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BIA AND SECOND CIRCUIT ON GRANDFATHERING UNDER SECTION 245(I) AND IMPLICATIONS FOR EMPLOYMENT-BASED CASES

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by
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Recent decisions from the Board of Immigration Appeals and U.S. Court of Appeals for the Second Circuit raise new questions on an "old" issue: when an immigrant visa petition or labor certification filed on one's behalf prior to April 30, 2001 was "approvable when filed" and therefore permits one to adjust his or her status to permanent residence under the grandfathering provisions of Section 245(i).[1] *Matter of Jara Riero*, 24 I&N Dec. 267 (BIA 2007), decided on August 15, 2007, and *Butt v. Gonzales*, ___ F.3d ___, 2007 WL 2452423 (2d Cir. 2007), decided a few days later, both address the heretofore unexamined phrases "approvable when filed," and "meritorious in fact," and consider whether Respondents have the right and the responsibility to present evidence to demonstrate that the underlying visa petition or labor certification was bona fide, even if subsequently withdrawn, denied or revoked.

Section 245(i) allows a "grandfathered alien" to apply for adjustment of status to permanent residence despite the fact that he or she entered without inspection or remained in the United States without lawful status, because he or she is the beneficiary of a labor certification and/or visa petition filed before April 30, 2001. To be "grandfathered," the immigrant visa petition or labor certification application must have been (1) properly filed and (2) approvable when filed. 8 C.F.R. § 1245.10(a)(2). "Approvable when filed" means that as of the date of the petition, the application or petition was (1) properly filed, (2) meritorious in fact, and (3) non-frivolous (meaning patently without substance).

8 C.F.R. § 1245.10(a)(3). Where a visa petition or labor certification has been determined to have been fraudulent, it may not be used for grandfathering purposes. A petition may be approvable when filed even if it "was later withdrawn, denied, or revoked due to circumstances that have arisen after the time of filing." Id. Prior to these decisions, there was little case law construing the terms "approvable when filed" or "meritorious in fact."

Jara Riero involved an Ecuadorian man and his son who sought adjustment of status based on a visa petition filed by their wife and mother, respectively. 24 I&N Dec. 267. They claimed eligibility for adjustment of status under INA section 245(i) because the father was previously the beneficiary of a visa petition filed by his former wife on April 30, 2001. The visa petition was ultimately denied after the respondent and his wife failed to respond to a Notice of Intent to Deny that cited several material inconsistencies resulting from their interview and raised questions about whether the marriage was bona fide. The Immigration Judge held that it was not "approvable when filed." The BIA affirmed, but held that "the denial of the visa petition, although significant, is not determinative of whether the visa petition was meritorious in fact." Id. at 269. Rather, the BIA held that the respondent could present additional evidence that the marriage was bona fide at its inception.

Although the appeal was dismissed, *Jara Riero* bodes well for 245(i) applicants because it holds that the immigration court may find a visa petition to have been "meritorious in fact" even where it was previously denied by USCIS. The holding accords with the language of the regulations, which recognize that a visa petition may grandfather a 245(i) applicant even if it is no longer valid. Specifically, 8 C.F.R. § 1245.10(a)(3) states that

> A visa petition that 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 holding of *Jara Riero* is also consistent with existing USCIS constructions of the statute. An April 14, 1999 memo from then-Associate Commissioner Robert L. Bach officially adopted an "alien-based reading" of family-based visa petitions filed prior to the sunset date, for purposes of evaluating eligibility for section 245(i). The June 10, 1999 memo from Associate Commissioner Bach explained that the determination of approvability of employment-based visa petitions for grandfathering purposes is a separate inquiry from the evaluation

of the visa petition on the merits.

Sometimes, of course, it is unclear from the record whether a visa petition that was withdrawn or denied was fraudulent or meritorious at the time it was filed. In *Jara Riero*, the USCIS suspected that the I-130 filed by the respondent and his then-wife was not meritorious and issued a Notice of Intent to Deny, to which the respondent never replied. The petition was then denied. In *Jara Riero*, the BIA affirmed the decision of the Immigration Court to hear additional evidence that the I-130 petition was meritorious so that it could be determined whether the petition could be used for grandfathering purposes. The BIA weighed the evidence submitted by the respondent against the evidence in the record that the marriage was not bona fide, and affirmed the ruling of the Immigration Court that the petition was not meritorious in fact.

Although the outcome was negative for the respondent in *Jara Riero*, the decision itself provides future respondents a basis to argue in Immigration Court that a denied or withdrawn visa petition was "meritorious in fact" at the time it was filed, and otherwise "approvable when filed" for the purposes of grandfathering. Where USCIS has approved a visa petition and it has not been revoked, the respondent may cite the April 14, 1999 Bach memorandum instructing adjudicators to consider the petition to have been "approvable when filed," and the Immigration Court should consider the approved petition to be very strong evidence that the respondent is grandfathered. Where, however, the USCIS has denied a visa petition, the respondent must be allowed to submit evidence that the petition was approvable at the time it was filed, including testimony, affidavits, and documentary evidence.

Like the respondent in *Jara Riero*, the Second Circuit case of *Butt v. Gonzales* involved the beneficiary of an employment-based visa petition who sought grandfathering on the basis of a marriage-based I-130 visa petition filed prior to April 30, 2001. ___ F.3d ___, 2007 WL 2452423. The I-130 petition, along with the adjustment application, was denied on May 30, 2003, because Butt did not show up to his adjustment interview, and thus defaulted. The Second Circuit remanded with, among other questions, instructions for the BIA to resolve the disagreement between the parties as to the meaning of "approvable when filed." The Department of Homeland Security (DHS) argued that an application was "approvable when filed" if "it is meritorious and therefore should be granted based on the facts existing at the time of filing," while the Petitioner argued that a petition was "approvable when filed" if "there is no evidence of

fraud, if the application states a prima facie case for eligibility." The Second Circuit also requested that the BIA provide instruction as to how it should be determined that an application or petition was "approvable when filed" if the petitioner defaulted on his application and did not appeal that determination.

