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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

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File: [REDACTED]
EAC 99 271 50868

Office: BALTIMORE DISTRICT OFFICE

Date: **JUL 20 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 District Director, Baltimore, Maryland, denied the application for adjustment of status (Form I-485) and certified his decision to the Administrative Appeals Office (AAO). The district director's decision will be affirmed. The application will be denied.

The applicant is a citizen of India 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 pertinent procedural history of this matter shows that the applicant entered the United States as a B-2 visitor whose visitor status was extended to August 31, 1997. The Form I-485 application, that is the subject of this certification, was based upon an approved employment-based third preference visa petition which was filed on the applicant's behalf by J&S Behl, LLC, doing business as Spaceway Amoco in Annapolis, Maryland. The Form I-140, Immigrant Petition for Alien Worker, was filed on March 25, 1999 and approved on July 16, 1999. The Form I-485 was accompanied by a Labor Certification which was filed on January 17, 1998 and approved by the Department of Labor for the occupation of assistant manager of a gasoline station on August 20, 1998. The applicant filed the Form I-485, that is the subject of this certification, on September 1, 1999 and was interviewed by a legacy Immigration and Naturalization Services (INS) officer on November 21, 2002. On May 9, 2006, United States Citizenship and Immigration Services (USCIS) issued a Notice of Intent to Deny (NOID) the application because the applicant had not established that he had actually begun employment for the petitioner in the certified occupation. In rebuttal, the applicant provided evidence of his employment with J&S Behl, LLC but indicated that he had left that employer and was working for Pioneer Enterprises, LLC in Laurel, Maryland as a property manager. The applicant claimed that because his Form I-485 application had been pending for more than 180 days he was eligible to "port" to this new position under the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

Congress passed Section 106(c) of AC21 amending § 204 of the Act by adding the following provision, codified as 8 U.S.C. § 1154(j):

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

In the May 5, 2009 decision certified to the AAO for review, the director determined, based on his interpretation of the Act, relevant regulations, and policy directives, that a four-pronged test must be met for an applicant to "port" to a new employment opportunity under the provisions of AC21. The director found: (1) that the applicant's Form I-485 must have been pending for more than 180 days before an applicant accepts a new job opportunity; (2) that the original Form I-140 petitioner must have had a *bona fide* intent to employ the applicant in the certified occupation when the Form I-140

and the Form I-485 were filed; (3) that the new employment opportunity being offered must be legitimate; and (4) that the applicant must establish that the new job opportunity being offered is the “same or similar” occupational classification as the job for which the applicant was originally hired.

In this matter, upon review of the totality of the information in the record, the director determined that the applicant had satisfied the first three prongs of the four-pronged test. The director found, however, that the occupational classification for manager¹ of an automobile service station and the occupational classification for property, real estate, and community association manager were not the same or similar occupations contemplated by section 204(j) of the Act.

Upon review of the file, including counsel’s discussion of the differentiation in the grouping of occupations when the Department of Labor shifted from using the Dictionary of Occupational Titles (*DOT*) to the standard occupational classification system now used on the *O*Net*,² the AAO concurs with the director’s ultimate determination that the occupations in question are not the same or similar. The AAO has reviewed the following descriptions of the proffered positions. In an August 15, 1999 letter, J&S Behl (spelled as Bell), LLC confirmed the position proffered to the applicant would be at an annual salary of \$28,600 and that:

As an Assistant Manager, he will assist the manager in daily activities of the automobile service station. He will hire and train workers, prepare work schedules and assign workers to specific duties. In addition, he will be responsible for promotions and services. He will reconcile cash with sales and gasoline pump and water readings. He will also order and receive supplies and track inventory.

This position description corresponds generally to the position description on the Form ETA certified on August 20, 1998 which indicates the duties of the position are:

Assists manager in daily activities of a gasoline station. Assists manager in hiring and training workers, prepares work schedule and assigns workers to specific duties. Promotes sales of products and services. Reconciles cash with sales and gasoline pump meter readings. Orders and receives supplies and tracks inventory.

In a November 17, 2008 letter, Pioneer Enterprises, LLC indicated that it is a limited liability company made up of three partners, including the applicant. The managing member, [REDACTED] of Pioneer Enterprises, LLC stated that its business included identifying real estate investment opportunities throughout Maryland, making the necessary renovations or improvements to the

¹ The Labor Certification (Form ETA 750) identifies the original position as an assistant manager for a gasoline station; the approval letter enclosing the certified Form ETA 750, identified the occupation as manager, automobile service station.

² Counsel notes that 12,000 highly specific *DOT* job codes were encapsulated into 1,122 broader occupational units by grouping together *DOT* occupations that had similar work content and requirements. Counsel contends that the authors of the *O*Net* sacrificed accuracy in order to condense the *DOT* job codes into the broader *O*Net* standard occupational classifications or units.

properties, and then managing the resulting rental properties. The managing member noted that the applicant, in addition to receiving the benefits of a partner also received a guaranteed salary of \$35,000 for acting as a manager of the company. The managing member confirmed the applicant's employment since January 2006 and stated that the applicant performed the following job duties:

Manage daily operations and plan the use of materials and human resources for contracting and renovation purposes. Renovate properties as necessary to meet state code requirements. Recruit and manage sub-contractors, conduct hiring/firing procedures, and maintain personnel records. Prepare work schedule and assign duties. Track the progression of each project. Manage and advertise rental units and secure tenants by creating and executing leases. Pay invoices and procure materials for renovation projects. Service all inquiries and complaints from tenants and perform collections on all delinquent accounts.

Upon review of the descriptions of duties for the two positions, the AAO finds that each position is broadly defined and includes only general information regarding the tasks and work activities associated with each position. The duties of both positions constitute an overview of an occupation that involves a type of management responsibility; however, such an overview is not helpful when there are a wide variety of management positions within different occupational classifications that encompass these same generic tasks. The AAO acknowledges that the description of duties for the assistant manager of the gasoline station and the property manager position both include hiring workers, preparing work schedules and assigning duties and both descriptions include duties associated with ordering and receiving supplies or procuring materials. Again, however, the broadly stated duties lack the specificity necessary to offer a meaningful understanding of the actual daily tasks associated with either management position. The descriptions are simply too broad and too generic to ascertain that the duties performed are truly similar. Upon review of the myriad number of management positions in retail, sales, property, people, engineering, and specific projects, the applicant has not persuaded that a property manager occupation is the same or similar to that of an assistant managerial position at a gasoline station.

In addition, the diverse nature of the two businesses and the knowledge routinely associated with each type of business, including the types of federal and state statutes, regulations, and ordinances associated with each type of business, would appear to be vastly different and serve to further emphasize the disparity of the positions and the occupational classifications. Because of this difference, each position would necessarily require different training, certifications, and experience to perform the duties associated with each position. The applicant has not provided evidence that the same skill set of the assistant managerial position for a gasoline station transfers to that of the property manager position whose company is involved in renovating, renting, and managing rental units. Although both positions may require managing people and business to some degree, it is a comparison of the specific details regarding duties, training, certifications, and the nature of the business that would allow a conclusion that the positions are similar. In this matter, the proffered positions are defined in such broad strokes that USCIS cannot ascertain that the occupations are sufficiently similar, to allow the applicant to "port" pursuant to AC21. The AAO finds that the title

of a position, while may be a starting point for a comparison of occupations, is not a critical element in defining the actual nature of the jobs.

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.