evidence that the labor certification application was filed with the New Mexico Department of Labor on or before April 30, 2001. We note counsel's claim in his motion that the New Mexico Department of Labor does not provide acknowledgement receipts as proof of filing; however, counsel has not provided a letter from the New Mexico Department of Labor or any other evidence to support his claims. 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). The preponderance of the evidence does not support a finding that the applicant was the beneficiary of a labor certification application that was filed on or before April 30, 2001 and he is, therefore, ineligible to adjust his status pursuant to section 245(i) of the Act.

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, the applicant has not met that 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 affirmed. The application is denied.