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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 Date: **JUN 03 2009**
SRC 08 128 52987

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 Field Office Director, San Francisco, California, 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 The director's decision will be withdrawn and the matter remanded for the continued processing of the applicant's adjustment of status application.

The applicant is a native and citizen of the Philippines 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 her status as a derivative on her father's adjustment of status application. A review of the record reveals the following facts and procedural history:

The applicant was born on December 13, 1984. On May 28, 2003, the applicant's father filed a Form I-140, Immigrant Petition for Alien Worker that was approved on April 2, 2004. A visa number initially became current and available on April 2, 2004, the approval date of the petition. The applicant's father filed a Form I-824, Application for Action on an Approved Application or Petition, on May 23, 2005 which was approved on September 21, 2005. The priority date of the third preference category for "other workers" subsequently retrogressed per the Department of State's June 2005 Visa Bulletin. The visa did not again become current and available until February 1, 2006. The applicant turned 21 years of age on December 13, 2005 and filed the Form I-485, Application to Register Permanent Resident or Adjust Status, on March 12, 2008. The director denied the petition as the applicant had not filed the Form I-485 within one year of the initial availability date, April 2, 2004 or within one year of the February 1, 2006 date when the visa again became current and available. As the director found that some of the issues in this particular matter presented new areas of policy and law, the director certified the decision to the AAO for review.

Preliminarily, the AAO finds that the director properly considered the Board of Immigration Appeals (BIA) decision, *In Re Kim*, (BIA Dec. 20, 2004). As the director found, *In Re Kim*, is an unpublished decision that provides one interpretation of the phrase "has sought to acquire the status of an alien lawfully admitted for permanent residence." This unpublished decision is not a precedential decision and while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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 seeking to adjust status as a derivative on a parent's adjustment application. 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.

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 as to whether the applicant filed an application for admittance to permanent residence within one year of the visa number becoming available. The one year time period may occur either before or after the date that the visa number becomes available.

The applicant's age on the date the visa number initially became available was a little over nineteen years of age. However, in this matter, the applicant did not file a Form I-485 to adjust her status, and the visa number retrogressed and did not become available again until February 1, 2006.

As the applicant in this matter had not filed a Form I-485 prior to the visa availability date regressing, her age must be determined using the February 2006 date. On February 1, 2006, the applicant was 21 years and a month and a half old. The applicant's father's petition was filed May 28, 2003 and was approved on April 2, 2004; thus the petition was pending for ten months and five days. To determine the applicant's age for CSPA purposes, the ten months and five days must be reduced from her age at the time of visa availability date, in this matter February 1, 2006. The applicant's CSPA age, thus is 20 years 3 months, and 20 days. The applicant qualifies as a child for CSPA purposes.

However, to qualify to use the CSPA age, the applicant must also demonstrate that she sought to acquire the status of an alien lawfully admitted for permanent residence within one year of the visa availability. In this matter, the applicant's father filed a Form I-824 on the applicant's behalf on May 23, 2005. May 23, 2005 is within one year of the February 1, 2006 date, albeit within one year prior to the date. The filing of the Form I-824 satisfies the "sought to acquire" language of section 203(h)(1)(A) of the Act.

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 met her burden. Accordingly, the AAO withdraws the director's denial of the Application for Adjustment of Status and remands the matter for further processing of the applicant's Form I-485.

ORDER: The director's decision is withdrawn. The matter is remanded for the director to reopen the matter on a service motion and continue processing the applicant's Form I-485.