



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 20530

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500 12th St., SW, Mail Stop 5902
Washington, DC 20536**

Name: PRASAD, KAMLESHWAR

A 099-681-885

Date of this notice: 12/13/2013

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

williams
User team: Docket

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CS

Falls Church, Virginia 20530

File: A099 681 885 – Arlington, VA

Date: DEC 13 2013

In re: KAMLESHWAR PRASAD

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard W. Chang, Esquire

ON BEHALF OF DHS: Adam L. Berg
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Reopening; reconsideration; adjustment of status

The respondent, a native and citizen of India, appeals the December 23, 2011,¹ denial of a motion to reopen and reconsider seeking adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). The Immigration Judge held that the respondent did not demonstrate *prima facie* eligibility for adjustment of status. The appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review issues of law, discretion, or judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent asserts that he was admitted to the United States on May 11, 2000, and he retained Earl S. David, Esquire, on April 5, 2001, to file an application for labor certification on his behalf before the April 30, 2001, "grandfathering" deadline. *See* section 245(i)(1)(B)(i) of the Act. The record shows that the labor certification application was filed on July 13, 2001. On April 22, 2009, United States Citizenship and Immigration Services denied the respondent's application for adjustment of status because he could not demonstrate that a labor certification had been filed on his behalf on or before April 30, 2001. *See id.* The Immigration Judge denied the respondent's renewed application for adjustment of status on September 29, 2011, and ordered his removal. The respondent filed no appeal with the Board. In the motion at issue, the respondent argued that the filing deadline of section 245(i)(1)(B)(i) of the Act should be equitably tolled due to the ineffective assistance of Mr. David.

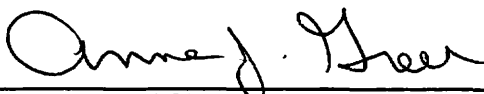
¹ While the Immigration Judge signed the decision on November 2, 2011, the coversheet accompanying the decision shows that it was issued on December 23, 2011.

The respondent has satisfied the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). See also *Matter of Compean, Bangaly, and J-E-C-*, 25 I&N Dec. 1 (A.G. 2009). An applicant for reopening must further demonstrate *prima facie* eligibility for the relief sought. *INS v. Abudu*, 485 U.S. 94, 104-05 (1988).

As noted by the Immigration Judge, the respondent has identified no legal authority supporting equitable tolling of the deadline of section 245(i)(1)(B)(i) of the Act. The respondent relies upon *Piranej v. Mukasey*, 516 F.3d 137 (2d Cir. 2008), which is not binding in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) (explaining that the Board historically follows a court's precedent in cases arising in that circuit). In any event, in remanding for fact-finding and a determination of whether Piranej had complied with *Matter of Lozada*, the court declined to address whether ineffective assistance of counsel could serve as a basis for equitable tolling of the April 30, 2001, grandfathering deadline under section 245(i) of the Act. *Piranej, supra*, at 145. Another court has answered this question in the negative by affirming the Board's holding that the deadline under section 245(i) operates as a statute of repose, and thus is not subject to equitable tolling. *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1048-50 (9th Cir. 2008). Similarly, the Fourth Circuit has held that the principles of equitable tolling do not apply to statutes such as section 245(i)(1)(B)(i) of the Act "where strict satisfaction of a time limit may be required as a precondition to jurisdiction over a matter." *Harris v. Hutchinson*, 209 F.3d 325, 328 (4th Cir. 2000). Therefore, as the respondent has not shown *prima facie* eligibility for adjustment of status pursuant to section 245(i), we affirm the denial of his motion to reopen and reconsider.

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
901 NORTH STUART ST., STE.1300
ARLINGTON, VA 22203

WASSERMAN, MANCINI & CHANG
CHANG, RICHARD W.
19151 I ST, N.W. SUITE 400
WASHINGTON, DC 20006

099-681
Date: Dec 23, 2011

File A099-681-885

In the Matter of:
PRASAD, KAMLESHWAR

Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee (\$110.00).

Enclosed is a copy of the oral decision.

Enclosed is a transcript of the testimony of record.

You are granted until _____ to submit a brief to this office in support of your appeal.

Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

✓ Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

Blenda Britt
Immigration Court Clerk

cc:

UL

Immigrant & Refugee Appellate Center | www.irac.net

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
ARLINGTON, VIRGINIA

IN THE MATTER OF

PRASAD, Kamleshwar

In Removal Proceedings

File No: A 099 681 885

WRITTEN ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the Respondent's Motion to Reopen and Reconsider, it is **HEREBY ORDERED** that the motion be

☐ GRANTED ☒ DENIED because:

- ☐ DHS does not oppose the motion.
- ☐ The Respondent does not oppose the motion.
- ☐ A response to the motion has not been filed with the court.
- ☐ Good cause has been established for the motion.
- ☐ The court agrees with the reasons stated in the opposition to the motion.
- ☐ The motion is untimely per _____

☒ Other: 1) This is not the Second Circuit.

2) There is no legal basis for me to toll the 245(i) cutoff date in this circuit.

Deadlines:

3) I have no jurisdiction over the Respondent's humanitarian request for deferred removal. This request should be made to the DHS.

- ☐ The application(s) for relief must be filed by _____
- ☐ The respondent must comply with DHS biometrics instructions by _____

Date

11/02/11


Judge Paul W. Schmidt
Immigration Judge

CERTIFICATE OF SERVICE

This document was served by: ☐ Mail ☐ Personal Service

To: ☐ Alien ☐ Alien c/o Custodial Officer ☐ Alien's Atty/Rep ☐ DHS

Date: _____

By: Court Staff _____

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