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

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[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 12 2005
SRC-02-262-53945

IN RE: Applicant: [redacted]

PETITION: Application for Adjustment of Status to that of Person Admitted for Permanent Residence Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

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, Director
Administrative Appeals Office

DISCUSSION: The application to adjust status was denied by the Director, Texas Service Center and a motion to reopen and reconsider was also denied. The case was then certified by the director to the Administrative Appeals Office (AAO). The decision of the director to deny the motion to reopen and reconsider will be affirmed, and the application will be denied.

The I-485 Application to Register Permanent Resident or Adjust Status was filed on August 29, 2002. In Part 2, Application Type, stating the grounds of eligibility for adjustment to permanent resident status, the applicant checked block "a," indicating that the application was based on an approved immigrant petition giving the applicant an immediately available immigrant visa number.

With the I-485 application, the applicant submitted a Supplement A to Form I-485. The applicant's responses to the questions on that form indicated that the applicant claims eligibility for adjustment of status under section 245(i) of the Immigration and National Act (the Act). *See* 8 C.F.R. § 245.10.

The immigrant petition on which the applicant bases his I-485 application is a I-140 Immigrant Petition for Alien Worker, which was filed on behalf of the I-485 applicant by a petitioner which is a corporation with an address in Miami Beach, Florida. The petitioner describes itself on the I-140 petition as an apartment complex company and the petitioner states the job title of the proposed employment as building supervisor.

The I-40 petition was based on a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor.

The Form ETA 750 was filed on September 28, 2001 and was approved by the Department of Labor on February 27, 2002.

The I-140 petition was filed on April 1, 2002.

The I-485 application was filed on August 29, 2002.

In a request for evidence (RFE) to the I-140 petitioner dated September 21, 2002, the director requested additional evidence of the beneficiary's experience. In response to the RFE, the petitioner submitted additional evidence.

The I-140 petition was approved by the director on November 10, 2002.

In an RFE to the I-485 applicant dated July 7, 2004, the director requested evidence to establish that the applicant met the requirements of section 245(i) of the Act. In response to the RFE, the applicant submitted additional evidence. The applicant's submissions in response to the RFE were received by the director on August 24, 2004.

In a decision dated August 26, 2004, the director denied the I-485 application on the ground that the applicant had failed to submit supporting evidence for eligibility under section 245(i) of the Act. The director found that the evidence failed to establish that a qualifying visa petition or labor certification was filed on or before April 30, 2001, as required by the Act. The director also found that the evidence failed to establish that the applicant was physically present in the United States on December 21, 2000, as also required by the Act.

The applicant filed a motion to reopen and reconsider on October 8, 2004.

In a Notice of Certification dated November 8, 2004, the director certified the case for review to the AAO. In an attachment to the Notice of Certification, the director denied the applicant's motion to reopen and reconsider, on the same grounds as the director had cited in his decision of August 26, 2004. In the Notice of Certification, the director informed the applicant that he could submit a brief or other written statement within thirty days.

On December 6, 2004 the applicant submitted a request for an extension of time of 90 days to file a brief. On December 17, 2004 the applicant submitted a Notice of Providing Supplemental Evidence, accompanied by additional evidence.

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Concerning applications to adjust status to permanent residence, the AAO exercises appellate jurisdiction over decisions on "[a]pplications for adjustment of status under part 245 of this title when denied solely because the applicant failed to establish eligibility for the bona fide marriage exemption contained in section 245(e) of the Act; . . . 8 C.F.R. § 103.1(f)(3)(iii)(JJ) (as in effect on February 28, 2003).

In the instant case, the director denied the beneficiary's application to adjust status to permanent residence on the grounds that the evidence failed to establish that the beneficiary was eligible for adjustment of status under section 245(i) of the Immigration and National Act (the Act). The denial decision was not within the appellate jurisdiction of the AAO, because the decision was not based on the failure to establish eligibility for the bona fide marriage exemption of section 245(e) of the Act. *See* 8 C.F.R. § 103.1(f)(3)(iii)(JJ) (as in effect on February 28, 2003). Nor does administrative appellate jurisdiction over the director's decision rest with the Board of Immigration Appeals. See 8 C.F.R. § 1003.1(b). The case is therefore one "for which there is no appeal procedure. . . ." as described in the regulation at 8 C.F.R. § 103.4(a)(4). Since the case is one described in the regulation at 8 C.F.R. § 103.4(a)(4), the AAO has authority to decide the case on certification by the director, even though the AAO would not have had jurisdiction to decide the case if it had been appealed by the beneficiary. *See* 8 C.F.R. § 103.4(a)(4), (5).

