

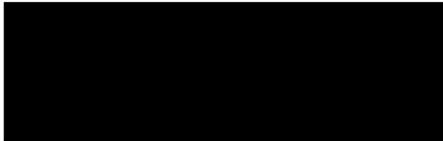


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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [Redacted]

Office: San Francisco

Date: MAR 22 2000

IN RE: Applicant: [Redacted]

APPLICATION: Application for Adjustment of Status to Permanent Residence Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255

IN BEHALF OF APPLICANT:



Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Unit

DISCUSSION: The application was denied by the District Director, San Francisco, California, who certified his decision to the Associate Commissioner, Examinations, for review. The Associate Commissioner withdrew the district director's decision and terminated the case. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted and the previous decision of the Associate Commissioner will be withdrawn, and the application will be approved.

The applicant is a native and citizen of [REDACTED] who is seeking to adjust his status to that of a lawful permanent resident pursuant to section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1255. The applicant is the beneficiary of an immediate relative visa petition filed by his United States citizen spouse.

The district director originally denied the application for permanent residence as a matter of administrative discretion after determining that the applicant was placed in removal proceedings based on his preconceived intention to remain permanently in the United States, he acquired his immediate relative status while he was in removal proceedings, and he has subjected the Attorney General to meritless litigation in contesting his exclusion proceedings.

Upon review of the record of proceeding, the Associate Commissioner noted that the Board of Immigration Appeals (BIA) found on February 10, 1999 that the applicant has established a well-founded fear of persecution. The BIA, therefore, sustained the applicant's appeal with respect to asylum, and the applicant was granted asylum and admitted to the United States as an asylee. The Associate Commissioner, therefore, determined that the issue raised by the district director relating to the applicant's ineligibility under section 245 of the Act was moot, withdrew the district director's decision, and terminated the case on April 22, 1999.

On May 21, 1999, counsel filed a motion to reopen and reconsider the decision of the Associate Commissioner. He states that termination of the applicant's adjustment application should be reconsidered because such action was inappropriate and not based on a correct application of law. Counsel argues that asylum is not a permanent status and may be terminated for reasons other than fraud, such as due to a change of circumstances in the subject's country; therefore, an asylee should be able to adjust under section 245, if eligible. He further argues that in addition, adjustment of status under section 209 of the Act, 8 U.S.C. 1159, is less advantageous than adjustment under section 245 because it is a more lengthy process, thus delaying the ability of an adjustment applicant under section 209 to petition for other family members.

Section 245 of the Act states, in part:

The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

The record reflects that the applicant arrived in the United States on May 3, 1991 without any identification or valid entry document, and he was placed in removal proceedings. On January 6, 1992, an immigration judge found the applicant inadmissible to the United States under the former section 212(a)(20) of the Act (now section 212(a)(7) of the Act), denied his application for asylum and withholding of exclusion and deportation, and ordered his removed from the United States. On January 7, 1992, the applicant appealed the judge's decision to the BIA. While in removal proceedings, the applicant married his United States citizen spouse.

The district director determined that the applicant was placed in removal proceedings based on his preconceived intention to remain permanently in the United States, he has shown an utter disregard for the immigration laws of this country, he acquired his immediate relative status while he was in removal proceedings, he has subjected the Attorney General to meritless litigation in contesting his exclusion proceedings, and he has continued to contest an exclusionary hearing where administrative relief could be found elsewhere. The district director, therefore, denied the application as a matter of administrative discretion on May 22, 1997.

In appealing the district director's decision, counsel argues that the applicant possesses many of the favorable characteristics cited by the Board in Matter of Arai, 13 I&N Dec. 494 (BIA 1970). He has close family ties in this country through marriage to his United States citizen wife; he has a United States citizen child; separation from his wife and their child would impose an emotional and economic hardship upon both him and his immediate family; both his wife and son depend on him for financial support; most importantly, his son would be without a father; he has resided in the United States since May 1991; he has established roots in this country and has shown himself to be a contributing member of society by paying his taxes; and has no criminal problems. Counsel further argues that:

(1) in the applicant's affidavit, he stated he wished to remain in the United States "until things get better" in his

country, and furthermore, he articulated a legally sufficient reason for him to seek refuge in this country by stating, "they kill me because I am Singh [Sikh];"

(2) the facts of this case do not support the district director's conclusion that the applicant entered into marriage with a United States citizen while he was in exclusion proceedings for the purpose of circumventing the Immigration Laws of the United States. First, the marriage took place over four years after his attempted entry into the United States, and further evidence of the bona fides of the instant marriage is the union has produced a son born in 1996.

(3) the applicant has not manifested "an utter disregard for the immigration laws of this country" as alleged by the district director. It is very difficult to respond to this accusation as the district director failed to specify the alleged manner of the applicant's transgressions, and it should be noted that the applicant has appeared for all scheduled interviews and hearings.

(4) the applicant has not subjected the Attorney General to "meritless litigation." The appeal from the immigration judge's denial of his claims for asylum and withholding of deportation is not frivolous, the judge found the applicant's testimony credible, and his application was denied solely because the judge found that he did not establish statutory eligibility for asylum. The district director's accusation that the applicant has engaged in "meritless litigation" may also be a reference to the suit in District Court to speed a decision by the district director on the applicant's adjustment application. The reason for filing the complaint in District Court was the seeming irrationality of the district director's decision to hold the applicant's adjustment of status request in abeyance until after the BIA considered the asylum appeal.

Subsequent to the district director's decision, counsel submits the BIA's decision dated February 10, 1999 regarding the application for asylum and withholding of exclusion and deportation. The BIA found that the applicant has established a well-founded fear of persecution. The BIA, therefore, sustained the applicant's appeal with respect to asylum, and the applicant was granted asylum and admitted to the United States as an asylee.

On motion, counsel requests reconsideration of the adjustment application. He argues that one is not ineligible for adjustment of status under section 245 of the Act merely because he was granted asylum, that asylum is not a permanent status and may be terminated, and that adjustment of status under section 209 of the Act is less advantageous than adjustment under section 245 because it is a more lengthy process.

It was held in Matter of Arai, supra, that where adverse factors are present in a given application for adjustment of status under

section 245 of the Act, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting a favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion.

The grant of an application for adjustment of status is a matter of discretion and of administrative grace, not mere eligibility, and that discretion must be exercised by the Attorney General even though prerequisites have been met.

While the record establishes that the applicant married his United States citizen spouse while he was in removal proceedings, there is no evidence in the record that the marriage was not entered into in good faith and for the purpose of procuring the applicant's entry as an immigrant. The record reflects that a request for bona fide marriage exemption pursuant to sections 204(g) and 245(e) of the Act (see also 8 C.F.R. 245.1(c)(iv)) was filed by the applicant's spouse on October 2, 1995. Evidence to establish that the marriage is bona fide and was entered into in good faith was also furnished. The district director did not find the marriage to be not bona fide.

It is concluded that the applicant has established he is in fact eligible for adjustment of status to permanent resident pursuant to section 245 of the Act and warrants a favorable exercise of discretion. Additionally, documentation in the record, when considered in totality, demonstrates the existence of substantial favorable factors which outweigh the unfavorable ones.

Therefore, the decisions of the district director and the Associate Commissioner will be withdrawn, and the application will be approved.

ORDER: The decision of the Associate Commissioner dated April 22, 1999 is withdrawn. The application is approved.