

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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6
7 August Term 2006
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9 Submitted: May 8, 2007 Decided: August 23, 2007

10 Last supplemental brief filed: July 30, 2007

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12 Docket No. 05-3270-ag
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15
16 MUHAMMAD BUTT,

17
18 Petitioner,

19
20 - against -

21
22 ALBERTO GONZALES, United States Attorney General,

23
24 Respondent.
25

26 -----X
27
28 Before: FEINBERG, CALABRESI, and WESLEY, Circuit Judges.
29

30 Petitioner, who intends to seek adjustment of status if and
31 when an employment-based immigrant visa becomes available to him,
32 seeks review of a decision of the Board of Immigration Appeals
33 affirming a decision of the Immigration Judge denying
34 petitioner's request for a continuance while his employer's
35 application for a labor certification was pending. We grant the
36 petition, vacate the BIA's decision, and remand the case for the
37 BIA to consider antecedent questions regarding petitioner's
38 eligibility for adjustment of status.
39

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41 brief), Gallagher, Malloy & Georges, P.C.,
42 Philadelphia, PA, for Petitioner.
43

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2 District of Ohio, for Respondent.

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4 FEINBERG, Circuit Judge:

5 Petitioner Muhammad Butt, who intends to seek adjustment of
6 status if and when an employment-based immigrant visa becomes
7 available to him, seeks review of a June 9, 2005, decision of the
8 Board of Immigration Appeals ("BIA") affirming a January 9, 2004,
9 decision of the Immigration Judge ("IJ") denying Butt's
10 application for a continuance of his removal proceeding and
11 ordering him removed. Butt argues that the IJ abused her
12 discretion in denying the continuance while his employer's
13 application for a labor certification, which must be approved
14 before Butt may seek an employment-based immigrant visa, was
15 pending. But before reaching that issue, we remand the case to
16 the BIA to consider, in the first instance, antecedent questions
17 regarding Butt's eligibility for adjustment of status, the
18 answers to which may bear on any subsequent consideration of
19 whether the IJ abused her discretion in denying the continuance.

20 I. BACKGROUND

21 Butt, a native and citizen of Pakistan, entered the United
22 States without inspection in February 2000,¹ and shortly

¹ As discussed below, the Government contends in its supplemental brief that Butt may not have been physically present in the U.S. on December 21, 2000. It is unclear whether the Government is thus contending that Butt may not have entered in February 2000. But the Government has conceded that any

1 thereafter sought to adjust his status to that of a lawful
2 permanent resident under 8 U.S.C. § 1255. As set forth in more
3 detail below, because Butt entered without inspection, he may
4 apply for adjustment of status only if he is "grandfathered" as
5 the beneficiary of either a timely-filed petition for
6 classification under section 204 of the Immigration & Nationality
7 Act ("INA") or a timely-filed application for a labor
8 certification under section 212(a)(5)(A) of the INA.
9 Furthermore, he must establish that he was physically present
10 here on December 21, 2000. 8 U.S.C. § 1255(i)(1)(C). Then, if
11 grandfathered, he may apply for adjustment of status under id. §
12 1255(i)(2).

13 Butt first sought grandfathering and adjustment of status on
14 the basis of a section 204 petition for classification filed by
15 his wife. He married a U.S. citizen on April 6, 2001, and,
16 shortly thereafter, his wife filed a form I-130 petition to
17 classify Butt as an alien relative, and he filed a form I-485
18 application to adjust status on the ground that his wife had
19 filed the form I-130. Both the I-130 and the I-485 were denied

inconsistency is likely a typographical error, and its responsive brief stated that Butt entered the country in February 2000, as does the Notice to Appear sent to Butt. In any event, except as discussed in Section II.A.1, *infra*, Butt's date of entry is not relevant to the disposition of this appeal.

1 on May 30, 2003, apparently because Butt was a "no show" and thus
2 defaulted. Joint Appendix 58, 61.