For an alien to be eligible for adjustment of status under section 245(i) of the Act, the alien must be the beneficiary of an immigrant visa petition or a labor certification application that was filed on or before April 30, 2001 and that meets the requirements of the Act and of the regulations. In addition, if the qualifying petition or labor certification was filed after January 14, 1998 and on or before April 30, 2001, the alien must have been physically present in the United States on December 21, 2000. INA § 245(i)(1); 8 C.F.R. § 245.10.

The record in the instant case includes an original Form ETA 750 application for labor certification filed on September 28, 2001. The record order indicates that the original certified Form ETA 750 was submitted to CIS at the same time as the I-140 petition. The record also contains a photocopy of that same ETA 750, which the record order indicates was also submitted in response to the director's RFE to the applicant.

The record also contains two partial copies of a Form ETA 750 dated stamped April 30, 2001, consisting of the first and third pages, but no second or fourth pages. The omitted second and fourth pages are the signature pages for Part A and Part B of the ETA 750. The record order indicates that those partial copies were submitted with the applicant's motion to reopen and reconsider of October 14, 2004. On the copies, the first page of the ETA 750 bears a date stamp of April 30, 2001 in the block for the date on which the application was received.

The record also contains copies of a notice from the employer stating "Employer plans to subsequently file an RIR application for this same job." That notice is date stamped "Received Apr 30 2001." The record contains no evidence identifying the office which affixed the date stamp to that notice. The stamp differs in appearance from the date stamp of April 30, 2001 appearing on the ETA 750 partial copies described above.

The record also contains four copies of a complete ETA 750 which were submitted for the first time on certification to the AAO. Two of those copies bear a date stamp of April 30, 2001 on page one. The first and third pages are identical to the partial copies date stamped April 30, 2001 which were submitted earlier. The second page bears the signature of the employer's owner with the date April 24, 2001 and the fourth page bears the signature of the beneficiary with the date April 24, 2001.

The other two copies of a complete ETA 750 submitted for the first time on certification to the AAO are identical to the above two copies, except that they lack the date stamp of April 30, 2001 on page one.

The regulation at 8 C.F.R. § 245.10(i) states in pertinent part:

> The denial, withdrawal, or revocation of the approval of a qualifying immigrant visa petition, or application for labor certification, that was properly filed on or before April 30, 2001, and that was approvable when filed, will not preclude its grandfathered alien . . . from seeking adjustment of status under section 245(i) of the Act on the basis of another approved visa petition, a diversity visa, or any other ground for adjustment of status under the Act, as appropriate.

The regulation at 8 C.F.R. § 245.10(a) states in pertinent part:

> As used in this section the term:
>
> (1)(i) *Grandfathered alien* means an alien who is the beneficiary . . . 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.

(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.

In the instant case, the only original ETA 750 in the record is the one filed on September 28, 2001 and approved by the Department of Labor on February 27, 2002. That ETA 750 cannot serve as the basis for qualifying the applicant under section 245(i) of the Act, since it was filed after April 30, 2001. Therefore the beneficiary's claim to qualify under section 245(i) of the Act must rest on the copies of the ETA 750 in the record which bear the date stamp of April 30, 2001 on page one in the block for the date on which the application was received.

As noted above, the copies of that ETA 750 which were submitted with the applicant's motion to reopen and reconsider lack the signature pages. Pages purporting to be the missing signature pages were submitted for the first time on certification to the AAO. Moreover, no documentation was submitted indicating that that application was received by a state employment office in the State of Florida, where the employer is located and where the alien is to work. Nothing on the date stamp of April 30, 2001 identifies the office which affixed the date stamp to the application.

