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U.S. Citizenship
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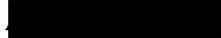
MAY 11 2006

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

RELATING FILE:



IN RE:



APPLICATION:

Application for Permanent Residence Pursuant to Section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on certification. The district director's decision will be affirmed and the application denied.

The record reflects that the applicant is a native and citizen of El Salvador who was found to be ineligible to adjust his status to lawful permanent resident status pursuant to section 245(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(i) based on the discretion of the director. The record indicates that the applicant has a U.S. citizen spouse.

The director concluded that the adverse factors in the applicant's case outweigh the favorable factors, therefore, he did not merit a favorable exercise of discretion in this matter. *Decision of the Director*, at 2, dated February 15, 2006.

The record does not include a response to the notice of certification.

The record includes, but is not limited to, the applicant's adjustment of status application, his in absentia deportation order and documents relating to his criminal history. The entire record was reviewed and considered in arriving at a decision on the appeal.

The application was filed pursuant to sections 245(i) of the Act, which 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 ...of-

- (i) a petition for classification under section 204 that was filed with the Attorney General [now, Secretary, Homeland Security, "Secretary"] on or before April 30, 2001;

...may apply to the Attorney General [Secretary] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

(2) Upon receipt of such an application, and the sum hereby required, the Attorney General [Secretary] may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-

- (A) the alien is eligible to receive an immigration visa and is admissible to the United States for permanent residence...

Adjustment of status is not merely based on statutory eligibility, but it is also a matter of discretion. *Jarecha v. INS*, 417 F.2d 220 (5th Cir. 1969) status, in pertinent part:

...The determination to grant permanent residence status under section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, lies entirely within the discretion of the Attorney General [Secretary]. An applicant who meets the objective prerequisites for adjustment of status is in no way entitled to that relief...

The question of whether to exercise favorable discretion involves a balancing of an alien's undesirability as a permanent resident with the social and humane considerations present to determine whether granting permanent residency is in the best interests of the country.

Other than the applicant's marriage to a U.S. citizen, the record is devoid of any favorable factors. Although the record reflects that the applicant has been employed as a security guard, teacher's aid and community service worker, there is no evidence that he has paid taxes on any income earned.

The applicant's adverse factors include his July 18, 1990 *in absentia* deportation order and his failure to follow the deportation order. The director listed several arrests/charges for the applicant, however, there is no evidence that he was ever convicted of any of these offenses. As such, they are not considered adverse factors. The director also states that the applicant entered the United States without inspection and worked without authorization. The AAO notes that section 245(i) of the Act allows adjustment of status in spite of an entry without inspection or working without authorization.¹ Therefore, these are not considered adverse factors in this particular case.

The AAO notes that the burden of proof in this case is on the applicant. Based on the balancing of the applicant's lone favorable factor and his adverse factors, the applicant's adjustment of status application was properly denied as a matter of discretion.

ORDER: The director's decision is affirmed and the application is denied.

¹ The AAO notes that the record includes approved applications for employment authorization (dated October 17, 1991 and June 29, 1992) based on Temporary Protected Status. Therefore, the applicant's employment, at least during the periods covered by the approved employment authorization applications, was lawful.