3 The Immigration and Naturalization Service commenced removal
4 proceedings in July 2003. After Butt failed to appear for a
5 hearing, the IJ ordered him removed to Pakistan. Subsequently,
6 Butt moved to reopen the removal proceedings, and the IJ granted
7 the motion. Butt then advised the IJ that he intended to seek
8 adjustment of status on the basis of an employment-based
9 immigrant visa, and that the prerequisite application for a labor
10 certification, filed by Butt's employer on or about December 30,
11 2003 and accepted for processing on January 7, 2004, was
12 pending.² He then requested a continuance of his removal
13 proceedings while the application was pending. The IJ denied the
14 request because "the fact that there is a [pending] labor
15 certification isn't grounds for an adjournment, particularly
16 considering how long labor certifications take and there's no
17 guarantee that they'll be approved." Because Butt did not apply

² The process through which an alien pursues employment-based adjustment of status is as follows: First, the alien's prospective employer must file an application for a labor certification. If the Department of Labor certifies the application, the alien's prospective employer must then file a Form I-140, Immigrant Petition for Alien Worker, accompanied by the Labor Certification. If the Petition is approved, the alien, who must be residing in the U.S., must file a Form I-485 Application to Register Permanent Residence or Adjust Status. See *Lendo v. Gonzales*, No. 05-1715, -- F.3d --, 2007 WL 1982038 at *2 (4th Cir. July 10, 2007).

1 for and was ineligible for any other form of relief, the IJ found
2 him removable and ordered him removed to Pakistan. As already
3 noted, the BIA affirmed without opinion in June 2005. Butt filed
4 a timely petition for review of that decision.³

5 II. ANALYSIS

6 Before us, the parties have principally argued whether it
7 was an abuse of discretion for the IJ to deny a continuance while
8 the application for a labor certification was pending. But we
9 decline to consider that question at this time and instead remand
10 the case to the BIA to consider antecedent questions regarding
11 Butt's eligibility for adjustment of status, the answers to which
12 may bear on any subsequent consideration of whether the IJ abused
13 her discretion in denying the continuance.

14 As noted above, because Butt entered without inspection, he
15 may apply for adjustment of status only if he is "grandfathered"
16 under 8 U.S.C. § 1255(i)(1). *Id.* § 1255(i)(1)(A)(i). To be
17 grandfathered, the alien must be the beneficiary of either a
18 petition for classification under section 204 of the INA, *id.* §
19 1154, filed on or before April 30, 2001, *id.* § 1255(i)(1)(B), or
20 an application for a labor certification under section

³ After this matter was fully briefed before us, the Department of Labor granted Butt's labor certification on October 10, 2006. Butt's prospective employer then filed the I-140 petition on October 31, 2006. The record is unclear as to whether Butt thereafter filed an I-485 application.

1 212(a)(5)(A) of the INA, id. § 1182(a)(5)(A), filed on or before
2 April 30, 2001, id. § 1255(i)(1)(B). In addition, if the
3 petition or application was filed after January 14, 1998, the
4 alien must have been physically present in the U.S. on December
5 21, 2000. Id. § 1255(i)(1)(C). Then, once grandfathered, the
6 alien may apply for adjustment of status, which the Attorney
7 General may grant if the alien pays a "fine" filing fee of
8 \$1,000, id. § 1255(i)(1), and "(A) the alien is eligible to
9 receive an immigrant visa and is admissible to the United States
10 for permanent residence; and (B) an immigrant visa is immediately
11 available to the alien at the time the application is filed," id.
12 § 1255(i)(2).

13 We remand to the BIA to consider (A) Whether Butt is
14 grandfathered, viz. (1) whether Butt was physically present in
15 the United States on December 21, 2000, and (2) whether the
16 section 204 petition for classification benefitting Butt was
17 "approvable when filed," as required by 8 C.F.R. §
18 245.10(a)(1)(i)(A) and (B) if Butt is in fact grandfathered on
19 the basis of the section 204 petition for classification, whether
20 he may then seek adjustment of status under 8 U.S.C. § 1255(i) on
21 the basis of an employment-based immigrant visa?⁴

⁴ By order dated July 11, 2007, we directed the parties to provide supplemental briefing addressing whether we should remand the case to the BIA to address (A)(2) and (B). The last of these briefs was filed on July 30, 2007.

