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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

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER

Date: SEP 02 2010

IN RE: Applicant: [REDACTED]

APPLICATION: Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant to
Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the application to register permanent residence or adjust status (Form I-485) and affirmed his decision in a subsequently filed motion to reopen or reconsider that he has certified to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed and the application will be denied.

The applicant seeks to adjust her status to that of a lawful permanent resident pursuant to section 245(k) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255(k). The director initially denied the application because the applicant failed to maintain lawful nonimmigrant status for more than 180 days in the aggregate and, therefore, was not eligible to adjust her status under section 245(k) of the Act. Counsel for the applicant filed a motion to reopen or reconsider the director's decision, which the director has certified to the AAO for review, as he is affirming his original decision to deny the application. On notice of certification, the director notified the applicant that she had 30 days to supplement the record with any additional evidence that she wished the AAO to consider. On notice of certification, counsel submits a brief.

A review of the record reveals the following facts and procedural history. The applicant initially entered the United States on January 10, 2003 as an H-4 nonimmigrant, with authorization to remain until May 14, 2005. The applicant's spouse had initially been granted H-1B nonimmigrant status from June 1, 2002 until May 14, 2005. At the time that the H-1B petition was approved on his behalf, the applicant's spouse was unmarried and, therefore, the applicant had not been listed on her spouse's H-1B petition as a dependent family member. The applicant and her spouse married on December 29, 2002.

The applicant's spouse received two extensions of his H-1B nonimmigrant stay. The first extension was valid from May 14, 2005 until May 13, 2008, and the second extension was valid from May 13, 2008 until June 21, 2008.¹ In March 2008 and again in June 2008, the applicant filed a Form I-539, Application to Extend/Change Nonimmigrant Status. Accompanying the applications were a letter from the applicant's spouse's employer and affidavits from counsel, the applicant, and the applicant's spouse, explaining why the applicant had not extended her H-4 status prior to 2008. According to the applicant's spouse's employer, it thought that the applicant's H-4 status had been automatically extended when her husband's H-1B status was extended in 2005 and that, had it known of the need to extend the applicant's status in a separate application, it would have taken such action. In her affidavit, counsel explained that she was retained to extend the applicant's spouse's H-1B status in 2005 and had not known of the change in his marital status, which caused her to prepare the petition without listing any of the applicant's spouse's dependents. The applicant explained in her affidavit that she assumed that her spouse's company had taken care of extending her nonimmigrant stay when they also extended her spouse's stay. In his affidavit, the applicant's spouse reiterates the applicant's explanations.

The director initially denied the Form I-485 on August 12, 2009, noting that the applicant was ineligible to adjust her status under section 245(k) of the Act because she had not maintained lawful status for more than 180 days. The director did not find persuasive the applicant's argument that she failed to

¹ The applicant's spouse became a lawful permanent resident on August 12, 2009.

maintain a lawful status through no fault of her own.

On motion, counsel stated that the applicant's adjustment application should be considered in light of 8 C.F.R. § 245.1(b)(6) because her failure to maintain her nonimmigrant status was not her fault. Counsel noted that, although the applicant's spouse had informed his employer of his marriage in 2002, the employer never notified her when she was preparing the petition to extend the applicant's spouse's H-1B status. Counsel also stated that the applicant's spouse had assumed that his wife's authorized stay would also be extended since he had notified his employer. Counsel noted the regulation at 8 C.F.R. § 245.1(d)(2), and stated that the applicant's failure to extend her H-4 status resulted from the applicant's spouse's employer failing to notify counsel of the applicant's spouse's change in marital status and that such an inaction, which was admitted to by the company, shows that the applicant was not at fault.

In affirming his initial decision to deny the application, the director stated that the applicant's spouse's employer was not solely at fault. The director noted that the applicant is ultimately responsible for maintaining her lawful status and that she should have noted the expiration date of her nonimmigrant period of admission and submitted a timely application to extend her nonimmigrant status.

On notice of certification, counsel reiterates many of the same arguments she proposed in her motion to reopen or reconsider. According to counsel, the applicant had no reason to assume that she would be required to submit a separate application to extend her nonimmigrant stay in H-4 status. Counsel also notes that there are humanitarian considerations that warrant an approval of the application.

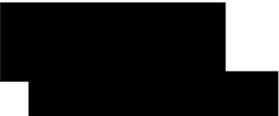
Section 245(a) of the Act states:

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 an 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.

Section 245(c) of the Act states:

[S]ubsection (a) shall not be applicable to . . . (2) subject to subsection (k), an alien . . . who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application



for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States

Section 245(k) of the Act states:

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 203(b) . . . may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and (c)(8), if--

(1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;

(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days--

(A) failed to maintain, continuously, a lawful status;

(B) engaged in unauthorized employment; or

(C) otherwise violated the terms and conditions of the alien's admission.

The regulation at 8 C.F.R. § 245.1(b) states, in pertinent part:

Restricted aliens. The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act, unless the alien establishes eligibility under the provisions of section 245(i) of the Act and § 245.10, is not included in the categories of aliens prohibited from applying for adjustment of status listed in § 245.1(c), is eligible to receive an immigrant visa, and has an immigrant visa immediately available at the time of filing the application for adjustment of status:

* * *

(6) Any alien who files an application for adjustment of status on or after November 6, 1986, who has failed (other than through no fault of his or her own or for technical reasons) to maintain continuously a lawful status since entry into the United States

The regulation at 8 C.F.R. § 245.1 states, in pertinent part:

(d) Definitions ---

* * *

(2) No fault of the applicant or for technical reasons. The parenthetical phrase “other than through no fault of his or her own or for technical reasons” shall be limited to:

(i) Inaction of another individual or organization designated by regulation to act on behalf of an individual and over whose actions the individual has no control, if the inaction is acknowledged by that individual or organization

The regulation at 8 C.F.R. § 245.1(d)(2)(i) requires that the individual or organization failing to take an action must be, by regulation, designated to act on the applicant’s behalf. An H-1B petitioner, such as the applicant’s spouse’s employer, and by extension its counsel, is designed by the regulations governing H-1B petitions at 8 C.F.R. § 214.2(h) to act on behalf of an H-1B beneficiary; however, such authorization does not extend to an H-1B beneficiary’s spouse, such as the applicant. The spouse of an H-1B beneficiary does not obtain H-4 status through the submission of a petition by the H-1B petitioner. Rather, the spouse obtains evidence of H-4 status either at the U.S. consulate overseas or through the submission of a Form I-539 to U.S. Citizenship and Immigration Services (USCIS) by showing proof of his or her marriage to the H-1B beneficiary. We also note the regulations at 8 C.F.R. § 214.1(c)(1) and (2), which state that an employer seeking to extend the services of an H-1B beneficiary petitions for an extension through the submission of a Form I-129 with USCIS, while an H-4 dependent seeks an extension of stay through the submission of a Form I-539. These regulations also evince that an H-1B petitioner is not designated to act on behalf of an H-4 dependent.

As neither the applicant’s spouse’s employer nor its counsel is designated by regulation to act on the applicant’s behalf, she cannot establish that her failure to maintain a lawful status from May 15, 2005, the date on which her H-4 nonimmigrant status expired, was due to her husband’s employer’s or its counsel’s inaction. Therefore, the applicant is not eligible to adjust her status pursuant to sections 245(a) or (k) of the Act, and the director’s denial of the Form I-485 was, therefore, the proper result.

As in all proceedings, the applicant bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director’s decision to deny the application is affirmed.