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

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FILE: [redacted] OFFICE: TEXAS SERVICE CENTER Date: APR 01 2005
SRC 03 088 51474

IN RE: Applicant: [redacted]

PETITION: Application to Register Permanent Residence or Adjust Status Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT:

[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, Director
Administrative Appeals Office

DISCUSSION: The employment-based application for adjustment of status was denied by the Director, Texas Service Center. The director certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be withdrawn and the case will be remanded to the director.

The applicant, [redacted] seeks to adjust status as the beneficiary of an approved employment-based immigrant petition pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The applicant seeks to adjust status under the provisions of section 245(a) of the Act, 8 U.S.C. § 1255(a), and use the provisions of section 245(i) of the Act, 8 U.S.C. § 1255(i). The applicant asserts that section 245(c) of the Act, 8 U.S.C. § 1255(c) does not disqualify him from adjustment of status because he meets the requirements of section 245(i) of the Act. The director determined that the applicant does not meet the requirements of section 245(i) of the Act and, accordingly, denied the application for adjustment of status. The director then issued a notice that she has certified for review to the AAO.

On notice of certification, the applicant, through counsel, has submitted a brief and evidence.

Section 245(a) of the Act provides that:

> 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 204(a)(1) or 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.

In relevant part, section 245(c) of the Act provides that:

> subsection (a) shall not be applicable to (1) an alien crewman; (2) subject to subsection (k), an alien (other than an immediate relative as defined in section 201(b) or a special immigrant described in section 101(a)(27)(H), (I), (J), or (K)) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States; (3) any alien admitted in transit without visa under section 212(d)(4)(C); (4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217; (5) an alien who was admitted as a nonimmigrant described in section 101(a)(15)(S); (6) an alien who is deportable under section 237(a)(4)(B); (7) any alien who seeks adjustment of status to that of an immigrant under section 203(b) and is not in a lawful nonimmigrant status; or (8) any alien who was employed while the alien was an unauthorized alien, as defined in section 274A(h)(3), or who has otherwise violated the terms of a nonimmigrant visa.

In relevant part, section 245(i) of the Act provides:

(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; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.... .

Paragraphs (a)(1), (a)(2), and (a)(3) of 8 CFR section 245.10 read as follows:

(a) Definitions. As used in this section the term:

(1)(i) Grandfathered alien means an alien who is the beneficiary (including a spouse or child of the alien beneficiary if eligible to receive a visa under section 203(d) of the Act) of:

(A) A petition for classification under section 204 of the Act which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed; or

(B) An application for labor certification under section 212(a)(5)(A) of the Act that was properly filed pursuant to the regulations of the Secretary of Labor on or before April 30, 2001, and which was approvable when filed.

(ii) If the qualifying visa petition or application for labor certification was filed after January 14, 1998, the alien must have been physically present in the United States on December 21, 2000. This requirement does not apply with respect to a spouse or child accompanying or following to join a principal alien who is a grandfathered alien as described in this section.

(2) Properly filed means:

(i) With respect to a qualifying immigrant visa petition, that the application was physically received by the Service on or before April 30, 2001, or if mailed, was postmarked on or

before April 30, 2001, and accepted for filing as provided in § 103.2(a)(1) and (a)(2) of this chapter; and

(ii) With respect to a qualifying application for labor certification, that the application was properly filed and accepted pursuant to the regulations of the Secretary of Labor, 20 CFR § 656.21.

(3) Approvable when filed means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act or qualifying application for labor certification, the qualifying petition or 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 petition or 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.

On January 29, 2003, the applicant filed Form I-485, Application to Register Permanent Residence or Adjust Status and Supplement A to Form I-485 based on an approved Form I-140, Immigrant Petition for an Alien Worker, naming the applicant as the beneficiary. The immigrant petition was filed on September 10, 2002, and approved on May 16, 2003. The name of the petitioner is [redacted] a convenience store and gas station and the position sought is a night manager. On July 28, 2004, the director issued a Notice of Intent to Deny on the application to adjust status. In that notice, the director noted that she had determined that the application for labor certification that formed the basis for the applicant's application for adjustment of status was not filed on or before April 30, 2001, and therefore, the applicant does not qualify for the exemptions of section 245(i) of the Act. The director noted that the priority date of the labor certification is August 24, 2001. Accordingly, since the record reflects that the applicant has not maintained, continuously, lawful status, and has been employed without authorization, the applicant is ineligible to adjust status. The director provided the applicant with 30 days to respond to the notice.

The applicant, through counsel, responded with a brief dated August 4, 2004 and additional evidence. In the brief, applicant's counsel contends that while the August 24, 2001 priority date is correct, that fact alone does not preclude the applicant from meeting the terms of section 245(i) of the Act. Counsel contends that the applicant does meet the eligibility requirements of section 245(i) of the Act because the applicant is the beneficiary of a previously filed application for labor certification wherein the filing date was April 17, 2001, a date prior to April 30, 2001. Applicant's counsel submitted a receipt notice from the Alien Labor Certification Unit of the Texas Workforce Commission as well as other evidence. The director was not persuaded by counsel's brief and evidence and on September 21, 2004 denied the application, citing the fact that the priority date upon which the applicant's adjustment application is based falls after April 30, 2001. She then forwarded the record to the AAO for review.

The issue of the applicant's eligibility to adjust status in this matter hinges on whether or not the applicant meets the requirements of section 245(i) of the Act. As part of the adjustment of status application, the applicant acknowledges remaining in the United States past the expiration of the period of admission in nonimmigrant status and working without authorization, therefore, the applicant concedes that without the exemptions of section 245(i), he would be ineligible to adjust status.

