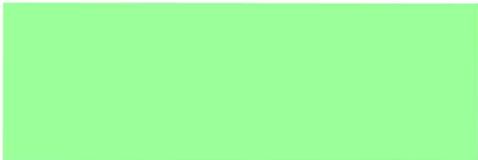




U.S. Citizenship
and Immigration
Services

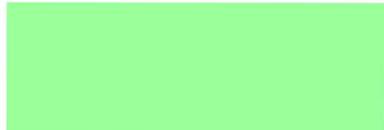
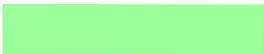
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Date: Office: TEXAS SERVICE CENTER

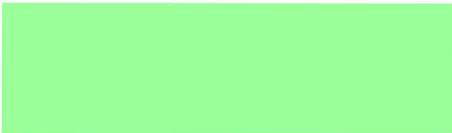
JUN 11 2013

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 California Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. 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). 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 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, counsel asserts that the applicant has established his eligibility to adjust status, and submits a brief for consideration.

A review of the record reveals the following facts and procedural history. The applicant was admitted into the United States on a B-1 nonimmigrant visitor's visa on March 21, 1994, with authorization to remain until April 20, 1994. There is no indication that the applicant's nonimmigrant stay in B-1 status was extended.

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], on July 18, 2003. The Department of Labor issued the priority date of April 18, 2003, and labor certification application [REDACTED] was certified on September 1, 2006. The [REDACTED] filed an Immigrant Petition for Alien Worker (Form I-140) on November 6, 2006. The Form I-140 was approved on April 16, 2007. The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), on March 16, 2009, and seeks to adjust status under section 245(i) of the Act.

On June 23, 2009, the applicant was issued a Request for Evidence (RFE) requesting the applicant to submit evidence to establish the validity of an approvable labor certification with a priority date on or before April 30, 2001, or that he is a grandfathered alien, in order for the applicant to adjust status under section 245(i) of the Act. The applicant was granted 30 days to submit his response.

In response to the director's RFE, the applicant submitted proof that he was the beneficiary of a labor certification application [REDACTED] filed on his behalf, which indicates a priority date of April 30, 2001; and, a U.S. Department of Labor, Employment and Training Administration, Notice of Findings issued on April 3, 2007. The Notice of Findings notified the applicant of the reasons why a certification could not be issued on the basis of the information the applicant had provided. The notice identified the following four findings: 1) the wage offer of \$24.77 per hour was below the prevailing wage of \$30.23 per hour; 2) the employer filed the application without providing a description of the job offer for the alien's employment; 3) the aline did not possess the two year experience as a Shipping Manager; and, 4) unduly restrictive requirements, specifically, that the position was for a Shipping Manager, but, on the ETA 750, Part A, Item 17, the number of employees that the

alien will supervise, indicates zero (0). The employer and the applicant were instructed to respond by May 8, 2007.

The director denied the application on September 13, 2009, determining that the applicant was not eligible to adjust status under section 245(i) of the Act. The director stated 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 based on the Department of Labor's April 3, 2007 letter notifying the applicant that appropriate action was required before the application could be processed.

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

On notice of certification, counsel asserts that the applicant's previous labor certification meets the requirements of "approvable when filed" and, therefore, qualifies under section 245(i) of the Act as a grandfathering alien. Counsel further asserts that the denial of the applicant's previous labor certification should not affect his eligibility to adjust status under section 245(i) of the Act. In addition, counsel contends that the standard that an application must have been "approvable when filed" is contrary to the language of 8 U.S.C. § 245(i), inconsistent with immigration regulations, and bad policy.

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.

The record is clear that the labor certification application filed on or before April 30, 2001, was not approvable when filed. As noted above, the Department of Labor's April 3, 2007, Notice of Findings, notified the applicant of findings why a certification could not be issued and identified the deficiencies in the ETA 750 application. While the AAO has considered counsel's assertions on appeal; the AAO is bound by the clear language of the regulations and lacks the authority to change the regulations.

The evidence, therefore, 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 that was approvable when filed. The applicant 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 remains denied.