1 Simply put, if Butt is not grandfathered or if he may not
2 apply for adjustment of status on a basis other than an approved
3 section 204 petition for classification, he is ineligible for
4 adjustment of status. Accordingly, we grant the petition, vacate
5 the BIA's decision, and remand the case to the BIA to consider
6 these questions in the first instance.
7

8 A. Whether Butt is "grandfathered" under 8 U.S.C. §
9 1255(i)(1)?

10
11 1. Was Butt physically present in the United
12 States on December 21, 2000?
13

14 First, we remand the case to the BIA for a finding on
15 whether Butt was physically present in the U.S. on December 21,
16 2000. Because the section 204 petition for classification
17 benefitting Butt was filed after January 14, 1998, to be
18 grandfathered, Butt must show that he was physically present in
19 the U.S. on December 21, 2000. 8 U.S.C. § 1255(i)(1)(C). 8
20 C.F.R. § 245.10(n) clarifies that the alien bears the burden of
21 proof on this question and specifies particular types of evidence
22 that will satisfy it.

23 In its supplemental brief, the Government argues that Butt
24 has not met his burden because there is no evidence in the
25 record, of the sort sanctioned by 8 C.F.R. § 245.10(n), that
26 establishes his physical presence in the U.S. on December 21,
27 2000. Furthermore, while the section 204 petition for
28 classification and corresponding adjustment of status application

1 claim that Butt entered the U.S. on February 14, 2000, and the I-
2 862 Notice to Appear states that he entered the U.S. on or about
3 February 28, 2000, the I-140 employment-based visa petition filed
4 by Butt's employer states that he entered on April 6, 2001
5 (though the Government concedes that this date, which is the date
6 on which Butt married his wife, is probably a typographical
7 error, see Gov't Supp. Ltr. Br., dated July 18, 2007, at 3-4).
8 Butt does not address this argument in his supplemental
9 submission.

10 If Butt was not physically present on December 21, 2000, he
11 is not grandfathered, and if he is not grandfathered, he is
12 ineligible for adjustment of status. Because the agency has not
13 made a finding on this question, we remand the case to the BIA to
14 do so (and to remand to the IJ if necessary).

15 2. Was Butt's section 204 petition for
16 classification "approvable when filed"?
17

18 Second, we remand the case to the BIA to determine whether
19 the section 204 petition for classification benefitting Butt was
20 "approvable when filed" within the meaning of 8 C.F.R. §
21 245.10(a)(1)(i)(A).

22 As noted, to apply for adjustment of status as an alien who
23 entered the U.S. without inspection, Butt must be "grandfathered"
24 under 8 U.S.C § 1255(i)(1). Butt is the beneficiary of a section
25 204 petition for classification filed on or before April 30,

1 2001,⁵ and, we assume, for purposes of this discussion, that he
2 was physically present in the U.S. on December 21, 2000. He
3 therefore satisfies the express statutory requirement set forth
4 in 8 U.S.C. § 1255(i) (1).

5 But the implementing regulations impose additional
6 requirements, including that the petition or application be
7 "approvable when filed":

8 Grandfathered alien means an alien who is the
9 beneficiary ... of:

10 (A) A petition for classification under section 204
11 of the Act which was properly filed with the
12 Attorney General on or before April 30, 2001, and
13 which was approvable when filed
14

15 8 C.F.R. § 245.10(a) (1) (i) (emphasis added); see also id.
16 245.10(i). "Approvable when filed" is defined as follows:

17 [A]s of the date of the filing of the qualifying
18 immigrant visa petition under section 204 of the Act or
19 qualifying application for labor certification, the
20 qualifying petition or application was properly filed,
21 meritorious in fact, and non-frivolous ("frivolous"
22 being defined herein as patently without substance).
23 This determination will be made based on the
24 circumstances that existed at the time the qualifying
25 petition or application was filed.
26

27 8 C.F.R. § 245.10(a) (3) (emphasis added).

28 The parties did not initially address whether Butt's
29 petition was "approvable when filed." Accordingly, as noted
30 above, we solicited their views as to whether we should remand

⁵ Because Butt's application for a labor certification was not filed until December 2003, after the April 30, 2001, deadline imposed by 8 U.S.C. § 1255(i) (1) (B), he is not eligible for grandfathering on that basis.

