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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] Office: SAN FRANCISCO DISTRICT OFFICE
WAC 05 232 52401

Date: **JUN 03 2009**

IN RE: Applicant: [REDACTED]

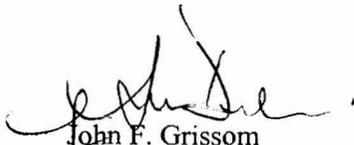
Petition: Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant to
Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF PETITIONER:

[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 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 district director's decision will be affirmed. The application will be denied.

The applicant is a native and citizen of Mexico 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 November 12, 1984. On April 30, 2001, the applicant's father filed a special immigrant visa petition that was approved on September 4, 2002. A visa was immediately available to the applicant when her father's visa petition was approved on September 4, 2002. On August 8, 2005, the applicant submitted her application to adjust status (Form I-485) to U.S. Citizenship and Immigration Services (USCIS). On March 27, 2007, the applicant's father and mother received their permanent resident status. The applicant's Form I-485 was denied because the applicant was over 21 and had not timely filed her application.

Counsel for the applicant filed a motion to reopen and reconsider the director's decision citing new facts as set out in the applicant's father's affidavit and citing the Board of Immigration Appeals (BIA) decision, *In Re Kim*, (BIA Dec. 20, 2004). The director reopened the matter and on February 12, 2009 issued a new decision denying the application and certifying the matter to the AAO for review. Counsel for the applicant supplemented the record with a brief and resubmitted evidence already in the record. The record in this matter is considered 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 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.

The applicant's derivative beneficiary visa number became available on September 4, 2002. The applicant filed her Form I-485 on August 8, 2005, which is significantly more than one year after the September 4, 2002 date the derivative visa number became available. The applicant is, therefore, ineligible to derive benefits from her father's September 4, 2002 approved petition as she was over the age of 21 at the time of the director's decision on her Form I-485 application as a derivative beneficiary, and she is not eligible for the benefits of the CSPA because she did not seek to acquire permanent residence status within one year of her visa number becoming available.

Counsel cites *In Re Kim*, (BIA Dec. 20, 2004), an unpublished decision for the proposition that seeking to acquire the status of an alien lawfully admitted for permanent resident is satisfied by the applicant's father hiring an attorney to process the family's Form I-485 applications, even if the filing of the Form I-485 applications are delayed. Counsel asserts that the applicant's father's financial circumstances, as detailed in his April 3, 2007 affidavit, prohibited the applicant's father from filing his Form I-485 as well as that of the applicant's Form I-485 once the family was first eligible to file. Counsel has provided a September 13, 2002 letter signed by the applicant's father's prior attorney in which the prior attorney advised an attorney handling another matter for the family that her office is "now in the process of filing their applications to adjust their status to permanent residents of the United States" and noting that the applications should be filed with legacy INS within the next week. Counsel also contends that the applicant could not file the Form I-485 until her father, the principal beneficiary of the approved immigrant visa petition, filed his Form I-485, which was not filed until July 2005.

Counsel on certification also cites a Central District of California Court in a March 23, 2006 decision wherein the court found that an applicant who was under 21 "expressly" satisfied the definition of child under INA Section 101(b)(1)(A) at the time of filing for adjustment of status and thus did not need to meet the one-year filing requirement of INA Section 203(h)(1)(A). Counsel observes that the applicant in this matter was still under the age of 21 when she filed the Form I-485 although she was over the age of 21 when her application was adjudicated.

The AAO notes that *In Re Kim* is not a published 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. Moreover, the AAO observes that the almost three-year delay between hiring an attorney to begin the filing process and the actual filing nullifies any notion that the applicant was continuing to "seek to acquire residence status." The AAO notes that the applicant and her father used a different attorney, than the attorney initially hired, to actually file the Form I-485. The fact of the significant delay in this matter between hiring an attorney and the actual filing only emphasizes that "hiring an attorney" is insufficient to establish that the individual is seeking to acquire residence status. To allow counsel's interpretation would require that once counsel was hired, the applicant could delay for years the actual filing of an application using the CSPA. The AAO finds that such delays are outside the scope of the intent of Congress in passing this legislation.

Regarding the district court case cited by counsel, the AAO notes that in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to

follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value. The AAO notes that Congress provided the methodology for calculating an applicant's age for adjustment of status purposes in section 203(h) of the Act and also further required that once the child's age had been calculated that 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. We note that the one-year time period may occur either before or after the date that the visa number becomes available. In this matter, although the petitioner lacked three months in reaching the age of 21 when she filed the Form I-485, she did not file the petition within one-year of the visa number becoming available, which would have afforded her the protection of the CSPA. The delay in filing the application for more than one year after the visa number became available required the director's denial of this claim.

The AAO further observes that the Ninth Circuit Court in *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004) stated in pertinent part:

Under the newly amended version of the statute, however, an individual eligible for permanent residence as a derivative beneficiary under INA § 203(d), 8 U.S.C. § 1153(d) who is over twenty-one years of age may have his status adjusted provided that: (1) he was a "child" on the date upon which the immigrant visa became available for his parents, (2) he applied for adjustment of status within one year of availability, and (3) he "aged out" while waiting for his application to be adjudicated. INA § 203(h)(1)(A)-(B), 8 U.S.C. § 1153(h)(1)(A)-(B).

The applicant does not meet all three of the criteria set out in the statute. The applicant did not apply for adjustment of status within one year of availability.

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 denial of the Application for Adjustment of Status.

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