In order to qualify under the terms of section 245(i) of the Act, an alien must demonstrate that he or she qualifies as a "grandfathered alien." *See* 8 CFR § 245.10. CIS regulations, cited above, define the term "grandfathered alien" at 8 CFR section 245.10(a)(1). In short, the alien must be the beneficiary of either an immigrant petition or an application for labor certification that was properly filed, as defined at 8 CFR § 245.10(a)(2), on or before April 30, 2001. In addition, the immigrant petition or application for labor certification must have been "approvable when filed." *See* 8 CFR § 245.10(a)(3).

The director is correct that an alien who is adjusting as the beneficiary of a valid labor certification that was accepted for processing on August 24, 2001 is not considered, by virtue of that valid labor certification, to meet the definition of a "grandfathered alien." This means that the applicant would not be qualified to use section 245(i) of the Act if the August 24, 2001 labor certification were the only document submitted by the applicant as evidence of his qualifications as a "grandfathered alien." However, the applicant points to a previously submitted application for labor certification naming the alien as beneficiary as evidence of his qualification as a "grandfathered alien." The evidence in record of this previously submitted application for labor certification is a letter of receipt, dated August 22, 2001, from the Alien Labor Certification Unit of the Texas Workforce Commission containing the applicant's name, the petitioner's name, and a receipt date of April 17, 2001.

The CIS regulations provide that the priority date of the valid labor certification is not always the determining date for purposes of eligibility under section 245(i) of the Act. Certain applications for labor certification and/or immigrant petitions may still qualify despite the fact that they have been subsequently withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing. However, the beneficiary will still have to show he or she is eligible for immigrant classification and has an immigrant visa number immediately available at the time of filing for adjustment of status. *See* 8 CFR § 245.10(a)(3) and (b)(2).

As set forth in the introductory text to the March 26, 2001, interim rule, CIS has chosen to implement section 245(i) of the Act with an "alien-based reading." Under this reading, an alien is considered to qualify as a "grandfathered alien" as long as he or she meets the terms of section 245(i) of the Act, meaning he or she is the beneficiary of a properly filed application for labor certification or immigrant petition that was filed on or before April 30, 2001 and was approvable when filed. The regulations at 8 CFR § 245.10(a)(3) hold that unless that initial immigrant petition or application for labor certification was not properly filed or meritorious in fact, or was filed frivolously, the fact that the qualifying application for labor certification or immigrant petition is not the instant vehicle for adjustment of status does not alter the fact that the alien is eligible to benefit from section 245(i) of the Act. *See* Adjustment of Status to That Person Admitted for Permanent Residence; Temporary Removal of Certain Restrictions of Eligibility, 66 FR 16383 (March 26, 2001).

The issue before the AAO is whether or not the receipt letter from the Alien Labor Certification Unit of the Texas Workforce Commission meets the criteria of 8 CFR § 245.10 to qualify the alien beneficiary as a "grandfathered alien." The applicant must show that he is the beneficiary of an application for labor certification that was properly filed and was approvable when filed.

In order to qualify as properly filed under 8 CFR § 245.10, the applicant must demonstrate that the application for labor certification was accepted pursuant to the regulations of the Secretary of Labor, 20 CFR § 656.21. In general, CIS will accept a receipt letter from a state employment agency as evidence that the application was accepted pursuant to the DOL regulations. *See* Memo from Robert L. Bach, Executive Associate Commissioner, Office of Policy and Programs, to Regional Directors, et al, *Accepting Applications for Adjustment of Status under Section 245(i) of the Immigration and Nationality Act*, 2, (June 10, 1999). The

applicant has provided a receipt letter, and therefore this office will find that the application for labor certification was properly filed.

In order to qualify as approvable when filed, the applicant must demonstrate that the applicant was "properly filed, meritorious in fact, non-frivolous ("frivolous" being defined herein as patently without substance)." See 8 CFR § 245.10(a)(3). In general, CIS will accept a receipt letter from a state employment agency as evidence that the application was approvable when filed pursuant to the DOL regulations. *Id.* CIS does retain the prerogative, however, to make a finding that the application was not approvable when filed if it has evidence of a fraudulent or otherwise non-meritorious employment relationship. The evidence in the record does not contain any evidence the director has made such a finding.

Therefore, after a review of the evidence in the record, the applicant does meet the definition of a "grandfathered alien" and has overcome the grounds of the directors' denial.

Apart from the decision of the director, however, this office notes that there is an additional eligibility requirement for a "grandfathered alien" who is the beneficiary of a qualifying application for labor certification or immigrant visa petition that was filed after January 14, 1998 and on or before April 30, 2001. The alien must show that he or she was physically present in the United States on December 21, 2000. *See* section 245(i)(1)(C) of the Act.

The record does contain some evidence suggesting the applicant has met this requirement. Specifically, the applicant has submitted an I-94, Entry/Exit Document documenting his arrival in the United States on March 1, 1999. While the AAO will concede that this document demonstrates that the applicant entered the United States in March of 1999, the AAO does not find the evidence sufficient to demonstrate that the applicant was physically present in the United States on December 21, 2000. *See* 8 CFR § 245.10(n)(3) and 8 CFR § 245.22. However, the record does not reflect that the director considered this eligibility requirement. For these reasons, the record is being remanded to the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision to deny the petition is withdrawn, and the record is returned to the director for the purpose of allowing the applicant an opportunity to demonstrate that he was physically present in the United States on December 21, 2000.