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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] SRC 07 138 53071

Office: TEXAS SERVICE CENTER

Date: DEC 19 2007

IN RE: Applicant: [Redacted]

APPLICATION: Application to Register Permanent Residence or Adjust Status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, utilizing Rules of Alternate Chargeability pursuant to section 202(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1152(b).

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, certified the instant application to register permanent residence or adjust status to the Administrative Appeals Office (AAO) for review. The director determined that the applicant was not eligible to utilize rules of alternate chargeability such that he might be charged to Pakistan, rather than his native India. The director's decision will be affirmed. The application will be denied.

The applicant is a citizen of India, born in New Delhi, India on October 14, 1959. He is a structural engineer, educated at Indian universities. He seeks to adjust to lawful permanent resident status in the United States based on an approved second preference employment-based visa petition filed on his behalf which has a priority date of August 11, 2004. The director requested that this office review the following issue: whether Citizenship and Immigration Services (CIS) may allow an applicant born in 1959 to Hindu parents who entered the territory of present-day India, upon leaving their native region in the territory which came to be known as Pakistan during or just following the 1947 partition of British India, to utilize the rules of alternate chargeability such that the applicant might be charged to Pakistan, rather than to his native India. *See* section 202(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1152(b)(4).

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 245(a) of the Act, 8 U.S.C. § 1255(a), provides:

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 1154(a)(1) of this title or [sic] 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.

Section 245(k) of the Act, 8 U.S.C. § 1255(k) states:

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 1153(b) of this title (or, in the case of an alien who is an immigrant described in section 1101(1)(27)(C) of this title, under section 1153(b)(4) of this title) may adjust status pursuant to subsection (a) of this section and notwithstanding subsection (c)(2), (c)(7), and (c)(8) of this section, if –

- (1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;
- (2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days –
 - (A) failed to maintain, continuously, a lawful status;
 - (B) engaged in unauthorized employment; or
 - (C) otherwise violated the terms and conditions of the alien's admission.

8 C.F.R. § 245.1(g)(1) provides:

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. An immigrant visa is considered available for accepting and processing the application Form I-485 [if] the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current). An immigrant visa is also considered immediately available if the applicant establishes eligibility for the benefits of Public Law 101-238. Information concerning the immediate availability of an immigrant visa may be obtained at any Service office.

8 C.F.R. § 245.2(a)(2)(i)(A) provides:

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.

8 C.F.R. § 245.2(a)(5)(ii) states in relevant part:

Under section 245 of the Act. . . . No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240.

Section 202 of the Act, 8 U.S.C. § 1152, provides in relevant part:

(b) Rules for chargeability

Each independent country, self-governing dominion, mandated territory, and territory under the international trusteeship system of the United Nations, other than the United States and its outlying possessions, shall be treated as a separate foreign state for the purposes of a numerical level established under subsection (a)(2) of this section when approved by the Secretary of State. All other inhabited lands shall be attributed to a foreign state specified by the Secretary of State. For the purposes of this chapter the foreign state to which an immigrant is chargeable shall be determined by birth within such foreign state except that

- (1) an alien child, when accompanied by or following to join his alien parent . . .
- (4) an alien born within any foreign state in which neither of his parents was born and in which neither of his parents has a residence at the time of such alien's birth may be charged to the foreign state of either parent.

The regulation at 22 C.F.R. § 42.12 states in relevant part:

Rules of chargeability. (a) Applicability. An immigrant may be charged to the numerical limitation for the foreign state or dependent area of birth, unless the case falls within one

of the exceptions to the general rule of chargeability provided by INA 202(b) and paragraphs (b) through (e) of this section to prevent the separation of families

(e) Exception for alien born in foreign state in which neither parent was born or had residence at time of alien's birth. An alien who was born in a foreign state, as defined in § 40.1, in which neither parent was born, and in which neither parent had a residence at the time of the applicant's birth, may be charged to the foreign state of either parent as provided in INA 202(b)(4). The parents of such an alien are not considered as having acquired a residence within the meaning of INA 202(b)(4), if, at the time of the alien's birth within the foreign state, the parents were visiting temporarily or were stationed there in connection with the business or profession and under orders or instructions of an employer, principal, or superior authority foreign to such foreign state.

