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DIVISION OF PERSONAL SERVICES

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

L2

[Redacted]

File:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

APR 27 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:

[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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied 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. The application will be denied.

The applicant is a native and citizen of Ecuador 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 July 27, 2007, a petitioner, Doubletree Hotel, 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 September 24, 2008, U.S. Citizenship and Immigration Services (USCIS) approved the I-140 petition. On October 8, 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 a motion to reconsider the director's decision on October 31, 2008.

In a February 4, 2009 decision on the applicant's motion, the director affirmed his determination that the applicant was ineligible for adjustment of status and certified his decision to the AAO for review. In finding that the applicant was ineligible to adjust her status, the director rejected 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. According to counsel, the applicant's labor certification should receive a priority date based upon the date that DOL received the express mail package containing the labor certification that was being filed. The director informed the applicant that she had 30 days to supplement the record with any evidence that she wished the AAO to consider. Counsel submits a brief which contains the same arguments that he submitted with his motion to reconsider. Counsel contends that the April 30, 2001 legacy INS memorandum does not exclude labor certifications from coverage.

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 agrees with the director's decision to deny the applicant's Form I-485. As stated earlier, counsel contends 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 indicates 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 U.S. Postal Service (USPS) express mail receipts for the filing of the applicant's Form ETA-750 with the DOL. The receipt shows that, on April 29, 2001, counsel sent a package to DOL in Maryland.

As stated by the director in his February 4, 2009 decision, 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 counsel's reasoning, 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 counsel relies 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 affirms the director's decision. 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 affirmed. The application is denied.