1 the case to the BIA to consider, in the first instance, whether
2 Butt has satisfied this requirement. In response, Butt, citing
3 a U.S. Citizenship and Immigration Services ("USCIS") Interoffice
4 Memorandum, dated March 9, 2005 ("USCIS Memorandum"), argued that
5 an application is to be deemed "approvable when filed" absent
6 evidence of fraud, and there is no such evidence in the record.⁶
7 The Government, on the other hand, argues that an application is
8 only "approvable when filed" if it is actually meritorious, and
9 because Butt defaulted on his application, and did not appeal
10 that determination, it is impossible to determine whether it was
11 "approvable when filed."⁷

⁶ Specifically, Butt, while arguing in passing that his application was "meritorious and non-frivolous" and that he submitted "clear and convincing" evidence showing that the marriage was bona fide, principally relies on the USCIS Memorandum, which states that "[a]bsent evidence of fraud, when a qualifying application for labor certification . . . is properly filed and accepted by the United States Department of Labor in accordance with 20 CFR 656.21, USCIS will consider the requirements of 8 CFR 245.10 related to 'properly filed' and 'approvable when filed' to have been met for grandfathering purposes under section 245(i)." Because there is no evidence of fraud, Butt argues, his application was "approvable when filed."

⁷ The Government notes that because Butt defaulted and did not appeal, there was no determination concerning the merit of his petition. Furthermore, neither Butt nor his wife submitted an affidavit of marriage or other documentation suggesting the marriage was bona fide. The Government argues further that Butt's reliance on the USCIS Memorandum is misplaced for two reasons. First, the Memorandum states that it "is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications for adjustment of status. . . . [and] is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law

1 We decline to resolve this disagreement without the benefit
2 of the BIA's views. The meaning of "approvable when filed" is
3 ambiguous, especially as applied to the facts here presented.⁸
4 For example, an application may be "approvable when filed" if, as
5 the Government urges, it is meritorious and therefore should be
6 granted based on the facts existing at the time of filing. Under
7 the regulations, an application is "approvable when filed" if it
8 is "meritorious in fact," which is perhaps most naturally read as
9 requiring that, based on the facts as they exist at the time of
10 filing, the application should be granted. See supra page 9,
11 quoting 8 C.F.R. § 245.10(a)(3); see also, e.g., *Lasprilla v.*
12 *Ashcroft*, 365 F.3d 98, 100-01 (1st Cir. 2004) (holding that
13 application was not "approvable when filed" because petitioner
14 "had two opportunities -- in his motion to reopen and in his
15 motion to reconsider -- to present a sufficient showing that he
16 was within the exception and thus that the visa application was
17 'approvable when filed,'" and failed to do so). But it may also
18 be the case that an application is "approvable when filed" if, as

. . . by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner." Second, the section on which Butt relies concerns applications for labor certification, not petitions for classification.

⁸ The Government, in its supplemental submission, concedes that "the record is unclear whether the spousal visa petition filed on Butt's behalf was approvable when filed." Gov't Supp. Ltr. Br., dated July 18, 2007, at 1.

1 Butt urges, there is no evidence of fraud, if the application
2 states a prima facie case for eligibility, or something else
3 altogether. Indeed, the regulations require, in the very same
4 sentence requiring that the application be "meritorious in fact,"
5 that it be "non-frivolous," which would be a redundant
6 requirement if the application must be meritorious as the
7 Government defines that term. See supra page 9, quoting 8 C.F.R.
8 § 245.10(a)(3).

9 Furthermore, in light of whatever definition of "approvable
10 when filed" the BIA adopts, was Butt's application, which was
11 denied when Butt failed to appear, "approvable when filed"? That
12 is, when a petitioner defaults on his application, as Butt did,
13 and does not appeal that determination, how are we to determine
14 whether the application was "approvable when filed"?

15 Given these ambiguities concerning whether Butt's petition
16 was "approvable when filed" -- a question that is potentially
17 dispositive of this petition -- we remand to give the BIA an
18 opportunity to express its views before we decide the petition.

19 B. Whether Butt may seek adjustment of status on the
20 basis of an employment-based immigrant visa when he
21 was grandfathered on the basis of a section 204
22 petition for classification?

23
24 Third, assuming that Butt is grandfathered, we also remand
25 the case to the BIA to determine whether Butt may be
26 grandfathered on the basis of a section 204 petition for

1 classification but then seek adjustment of status on the basis of
2 an employment-based immigrant visa.