The Constitution of India, Part II, Article 6 (1950) provides:

Rights of citizenship of certain persons who have migrated to India from Pakistan

Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if –

(a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted)¹; and

(b)(i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government: Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO's *de novo* review authority. *See*, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all

¹ Under the terms of the Government of India Act, 1935, "India" included British India, meaning all of the British Governors' provinces and the Chief Commissioners' provinces, and all territories held under Indian rulers who were in turn under the authority of the King of Great Britain, and certain other territories. *See* Government of India Act, 1935, Part III, Chapter V (accessible at <http://khadc.nic.in/snippets/The%20Government%20of%20India%20Act,%201935.pdf>) (accessed December 5, 2007). In 1935, "British India" included all of modern-day Pakistan and India, as well as certain other territory. *See* "India", MSN Encarta Online Encyclopedia, http://encarta.msn.com/encyclopedia_761557562_13/India.html (accessed December 5, 2007).

relevant evidence in the record, including new evidence properly submitted in response to the notice of certification.²

The applicant indicated in a letter dated March 23, 2007 submitted with the application that, as Hindus, his parents had to leave their native region in the territory that came to be known as Pakistan due to religious rioting that broke out when that territory became an Islamic country at the time of the 1947 Partition of British India, and they had to resettle in India. *See also* "Timeline: India", *BBC News*, http://news.bbc.co.uk/2/hi/south_asia/1155813.stm, (accessed December 4, 2007)(which reflects that during 1947 through 1948 Hindus in the territory of Pakistan were forced into present-day India.) As the director indicated in the notice of certification, there is nothing in the record to establish that at the time of the applicant's birth in 1959, the applicant's parents were visiting India temporarily or were *stationed* in India in connection with the business or profession and under orders or instructions of an employer, principal, or superior authority foreign to India as required by the regulation at 22 C.F.R. § 42.12(e), which defines the specific chargeability exception that the applicant suggests applies in this matter. It is noted that according to Part II, Article 6 of the Constitution of India (1950), quoted above, Hindus who resettled in present-day India under the conditions and at the time that the applicant's parents did automatically became citizens of India when the Constitution of India was adopted in 1950.³ Nothing in the record demonstrates that when the applicant was born in New Delhi in 1959, the applicant's parents were not residents of India, but were merely stationed there in connection with the business and under the instructions of the United Kingdom, a superior authority foreign to India, as the applicant indicates in his letter dated November 12, 2007 submitted in response to the notice of certification, *See* 22 C.F.R. § 42.12(e). Rather, it appears that from the time that the Constitution of India was adopted in 1950 through 2006, when the applicant's parents left India for the United States, they had their residence in India, were citizens of India and were not in that country on a temporary basis.⁴

The applicant has failed to demonstrate that at the time of his birth in 1959 his parents had not acquired a residence in India within the meaning of section 202(b)(4) of the Act. *See also* 22 C.F.R. § 42.12(e). Thus, he is not eligible to utilize the rules of alternate chargeability such that he might be charged to Pakistan, rather than to his native India.

In the letter dated November 12, 2007 submitted in response to the notice of certification, the applicant asserts in the alternative that he might currently be charged to his native India given that the U.S. Department of State July 2007 Visa Bulletin indicates that immigrant visa numbers are current for India in the employment-based second preference category. This assertion is not persuasive. The Department of State issued the July 2007 Visa Bulletin subsequent to the filing of the instant Form I-485, Application to Register Permanent Residence or Adjust Status. The applicant must demonstrate that an immigrant visa number was available to him based on his August 11, 2004 priority date *at the time that his Form I-485 was filed* on April 2, 2007. *See* §§ 245(a)(3) and 245(k) of the Act; 8 C.F.R. § 245.1(g)(1); and 8 C.F.R. § 245.2(a)(2)(i)(A). As pointed out by

² The record in this case provides no reason to preclude consideration of any of the documents newly submitted in response to the notice of certification. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ The Constitution of India was adopted on January 26, 1950. *See* background information on this constitution as provided to universities, nongovernmental organizations and the public at the International Constitutional Law online project, http://www.servat.unibe.ch/law/icl/in__indx.html (accessed December 6, 2007), as well as the official British English version of this constitution which is posted at http://www.servat.unibe.ch/law/icl/in00000_.html (accessed December 6, 2007).

⁴ This office notes that CIS electronic databases also indicate that the applicant's parents lived in India as citizens. That is, in 2006, when the applicant's parents became U.S. lawful permanent residents through a child of theirs other than the applicant, who is a U.S. citizen, and they entered the United States, they presented themselves as citizens of India who had been born in the territory of present-day Pakistan.

the director in the notice of certification, the Department of State indicated in the April 2007 Visa Bulletin that during April 2007 immigrant visa numbers would be available only for those priority dates which fall before January 8, 2003 for India in the employment-based second preference category. Thus, as the applicant's employment-based second preference petition has an August 11, 2004 priority date, and as his Form I-485 was filed during April 2007, the applicant may not be charged to India.⁵

In visa application proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The application is denied.

⁵ This office would also note incidentally that at the time that the applicant wrote and filed his letter in November 2007, the visa numbers for India, employment-based second preference category, had retrogressed to January 1, 2002, such that immigrant visa numbers were only available for priority dates before that date. It is unclear to this office why the applicant did not acknowledge this in his letter.