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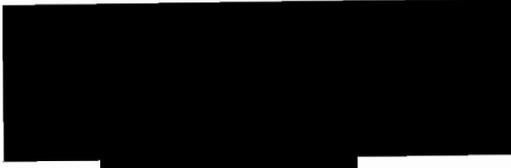
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

42



File:



Office: TEXAS SERVICE CENTER

Date:

APR 24 2009

IN RE: Applicant:



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

ON BEHALF OF PETITIONER:

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.

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 affirmed and the matter remanded for the continued processing of the applicant's adjustment of status application.

The applicant is a native and citizen of Honduras who filed this application for adjustment of status to that of a lawful permanent resident under section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1255. The applicant is seeking to adjust his because his mother is the beneficiary of an approved employment-based I-140 Petition and the applicant is eligible for derivative status. A review of the record reveals the following facts and procedural history:

The applicant was born on October 5, 1986. On May 21, 2007, a petitioner, White Settlement ISD, filed an I-140 petition on the applicant's mother's behalf. 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 21, 2004. The applicant's mother's visa category is third preference employment (E32). On August 2, 2007, the applicant and his mother submitted their applications to adjust status (Form I-485) to U.S. Citizenship and Immigration Services (USCIS). On October 16, 2007, USCIS approved the I-140 petition. On March 1, 2008, a visa number became available for the applicant and his mother. On November 26, 2008, USCIS approved the applicant's mother's Form I-485.

In a December 22, 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 his status, the director concluded that the applicant met the eligibility criteria set forth at section 203(h) of the Immigration and Nationality Act (INA). The director informed the applicant that he had 30 days to supplement the record with any evidence that he wished the AAO to consider. The applicant, however, has declined to submit any evidence for consideration. The record is, therefore, complete.

The Child Status Protection Act (CSPA) amended the INA to permit an applicant for certain immigration benefits to retain classification as a child under the INA, even if he or she reached the age of 21 at the time an application was adjudicated. The CSPA added section 203(h) for individuals, such as this applicant, seeking to adjust status as a derivative on a parent's approved I-140 Petition. Section 203(h) of the INA states, in pertinent part:

RULES FOR DETERMINING WHETHER CERTAIN ALIENS ARE CHILDREN-

- (1) IN GENERAL.-- For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using—
 - (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
 - (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) PETITIONS DESCRIBED- The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).

Section 203(h) of the INA allows for a calculation of an applicant's age for adjustment of status purposes in the following manner:

- Determine the applicant's age on the date the visa number became available;
- Determine the number of days that the applicant's parent's petition was pending from the date of filing until the date of approval; and
- Subtract the number of days that the petition was pending from the applicant's age as of the visa availability date.

Once the applicant's age is determined, a determination must be made on whether the applicant filed an application for admittance to permanent residence within one year of the visa number becoming available.

The applicant's visa number became available on March 1, 2008. With a birth date of October 5, 1986, the applicant was 21 years old on March 1, 2008. The applicant's mother's I-140 Petition was pending for 148 days from the date it was filed on May 21, 2007 until the date it was approved on October 16, 2007. Therefore, as of the date that the applicant's visa number became available, he was approximately 20½ years old and he met the definition of a "child" pursuant to section 101(b) of the INA. The applicant filed his Form I-485 on August 2, 2007, less than one year prior to March 1, 2008. The applicant is, therefore, eligible to derive benefits from his mother's approved I-140 Petition even though the applicant was over the age of 21 at the time of the director's decision.

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 he is eligible for adjustment of status. Here, the applicant has met his burden. Accordingly, the AAO affirms the director's decision and remands the matter for continued processing of the applicant's Form I-485.

ORDER: The director's decision is affirmed. The matter is remanded for the director to continue processing the applicant's Form I-485.