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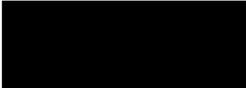
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

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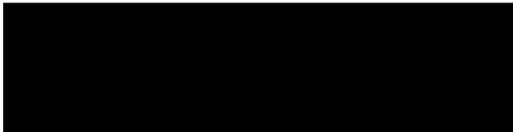
IN RE:

Applicant:



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. The application will be denied.

The applicant seeks to adjust his status to that of a lawful permanent resident pursuant to section 245 of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255. 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 his 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 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 additional evidence.

A review of the record reveals the following facts and procedural history. The applicant initially entered the United States on September 28, 2001 as a B-2 visitor for pleasure. The applicant subsequently changed his status to an H-1B nonimmigrant, valid from: January 4, 2002 until December 9, 2004; December 10, 2004 until December 9, 2007; and December 8, 2008 until December 7, 2009. The applicant filed his Form I-485 adjustment application on October 6, 2008. There is a gap in the applicant's H-1B nonimmigrant status from December 10, 2007 until December 7, 2008.<sup>1</sup>

The director initially denied the Form I-485 on May 18, 2009, noting that the applicant was ineligible to adjust his status under section 245(k) of the Act because he had not maintained a lawful status for more than 180 days. On motion, counsel stated that the applicant's failure to maintain lawful status was due to the ineffective assistance of the H-1B petitioner's prior counsel. In affirming his initial decision to deny the application, the director noted that no evidence had been submitted to indicate that the H-1B petitioner's prior counsel had acknowledged his inaction. The director further noted that the receipt number of the H-1B petition that counsel provided to establish that a timely H-1B extension request had been filed by prior counsel in December 2007 did not pertain to the H-1B petitioner or the applicant. The director noted that the H-1B petition that was approved on the applicant's behalf for the period of December 8, 2008 until December 7, 2009 was approved in error.

On notice of certification, counsel submits evidence relating to his ineffective assistance of counsel claim, which includes: a letter from the Departmental Disciplinary Committee of the Supreme Court of the State of New York; an answer from the H-1B petitioner's prior counsel answering the complaint against him; and current counsel's answer to the Supreme Court of the State of New York.

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<sup>1</sup> The applicant is the beneficiary of an I-140 petition for alien worker that was filed on October 6, 2008 and approved on January 13, 2009. The I-140 petitioner is the same company that filed the initial H-1B petition and the subsequent extension requests on the applicant's behalf.

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 . . . .

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 an organization failing to take an action must be, by regulation, designated to act on the applicant’s behalf. The beneficiary of an employment-based visa petition is not an affected party. 8 C.F.R. § 103.3(a)(1)(iii)(B). Therefore, counsel’s argument that the H-1B petitioner’s prior attorney was at fault for the applicant’s failure to maintain his lawful nonimmigrant status has no merit.

The director also noted in his decision that an error was committed in approving the H-1B petition to extend the applicant’s stay in H-1B status for the period of December 8, 2008 until December 7, 2009. The question of whether the applicant’s H-1B petition was approved in error is moot. As the applicant has failed to establish that his failure to maintain nonimmigrant status from December 2007 until December 2008 was through no fault as his own, he is ineligible to adjust his status under section 245(a) or 245(k) of the Act.

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. The application is denied.