In a letter dated October 8, 2004, counsel states the following:

> Please note that undersigned counsel has the original stamps in red from the Department of Labor in our office on both the first page enclosed on exhibit 1 and the third page on exhibit 1 where the date indicated is April 30, 2001. Should these original stamps be required kindly let us know. Also note that the certification shows a later priority date as that was a subsequently filed Labor Certification - the first one was withdrawn since it was filed as a Non RIR Application. The second one was filed RIR and that is the one which has been certified. However, the proofs submitted with exhibit 1 should satisfy proof that the beneficiary is "grandfathered in" under section 245(i)

(Letter from counsel, October 8, 2004, at 1).

Counsel's assertion that a date of April 30, 2001 appears on the first and third pages of exhibit 1, referring to the partial copy of the ETA 750 submitted with the motion to reopen and reconsider, is not correct, since the date stamp of April 30, 2001 appears only on the first page of that copy. In his brief, counsel also asserts that a former employee hand delivered the ETA 750 to the Florida state employment office and obtained the Labor Department stamp. Nonetheless, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

No evidence in the record supports counsel's assertions that the Department of Labor affixed the date stamp of April 30, 2001 to the ETA 750 which is marked as exhibit 1. Moreover, the record contains no receipt letter from the State of Florida or other evidence of filing with the State Department of Labor.

For the foregoing reasons, the evidence in the record fails to establish that an application for labor certification was properly filed on behalf of the applicant in the instant I-485 application on or before April 30, 2001. Therefore, the ETA 750 in the record bearing the date stamp of April 30, 2001 cannot serve as the qualifying labor certification for purposes of section 245(i) of the Act.

A second ground cited by the director for denying the application was the failure to establish that the applicant was physically present in the United States on December 21, 2000.

The requirement for physical presence in the United States as of December 21, 2000 is based in section 245(i)(C) of the Act, which refers to the date of the enactment of the LIFE Act Amendments of 2000. The calendar date of the date specified by the statute is found in the regulation at 8 C.F.R. § 245.10(a)(1)(ii), which states in pertinent part: "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.

Nothing in the record indicates any claim by the applicant that a qualifying visa petition or application for labor certification was filed on his behalf on or before January 14, 1998, therefore the applicant is subject to the physical presence requirement of section 245(i)(C) of the Act.

The record contains a copy of the applicant's passport in which is found a visa issued in [redacted] on January 24, 2000 for entry into the United States as a B2 visitor. Opposite that page in the applicant's passport is a stamp showing an entry into the United States at Miami International Airport on February 7, 2000. The record also contains a copy of marriage certificate of the applicant showing his marriage in [redacted] October 20, 2001. The foregoing documents were in the record prior to the director's decision of August 26, 2004 denying the I-485 application. The record also contains a copy of an I-94 card issued to the applicant showing an entry into the United States at Miami International Airport on February 7, 2000, as a B-2 visitor. The copy of the I-94 card is among the documents submitted by the applicant on certification to the AAO. The information on the I-94 card is consistent with the visa and the passport stamp mentioned above.

The foregoing evidence is sufficient to establish that the applicant was physically present in the United States on December 21, 2000.

In his decision of November 8, 2004 denying the applicant's motion to reopen and reconsider, the director correctly found that the evidence was insufficient to establish that a qualifying visa petition or labor certification was properly filed on the applicant's behalf on or before April 30, 2001. For the reasons

discussed above, the assertions of counsel on certification and the evidence submitted on certification are insufficient to overcome that portion of the director's decision. Concerning the applicant's physical presence in the United States, however, the evidence in the record prior to the director's decision of November 8, 2004 was sufficient to establish that the applicant was physically present in the United States on December 21, 2000. The copy of the applicant's I-94 card submitted on certification provides further corroboration of the applicant's entry into the United States on February 7, 2000. The assertions of counsel on certification and the evidence submitted on certification are therefore sufficient to overcome that portion of the director's decision.

Although the director erred in finding that the evidence failed to establish the beneficiary's physical presence in the United States on December 21, 2000, the director's finding concerning the failure to establish the proper filing of a qualifying visa petition or labor certification on or before April 30, 2001 was correct, and that finding was a sufficient ground for denying the I-485 application.

For the reasons discussed above, the assertions of counsel submitted on certification and the evidence submitted on certification are insufficient to overcome the decision of the director to deny the applicant's motion to reopen and reconsider.

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

ORDER: The decision of the director to deny the motion to reconsider is affirmed. The application is denied.