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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



42

File: [Redacted]

Office: TEXAS SERVICE CENTER

Date: **APR 06 2009**

IN RE: Applicant: [Redacted]

Petition: Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant to Section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i)

ON BEHALF OF APPLICANT:



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 "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was approved by the Director, Texas Service Center, who certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn and the matter remanded for the director to deny the application.

The applicant is a native and citizen of Peru who filed this application for adjustment of status to that of a lawful permanent resident under section 245(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1255(i). A review of the record reveals the following facts and procedural history:

On January 22, 2007, a petitioner, Select Printing, filed an I-140 petition on the applicant's behalf and the applicant concurrently filed a Form I-485 application to adjust status. Attached to the I-140 Petition was an approved Form ETA-750, Application for Alien Employment Certification (labor certification) with a priority date of May 1, 2001. On April 23, 2007, U.S. Citizenship and Immigration Services (USCIS) approved the I-140 petition. On May 13, 2008, USCIS denied the applicant's Form I-485 because she was ineligible to adjust status under the provisions of section 245(i) of the INA because her priority date, which is the date that her labor certification was accepted for processing by the Department of Labor (DOL), was after April 30, 2001. Counsel filed an appeal of the director's decision and the director treated the appeal as a motion. The director granted the motion on July 8, 2008.

In a December 2, 2008 decision, the director determined that the applicant was eligible for adjustment of status and certified his decision to the AAO for review. In finding that the applicant was eligible to adjust her status, the director concurred with counsel's argument that USCIS should apply the guidance from an April 30, 2001 legacy Immigration and Naturalization Service (INS) memorandum, *Field Guidance regarding eligibility for Section 245(i) under the Legal Immigration Family Equity Act*, to the applicant's labor certification. This means that the applicant's labor certification would receive a priority date based upon the date that DOL received the express mail package containing the labor certification that was being filed. In this case, the priority date on the applicant's labor certification would become April 30, 2001, not May 1, 2001 and the applicant would, therefore, be eligible to adjust her status pursuant to section 245(i) of the INA. In his decision, the director stated:

[US]CIS finds it reasonable as a matter of favorable discretion in order to preserve uniformity as a greater positive equity to consider an application for labor certification filed on May 1, 2001 under the rules and regulations of the Secretary of Labor as equally properly filed by the sunset date prescribed in section 245(i) of the Act.

The director informed the applicant that she had 30 days to supplement the record with any evidence that she wished the AAO to consider. Neither counsel nor the applicant has submitted any evidence for the AAO to consider, and the AAO deems the record complete.

Section 245(i) of the INA 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 (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

* * *

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

The AAO disagrees with the director's decision to approve the applicant's Form I-485. As stated earlier, the director is agreeing with counsel that USCIS should deem the receipt date of the applicant's labor certification to be April 30, 2001, not May 1, 2001, which is the date that the Form ETA-750 and DOL records indicate that the labor certification was accepted for processing. In support of his statements, counsels refer to an April 30, 2001 legacy Immigration and Naturalization Service (INS) memorandum, *Field Guidance regarding eligibility for Section 245(i) under the Legal Immigration Family Equity Act*. According to counsel, if USCIS applies this memo to the facts of the applicant's situation, her priority date would be April 30, 2001, not May 1, 2001. Counsel includes in the record copies of documents that he claims are the UPS receipts for the filing of the applicant's Form ETA-750 with the DOL. The receipt shows that, on April 28, 2001, counsel send a package to DOL in Washington, D.C. Counsel states:

Please note that the approved [Form ETA-750] indicates the Date of Acceptance for Processing May 01, 2001. Our office submitted copies of the UPS NEXT DAY AIR receipt and UPS Delivery Service Invoice to the [DOL] as proof that the application was received for processing on April 30, 2001 . . . but the correction was never made. [I]t would not be fair for the employer or the beneficiary . . . to lose the 245(i) protection because the April 30, 2001 filing date is not being recognized.

As a preliminary matter, the AAO notes that USCIS and DOL are two separate federal entities; USCIS is a component within the Department of Homeland Security and DOL is a Department unto itself. USCIS does not have the authority to change the priority date of a labor certification that is filed with DOL, just as the DOL would not have the authority to change a priority date of a USCIS petition. Contrary to the director's misguided reasoning in his decision, USCIS has no discretion to change the priority date of a labor certification. Priority dates of labor certifications are assigned by DOL in accordance with its regulations, policies and procedures. The April 30, 2001 legacy INS memorandum that both the director and counsel rely upon does not give USCIS any authority to change a labor certification's priority date or to become involved in the processing of a labor certification in any way. In fact, on the last page of the memorandum, it states clearly that labor certifications are a type of filing that "[o]ffices should NOT accept."

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that she is eligible for adjustment of status. Here, the applicant has not met her burden. Accordingly, the AAO withdraws the director's decision and remands the matter for the director to deny the application. The applicant is not eligible to adjust her status pursuant to section 245(i) of the INA because she is not the beneficiary of an application for labor certification that was filed on or before April 30, 2001.

ORDER: The director's decision is withdrawn and the matter remanded for the director to deny the application.