The *Jara Riero* case resolves, in part, the latter question posed by the Second Circuit, because the BIA held that additional evidence may be considered by the Immigration Court to establish eligibility for adjustment of status under the grandfathering provisions of section 245(i).[2] These cases primarily address the use of family-based immigrant petitions filed prior to April 30, 2001 as a basis for grandfathering, however. They do not offer guidance regarding the questions specific to employment-based immigrant petitions or labor certifications that may arise when they are sought to be used for the same purpose.

The difference between family and employment-based immigrant petitions is crucial, because the vast majority of family-based beneficiaries are in possession of the information needed to establish that the petitions were "meritorious in fact" and otherwise "approvable when filed." If the petition is based on marriage, the beneficiary most likely has access to evidence of shared housing, bank accounts, and utility bills, and may also submit photos of the couple while they were together, and offer affidavits and testimony in support of his or her contention that the marriage was bona fide. If the petition is based on another family relationship, the beneficiary also has standing to request documentation of the relationship from the appropriate authority.

Employment-based I-140 immigrant petitions, however, involve consideration of information that may never become available to the beneficiary, and to which the beneficiary has no legal right. Moreover, only the employer is provided with an opportunity to respond to any query on the I-140 petition. Such information includes financial and tax documentation showing that the employer petitioner has the ability to pay the beneficiary. Many petitioners wish to keep this information confidential from the beneficiary of an immigrant visa petition. In addition, if the beneficiary was not employed by the petitioner at the time of filing, the beneficiary won't have copies of paystubs or W-2 forms showing that there was a bona fide job opportunity and that the petitioner had the ability to pay the beneficiary at the time the petition was filed. If the petitioning employer has fallen on hard times and lost contact with the

beneficiary, it may be very difficult to contact the petitioner or gather evidence, even with the assistance of a subpoena. Finally, in the worst case scenario, if the petitioner has been accused of fraud in connection with its immigrant petitions and the beneficiary is unaware of the fraud and believed there to be a bona fide job opportunity at the end of the process, the beneficiary faces an almost insurmountable task in demonstrating that the petition and underlying labor certification were "approvable when filed."

In addition, an aspect of the employment-based context not addressed by the *Jara Riero* and Butt decisions is the use of *either* an immigrant visa petition or labor certification as the basis for grandfathering. An applicant for adjustment under section 245(i) may rely on an approved labor certification, even where the applicant has been *substituted* for the original beneficiary at the immigrant visa stage. *See* 8 C.F.R. § 1245.10(j). The regulations addressing this scenario provide that:

> An alien who was previously the beneficiary of the application for the labor certification but was subsequently replaced by another alien on or before April 30, 2001, will not be considered to be a grandfathered alien. An alien who was substituted for the previous beneficiary of the application for the labor certification after April 30, 2001, will not be considered to be a grandfathered alien.

Id. The regulation, despite its oblique language, makes aliens who were substituted beneficiaries of labor certifications eligible for grandfathering, provided that the substitution took place prior to April 30, 2001.

Finally, another sticky issue not directly addressed by either *Jara Riero* or *Butt* is whether a beneficiary of an employment-based immigrant visa petition should be bound by a determination of fraud, when the beneficiary has no right to appeal the determination of USCIS. Such a determination potentially also affects the beneficiary's ability to adjust status as a discretionary matter, and may render him or her inadmissible. One may argue that because 245(i) is an ameliorative statute, the beneficiary should be given the benefit of the doubt when making this evaluation. The argument is made stronger if the USCIS did not revoke the labor certification when making its fraud determination. In such a scenario, one should rely on *Jara Riero* to argue that the denial of the I-140 petition should not preclude the beneficiary from showing that he or she had no part in the alleged fraud committed by the petitioner, was qualified for the position being offered, and believed there to be a bona fide job opportunity.

Although *Jara Riero* provides new insight into the evidence relevant to the determination of when an applicant for adjustment is grandfathered under section 245(i), and *Butt* promises additional insights to come, these cases are primarily concerned with family-based immigrant visa petitions and may not result in guidance for the specific issues that arise when a respondent in removal proceedings has no choice but to rely for grandfathering purposes on an employment-based visa petition that has been denied. Nevertheless, these cases do provide a basis to argue that former beneficiaries of employment-based visa petitions have the right to submit evidence of their bona fide belief in the job opportunity, and that the petition or labor certification was approvable at the time it was filed.

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[1] As used here, "Section 245(i)" refers to the INA provision authorizing the adjustment of status of certain ineligible aliens if they are the beneficiary of an immigrant visa petition or labor certification filed prior to April 30, 2001. 8 C.F.R. § 1245.10(i) is the regulation that authorizes the Immigration Court to adjudicate applications for adjustment of status of certain otherwise ineligible aliens who qualify under section 245(i). For convenience, "section 245(i)" will be used to refer to the general grandfathering scheme. When referring to specific sections or regulations, the actual regulation will be cited.

[2] Although *Riero* was decided shortly before *Butt*, it was not cited by the Second Circuit, and appears not to have been considered by the Second Circuit. However, it is also important to note that in both family and employment-based immigrant petition context, the beneficiary does not receive a copy of the final decision of USCIS. In addition, the beneficiary does not have standing to appeal a negative determination to the Administrative Appeals Office.