U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] OFFICE: TEXAS SERVICE CENTER Date: AUG 22 2005
SRC 03 171 50860

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 Acting Director, Texas Service Center. The acting director certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the acting director will be withdrawn and the application will be approved.

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 acting 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 applicant, through counsel, filed a motion to reopen/reconsider, which the acting director dismissed. The applicant filed several subsequent motions to reopen/reconsider, each of which the acting director dismissed. The acting director then issued a notice that she has certified her decision 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 May 27, 2003, the applicant filed Form I-485, Application to Register Permanent Residence or Adjust Status and Supplement A to Form I-485, based on a pending Form I-140, Immigrant Petition for an Alien Worker, naming the applicant as the beneficiary. The Form I-140 was filed on May 16, 2003, and was based on an approved application for labor certification with a priority date of February 8, 2002. The name of the petitioner is YANM Inc, d/b/a Great American Jewelers and the position sought is a Jewelry Repairer. The petition was approved on November 3, 2003. On September 22, 2004, the acting director issued a Notice of Request for Evidence concerning the corresponding application to adjust status. In that notice, the acting director requested that applicant submit an application for labor certification was filed on or before April 30, 2001, in order to qualify the applicant for the exemptions of section 245(i) of the Act. The acting director noted that the applicant had submitted a previous application for labor certification with a priority date of April 26, 2001, but that the applicant must demonstrate that the application for labor certification was approvable when filed. She then listed several factors that suggested that the petition was not approvable when filed. Specifically, the application was never certified by the DOL and the beneficiary is currently living and working in a different state.[1]

The applicant, through counsel, responded with a brief dated October 7, 2004 and additional evidence. In the brief, applicant's counsel contends that while the February 8, 2002 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 26, 2001. Counsel contends that this application qualifies as approvable when filed under CIS regulations and policy memoranda. Counsel points to a receipt notice from the Employment Security Commission of North Carolina, previously submitted to CIS, which acknowledges receipt of the application for the application for labor certification with a date of April

[1] In the November 16, 2004, notice of denial, the acting director also noted that Employment Security Commission of North Carolina records show that the April 26, 2001, application for labor certification, was denied for abandonment after the business that filed that application did not respond to a request for information.

26, 2001. The acting director was not persuaded by counsel's brief and evidence and on November 16, 2004 denied the application, citing the fact that the pre-April 30, 2001, application for labor certification was abandoned subsequent to filing. In her denial, the acting director noted, "You have failed to establish eligibility for the benefit sought. Accordingly, your application for adjustment of status has been denied."

Subsequent to the denial, the applicant filed a motion to reopen/reconsider on December 10, 2004, asserting that the acting director improperly denied the application for adjustment of status. In an attempt to demonstrate that the initial petition was meritorious in fact, counsel included a statement, dated December 5, 2004, from the Vice President of the entity that filed to initial application for labor certification. The Vice President stated that the application was filed in good faith and the entity had a "true need" to employ the [redacted]pon it approval. However, due to the economic downturn of 2001, which occurred after the filing of the application, the entity decided it no longer needed to fill the position.

On January 20, 2005, the acting director dismissed the motion to reopen, citing a lack of evidence that the economic downturn had affected the initial entity's business.

On February 9, 2005, counsel filed a new motion to reconsider, stating that the prior motion should have been approved and that he would provide a brief to the AAO in 30 days. The acting director dismissed this motion on February 24, 2005, citing the fact that the motion did not state any error in law or fact or provide new evidence. The acting director noted that the AAO did not have jurisdiction over the case and that there is no provision to extend the applicant additional time to submit a brief or evidence.

On March 28, 2005, the counsel submitted a new motion to reopen/reconsider the previous decision, citing the same facts and regulations as the previous motion and providing the same evidence. Counsel also included a March 9, 2005, CIS memorandum concerning Section 245(i) of the Act.

In a notice dated June 20, 2005, the acting director denied the motion to reopen/reconsider and certified her decision to the AAO for review.

As correctly stated by the acting director, 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/or 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 acting director also is correct that an alien who is adjusting as the beneficiary of a valid labor certification that was accepted for processing on February 8, 2002 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 February 8, 2002 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 May 23, 2001, from the Employment Security Commission of North Carolina containing the applicant's name, the petitioner's name, and a receipt date of April 26, 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).

While the acting director sought evidence that the application for a labor certification was properly filed and approvable when filed and was not satisfied with the applicant's submission, counsel contests that conclusion. The AAO must now review whether the applicant provided acceptable, regulatory prescribed evidence.

The issue before the AAO is whether or not the receipt letter from the Employment Security Commission of North Carolina 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 finds 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 record of proceedings contains a request from the acting director that questions the whether the initial labor certification was meritorious, given the fact that the beneficiary was (at the time of the request for evidence) living in another state and working for another employer (the instant petitioner). The evidence in the record contains the applicant's response and a statement from the initial employer attesting that the initial application was filed in good faith and that the offer was rescinded due to circumstances arising after the time of filing (the 2001 economic downturn). The AAO is satisfied that the applicant has met his burden of proof in demonstrating that the April 26, 2001, application for labor certification was properly filed and was not fraudulent or non-meritorious, and therefore, approvable when filed.

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 acting directors' denial.

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 met that burden.

ORDER: The acting director's decision to deny the petition is withdrawn and the application is approved.