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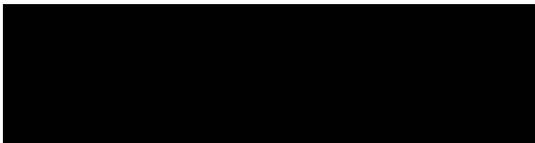
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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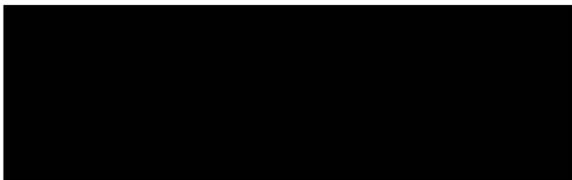
File: [REDACTED] Office: TEXAS SERVICE CENTER
SRC 07 221 50822

Date: **JUL 09 2009**

IN RE: Applicant: [REDACTED]

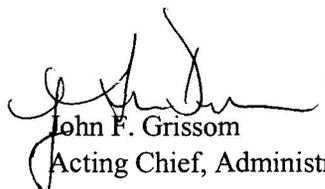
Petition: Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant to
Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF PETITIONER:



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 Director of the Texas Service Center denied the application for adjustment of status (Form I-485) and certified his decision to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The application will be denied.

The applicant is a native and citizen of Russia 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 record shows: that the applicant was paroled into the United States on January 19, 2001 valid until February 19, 2001; that an extension of the applicant's parole was granted from March 14, 2001 through February 18, 2002; and that an additional extension was granted valid until August 25, 2002. The record also shows that the applicant had employment authorization valid from August 25, 2002 to August 24, 2003. On October 28, 2002, a third party company filed a Form I-129, Petition for Nonimmigrant Worker, on the applicant's behalf. The Form I-129 indicated that the petition was for new employment and requested a change of status and extension of stay for the applicant. The applicant was notified on November 7, 2002, through counsel, that the petition had been approved for the classification requested for a period from November 5, 2002 to September 5, 2005, but that the applicant was ineligible for a change of status. The applicant's ineligibility for a change of status was based on his parole into the United States rather than his admission into the United States.

The record further shows that on February 25, 2003, an amended Form I-129 was filed on the applicant's behalf indicating that the Form I-129 was for a continuation of previously approved employment without change and requesting an extension or amendment of the stay of the applicant since the applicant now holds this status. Counsel indicates that the amended petition was submitted to clarify the applicant's date of birth to avoid possible consular issues when the applicant returned to Moscow to process his H-1B visa. Counsel notes that the subsequent approval notice dated April 30, 2003 approved the petition and the extension of stay and did not indicate that the applicant needed to obtain consular processing for his change of status to H-1B status. Counsel also notes that the applicant's request to extend his status in 2005 was approved and that the applicant's wife's H-4 status was approved November 18, 2004.

The director in this matter denied the Form I-485 that is the subject of this certification as the applicant's authorized parole terminated on August 25, 2002 and the Form I-485 was not filed until June 15, 2007. The director based his denial on the applicant's failure to maintain continuously lawful status since his entry into the United States. 8 C.F.R. 245.1(b)(6). The director found that the failure of the applicant to obtain the initial H-1B status or visa by departing the United States and entering in a recognized status as required in the November 7, 2002 notice precluded a determination that the applicant was in lawful status after the expiration of his authorized parole on August 25, 2002. The director found that the approval of the subsequent extensions of H-1B status were invalid as the applicant had never obtained the initial H-1B visa or status.

Counsel asserts that United States Citizenship and Immigration Services' (USCIS) mistake in validating the applicant's H-1B change of status twice as well as approving his H-4 dependent's status should not preclude the applicant from adjusting his status now to that of a lawful permanent

resident. Counsel contends that if it had not been for a USCIS mistake in validating the applicant's H-1B status on April 30, 2003, the applicant would have departed the United States to go through consular processing and obtain his visa.

The AAO does not find counsel's assertion persuasive. The language in the first Form I-797 approval notice clearly stated that the applicant was required to obtain his H-1B visa at a consulate abroad because his request to change his status in the United States was denied. When counsel submitted the amended Form I-129 on February 25, 2003, the requested action was for an extension or amendment of the applicant's stay since the applicant "now holds this status." As the applicant had not left the United States and reentered after obtaining his H-1B visa through consular processing as required, the representation that the applicant held H-1B status was misleading.

The AAO, like the Board of Immigration Appeals, is without authority to apply equitable doctrines so as to preclude a component part of USCIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). In this matter, the applicant did not depart the United States and reenter in a lawful status. The petitioner's failure to obtain the H-1B visa and status requires the determination that he is in a category of aliens who are ineligible to apply for adjustment of status to that of a lawful permanent resident.

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 not met his burden. Accordingly, the AAO affirms the director's denial of the Application for Adjustment of Status.

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