3 Butt's application for a labor certification was filed after
4 April 30, 2001, so he must be grandfathered, if at all, on the
5 basis of the section 204 petition for classification, which was
6 filed before that date. But the section 204 petition for
7 classification was eventually denied, so his status cannot be
8 adjusted on that basis. Instead, he plans to seek adjustment of
9 status on the basis of an employment-based immigrant visa, if and
10 when it is granted. As a result, he would be grandfathered on
11 the basis of a section 204 petition for classification but then
12 seek adjustment of status on the basis of an employment-based
13 immigrant visa.

14 Does the INA so permit? We also sought the parties' views
15 on this question in our supplemental briefing order. In its
16 supplemental brief, the Government appears to concede that, if
17 Butt is grandfathered as the beneficiary of a section 204
18 petition for classification, his eligibility to apply for
19 adjustment of status on some other basis, including an
20 employment-based immigrant visa, is preserved under 8 C.F.R. §
21 245.10(a)(3).⁹ Butt, of course, agrees.

⁹ However, the Government argues that the earliest an employment-based immigrant visa would be available to Butt is October 2007 (unless he applied in June 2007, when there was a brief window during which Butt's "priority date" would have allowed him to apply), and he has no right to remain in the

1 Although the parties appear to be in agreement on the
2 question of statutory interpretation -- i.e. that Butt may seek
3 adjustment of status on the basis of an employment-based
4 immigrant visa even though he was grandfathered on the basis of
5 a section 204 petition for classification -- we think, without
6 expressing any views whatsoever on the merits, that we would
7 benefit from the BIA's views on the issue. 8 C.F.R. § 245.10(i)
8 provides that

9 The denial, withdrawal, or revocation of the approval of
10 a qualifying immigrant visa petition, or application for
11 labor certification, that was properly filed on or
12 before April 30, 2001, and that was approvable when
13 filed, will not preclude its grandfathered alien
14 (including the grandfathered alien's family members)
15 from seeking adjustment of status under section 245(i)
16 of the Act on the basis of another approved visa
17 petition, a diversity visa, or any other ground for
18 adjustment of status under the Act, as appropriate.

19
20 8 C.F.R. § 245.10(i) (emphasis supplied); see also 8 C.F.R. §
21 245.10(a)(3) (stating that to preserve grandfathered status, an
22 alien whose properly filed visa petition was denied must be
23 "otherwise eligible to file an application for adjustment of
24 status under section 245(i) of the [INA]"). In our opinion,
25 these provisions do not unambiguously compel the interpretation

country in the interim. See *Hadayat v. Gonzales*, 458 F.3d 659,
662 (7th Cir. 2006) (observing that "[w]hat is grandfathered ...
is the basic eligibility for adjustment [of status]; in all
other respects the individual remains a 'nonimmigrant' -- that
is, a person with no legal right to remain in the United States
unless and until an immigrant visa becomes available"). We
decline to address this question until we have the benefit of
the BIA's views on the various questions set forth herein.

1 favored by the parties. To be sure, there is nothing in the
2 statutory or regulatory provisions in issue that explicitly
3 requires that the immigrant visa on which basis the Attorney
4 General adjusts an alien's status be based on the application or
5 petition through which the alien was grandfathered. Furthermore,
6 the USCIS Memorandum, see supra pages 9-10 & nn.6-7, arguably
7 supports, at page 2, the interpretation propounded by both
8 parties, namely that Butt may seek adjustment of status on the
9 basis of an employment-based immigrant visa even though he was
10 grandfathered on the basis of a section 204 petition for
11 classification. But the statutory and regulatory provisions also
12 do not foreclose other interpretations, viz. that the alien must
13 be grandfathered and have his status adjusted on the same basis
14 or that an alien may be grandfathered and have his status
15 adjusted on different bases only if he can show changed
16 circumstances, see 8 C.F.R. § 245.10(a)(3) (providing that "[a]
17 visa petition that was properly filed on or before April 30,
18 2001, and was approvable when filed, but was later withdrawn,
19 denied, or revoked due to circumstances that have arisen after
20 the time of filing, will preserve the alien beneficiary's
21 grandfathered status if the alien is otherwise eligible to file
22 an application for adjustment of status under section 245(i) of
23 the Act" (emphasis added)).

