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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

PUBLIC COPY

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JUN 11 2009

File:

[REDACTED]
SRC 08 133 53492

Office: TEXAS SERVICE CENTER

Date:

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 PETITIONER:

SELF-REPRESENTED

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, Texas Service Center, denied the application for adjustment of status (Form I-485) and 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 Brazil 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:

The applicant was admitted into the United States on a B-2 nonimmigrant visitor visa on June 9, 1999 valid to December 8, 1999. An extension of the applicant's visitor visa was granted from June 8, 2000 to December 7, 2000. The record does not show that the applicant departed the United States or was granted a further extension on the B-2 visitor visa. The applicant lists employment as a supervisor with Hurley Construction Co., Inc. in Palm Beach Gardens, Florida from 2002 to 2008, on his Form G-325A, Biographical Information sheet. The record includes evidence that the applicant's employer, Hurley Construction, Co., Inc. submitted a Form ETA-750, Application for Alien Employment Certification on February 27, 2004 that was certified on March 13, 2007.

The director in this matter determined that the applicant had not maintained lawful status, had engaged in employment not authorized by United States Citizenship and Immigration Services (USCIS), and was not in lawful immigration status at the time of filing the adjustment application that is the subject of this certification. The director determined that the applicant was not eligible to apply for adjustment of status pursuant to sections 245(c)(2) and 245(c)(8) of the Act. The director properly considered whether, despite the ineligibility of the applicant based on these sections of the Act, the record included evidence that the applicant was eligible to adjust status pursuant to section 245(i) of the Act.

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 record shows that the applicant was the beneficiary of a labor certification under section 212(a)(5)(a) of the Act filed by Arsh Company, Inc. through its attorney/agent Javier E. Lopera. The priority date established for this labor certification is noted as April 30, 2001. On November 24, 2003, the certifying officer of the Employment and Training Administration in Atlanta, Georgia issued a Notice of Findings to Arsh Company, Inc. at its address of record, notifying the company that the Department of Labor (DOL) intended to deny the application to certify the position requested for the applicant. The DOL found: that the record included documentation indicating that Javier Lopera's firm represented the beneficiary when the form ETA 750 application was filed; that the Javier Lopera law firm had been found guilty of committing immigration fraud; that the DOL had concluded that the petition may contain fraudulent documents; and thus the petition was not certifiable with the documents submitted. The DOL noted that it would deny the petition for fraud if the petitioning employer did not present the requested evidence.¹ The DOL notified the petitioning company that it must respond with the requested evidence and any rebuttal by December 29, 2003. The record includes the DOL's final determination, dated January 6, 2004 noting that the "application is Withdrawn with prejudice at the request of the Employer, after a Notice of Findings." The record does not include a response or any further information submitted by Arsh Company.

On February 26, 2009, United States Citizenship and Immigration Services (USCIS) denied the applicant's Form I-485 finding that the applicant was ineligible to adjust status under the provisions of section 245(i) of the INA. The director determined that the applicant's initial priority date, which is the date that his labor certification was accepted for processing by the DOL, although on April 30, 2001, was not properly filed, meritorious in fact, and not frivolous. The director noted that the Board of Immigration Appeals (BIA) found in *Matter of Jara Riero and Jara Espinol*, 24 I&N Dec. 267, 268-269 (BIA 2007) that a visa petition is not "approvable when filed" if it "is fraudulent or if the named beneficiary did not have, at the time of filing, the appropriate family relationship or employment relationship that would support the issuance of an immigrant visa," *Matter of Jara Riero and Jara Espinol*, 24 I&N Dec. 267, 268-269 (BIA 2007) quoting an example of the "approvable when filed" standard discussed in the Federal Register 66 Fed. Reg. 16,383, 16,385 (Mar. 26, 2001) (Supplementary Information).

On certification, the applicant asserts that the Arsh Company labor certification application filed on April 30, 2001 was not denied based on fraud, but rather was denied based on a presumption of fraud by the attorney due to the attorney's conviction of immigration fraud. The applicant asserts that the Form ETA 750 filed by the Arsh Company which was represented by Javier Lopera, an attorney who was licensed in the State of Florida when the Form ETA 750 was filed, was properly filed, meritorious in fact, and non-frivolous and thus approvable when filed. The applicant asserts that neither the applicant nor Arsh Company

¹ The DOL included a list of requested evidence that would assist in determining the authenticity of the petitioner (Arsh Company) and the beneficiary's employment relationship.

received the Notice of Findings and thus did not provide a rebuttal. The applicant contends that the cancellation of the Form ETA 750 was due to circumstances arising after the time of filing and thus his access to eligibility pursuant to section 245(i) of the Act was preserved. The applicant further contends that the petitioner (Arsh Company) of the Form ETA 750 submitted authentic documentation with authentic information to the DOL and reiterates that neither Arsh Company nor the applicant was aware of any wrongdoing on the part of Javier Lopera, their attorney of record. The applicant notes that at some point he made the decision to change employers and submit new documentation resulting in the submission of the new Form ETA 750 filed by Hurley Construction on February 27, 2004.

The AAO concurs with the director's decision in this matter. The applicant must establish that the Form ETA 750 filed April 30, 2001 was "approvable when filed" to establish eligibility under section 245(i) of the Act. The regulation at 8 C.F.R. § 245.10(a)(3) states in pertinent part:

Approvable when filed means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act or qualifying application for labor certification, the qualifying petition or application was properly filed, meritorious in fact, and non-frivolous ("frivolous" being defined herein as patently without substance). This determination will be made based on the circumstances that existed at the time the qualifying petition or application was filed. A visa petition that was properly filed on or before April 30, 2001, and was approvable when filed, but was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing, will preserve the alien beneficiary's grandfathered status if the alien is otherwise eligible to file an application for adjustment of status under section 245(i) of the Act.

The circumstances when the Form ETA 750 was filed in this matter involved questionable documents authenticating the employer-employee relationship between Arsh Company and the applicant. The applicant asserts that the documents supporting the labor certification application were authentic and not fraudulent. The record includes no evidence, other than the applicant's assertion, regarding the legitimacy of the Form ETA 750 that was filed on April 30, 2001. Contrary to the applicant's assertion that Arsh Company was not informed of the DOL's Notice of Findings, the record includes evidence that the Notice of Findings was mailed to Arsh Company, not its attorney of record on November 24, 2003 and that Arsh Company withdrew the labor certification application. To reiterate, the Arsh Company was informed that the "petition cannot be considered certifiable with the documents submitted" and that the petition would be denied "for fraud if the petitioning employer cannot present the requested evidence." Arsh Company chose not to provide a response to the DOL's Notice and withdrew its labor certification application as indicated on the DOL's final determination regarding the matter on January 6, 2004. Thus, the record includes no substantive evidence from the petitioning entity in the matter, substantiating that the petition was meritorious in fact when the petition was filed; rather the record includes the DOL's finding that the "petition cannot be considered certifiable with the documents submitted."

The AAO further observes that 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. Each entity promulgates its own regulations and issues its own policy memos. USCIS will not go behind the DOL's finding that the April 30, 2001 labor certification application filed by Arsh Company was not considered certifiable with the documents submitted. As the record includes no other documents submitted to substantiate that the April 30, 2001 labor certification application filed by Arsh Company on behalf of the applicant was meritorious in fact and non-frivolous, the application was not approvable when filed.

The applicant in this matter bears the burden of establishing that the labor certification application was meritorious in fact and non-frivolous and thus approvable when filed. The AAO finds that the applicant has failed to meet this burden. The AAO concurs with the director's conclusion that the applicant does not meet the requirements of section 245(i).

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.