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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **SEP 07 2010**
SRC 09 029 52368

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 certified the decision 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 his 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 denied the application because the applicant failed to maintain lawful nonimmigrant status for 185 days and, therefore, was not eligible to adjust his status under section 245(k) of the Act. The director also noted the applicant's ineligibility for adjustment of status under sections 245(a) and 245(i) of the Act. The director certified his decision to the AAO for review, and notified the applicant that he had 30 days to supplement the record with any additional evidence that he wished the AAO to consider. On notice of certification, counsel submits a brief and copies of pages from U.S. Citizenship and Immigration Services' (USCIS) Adjudicator's Field Manual (AFM).

A review of the record reveals the following facts and procedural history. The applicant initially entered the United States on October 24, 2003 in E-2 nonimmigrant status, and was authorized remain in that status until October 24, 2007. On December 19, 2007, the applicant submitted a Form I-539, Application to Change Status, seeking to change his status to a B-2 nonimmigrant visitor. On June 27, 2008, USCIS approved the applicant's change of status to a B-2 nonimmigrant, with authorization to remain until June 28, 2008 (one day). On November 7, 2008, the applicant applied for a National Interest Waiver through the submission of a Form I-140, Petition for Alien Worker, and concurrently filed a Form I-485, Application to Register Permanent Residence or Adjust status. The Form I-140 was approved in July 2009.

The director denied the Form I-485 on August 19, 2009 noting that the applicant was ineligible to adjust his status under sections 245(a), (i) or (k) of the Act. Regarding section 245(a) of the Act, the director stated that the applicant was ineligible for adjustment under this section of law because he failed to maintain a continuous lawful status from the time of his entry into the United States until he filed his application to adjust status. The director also noted that the applicant was ineligible to adjust his status under section 245(i) of the Act because he was not the beneficiary of a petition that had been filed prior to April 30, 2001. Regarding section 245(k) of the Act, the director stated that the applicant was out of lawful status during the following periods of time:

- From October 25, 2007 until December 18, 2007; and
- From June 28, 2008 until November 7, 2008.

The director noted that the total number of days that the applicant was out of status amounted to 185 days, which is five days more than permitted under section 245(k) of the Act.

On notice of certification, counsel states that the director made a error in law when he denied the petition. Counsel points to the USCIS AFM to support his assertion that the applicant was in lawful status during the October 25, 2007 through December 18, 2007 time period. Counsel notes that section

40.9.2(b)(3)(D) of the USCIS AFM states that, if a request for a change of status is approved, an alien shall be granted a new period of authorized stay, retroactive to the date that the previous period of authorized stay expired. In this instance, counsel states that the October 25, 2007 through December 18, 2007 period of time was not a period of unlawful status because the applicant's change of status application had been approved. Counsel notes that, if this period of time is considered to be in a lawful status, the applicant would have only 131 days of unlawful status, which is less than the 180 days permitted by section 245(k) of the Act.

Counsel also contends that USCIS errors caused the applicant to accrue additional time out of status. According to counsel, the applicant received the notice approving his change of nonimmigrant classification sometime in mid July 2008, which was after the applicant's period of authorized stay had expired. Counsel also states that when the applicant received the approval notice and saw that it was valid for only one day, the applicant assumed it was a typographical error and further assumed that his stay expired on June 28, 2009, not June 28, 2008. Counsel argues that USCIS failed to provide the applicant with the implication of the approval notice and that he had no way of knowing he was out of status. Counsel states that once the applicant realized that he was not in lawful status, he immediately filed his I-140 petition for a National Interest Waiver.

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) . . . 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 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

(ii) A technical violation resulting from inaction of the Service (as for example, where an applicant establishes that he or she properly filed a timely request to maintain status and the Service has not yet acted on that request). . . .

(iii) A technical violation caused by the physical inability of the applicant to request an extension of nonimmigrant stay from the Service either in person or by mail (as, for example, an individual who is hospitalized with an illness at the time nonimmigrant stay expires). The explanation of such a technical violation shall be accompanied by a letter explaining the circumstances from the hospital or attending physician.

* * *

Counsel’s reliance on the language at section 40.9.2(b)(3)(D) of the USCIS AFM is misplaced.¹ The mere filing of an application to change status does not place an alien into a valid and authorized nonimmigrant status. Evidence of the applicant’s period of authorized stay in B-2 status is contained on the Form I-94, Arrival and Departure Record, that is attached to the Form I-797A, Notice of Action. *See* 8 C.F.R. § 214.2(b)(1). This I-94 card authorized the applicant to remain in the United States in B-2 status from June 27, 2008 until June 28, 2008 only; it did not grant the applicant an authorized period of stay retroactive to October 25, 2007, the date that the applicant’s E-2 nonimmigrant status expired. We note 8 C.F.R. § 248.3(f), which provides that if an application to change status is granted, the applicant shall be “granted a new period of time to remain in the United States,” without specifying that the period of time shall be retroactive to the date of the expiration of the alien’s previous period of authorized stay.

¹ Section 40.9.2(b)(3)(D) of the USCIS AFM discusses the accrual of unlawful presence and the resulting inadmissibility under section 212(a)(9)(B) or section 212(a)(9)(C)(i)(1) of the Act. While unlawful presence and being in an unlawful immigration status are related concepts, the two terms are not synonymous.

More importantly, the regulation at 8 C.F.R. § 245.1(d)(2)(i) requires an applicant to establish that any period of time in an unlawful status was through no fault of the applicant or for technical reasons. Here, the applicant has not shown that the delay in filing his Form I-539 or Form I-485 was the result of another individual's or organization's inaction or for technical reasons. According to counsel, the applicant did not file his Form I-539 timely "in order to have time to consider his options to remain legally in the U.S." The applicant also did not immediately file his Form I-485 application because he misread the expiration date on the Form I-94 card. Neither of these reasons shows inaction on the part of an individual or entity over which the applicant had no control.

We also disagree with counsel's assertions that USCIS actions contributed to the applicant accruing additional days in an unlawful status. While the applicant claims that he received the Form I-797A, Notice of Action, after June 28, 2008, he admits to having misread the expiration date of his period of authorized stay, believing it to be June 28, 2009 instead of June 28, 2008. Accordingly, we find no error on the part of USCIS that contributed to the applicant's accruing additional time in an unlawful status.

The record reflects that the applicant had two periods when he did not maintain his lawful status: from October 25, 2007 until December 18, 2007; and from June 29, 2008 until November 7, 2008. Accordingly, the applicant may not adjust his status pursuant to section 245(k) of the Act because he failed to maintain, continuously, a lawful status for an aggregate period exceeding 180 days. The director's denial of the Form I-485 was, therefore, the proper result.²

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.

² As neither the applicant nor counsel argues that the applicant is eligible to adjust his status pursuant to section 245(a) or (i) of the Act, we shall affirm but not discuss, the director's findings that the applicant is also ineligible to adjust his status under these two sections of law.