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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

A1

Date: AUG 09 2011

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

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 APPLICANT:

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 \$630. 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, which he certified to the Administrative Appeals Office (AAO) for review. The AAO affirmed the director's decision to deny the application and the applicant filed a motion for the AAO to reopen or reconsider its prior decision. The AAO granted the motion and affirmed its prior decision. The matter is again before the AAO on a second motion to reopen or reconsider. The motion will be dismissed and the application will remain denied.¹

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. As the facts and procedural history were adequately addressed in our appellate decision, dated September 21, 2010, we shall repeat only certain facts as necessary here. 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.

In our September 21, 2010 decision, we noted that because the beneficiary of an employment-based visa petition is not an affected party pursuant to 8 C.F.R. § 103.3(a)(1)(iii)(B), the applicant could not establish that his employer's prior attorney was at fault for the applicant's failure to maintain his lawful nonimmigrant status.² In his first motion, counsel stated that a U.S. petitioner has been adversely affected by its inability to obtain H-1B status for a potential employee and that the applicant's employer filed complaints against its prior attorney, and submitted affidavits supporting the applicant's adjustment of status application. Counsel stated that even if the AAO's legal reasoning was correct according to a strict reading of the law, it was contrary to the spirit of the law. Counsel maintained that the applicant had done nothing wrong and that he is typical of the type of victim that the regulation at 8 C.F.R. § 245.1(d)(2) was intended to protect because a U.S. petitioner will never be an applicant for adjustment of status.

In our February 8, 2011 decision on the applicant's motion, we noted that representation before U.S. Citizenship and Immigration Services (USCIS) is governed by Title 8, Code of Federal Regulations, Part 292. We determined that the applicant's employer's former attorney represented the applicant's employer only; his representation did not extend to the applicant because the beneficiary of an employment-based visa petition is not an affected party. 8 C.F.R. § 103.3(a)(1)(iii)(B). We concluded that because the applicant could not demonstrate that his employer's attorney was designated by regulation to act on his behalf, he was unable to establish that his failure to maintain his nonimmigrant status was through no fault of his own.

¹ We note that since the filing of this second motion, the applicant has been assigned a new alien-registration number. Our prior decisions were issued under the alien-registration number.

² We also declared moot the question of whether an error was committed in approving the H-1B petition to extend the applicant's stay in H-1B status because the applicant did not establish that his failure to maintain nonimmigrant status from December 2007 until December 2008 was through no fault of his own.

On second motion, counsel submits a letter from the applicant's H-1B petitioner, stating how its business has been adversely affected because it cannot retain the applicant's services due to its former attorney's incompetence. Counsel also maintains that the Form G-28 submitted by prior counsel was also intended to cover representation of both the petitioner and the applicant, as dual representation was implied.

The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. The regulation at 8 C.F.R. § 103.5(a)(3) requires a motion to reconsider to state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy.

Here the petitioner's submissions do not meet the requirements of a motion to reopen or reconsider. The letter from the applicant's H-1B petitioner does not present new facts; it only contains assertions previously introduced into the record - that the petitioner has been negatively affected by its inability to use the applicant's expertise. Counsel's assertions that the Form G-28 authorized the petitioner's former attorney to represent the petitioner as well as the applicant are erroneous, and do not meet the requirements of a motion to reconsider. Counsel has not cited to any part of 8 C.F.R. § 292, or any law or USCIS policy to support his assertion that a Form G-28 signed by a petitioner also authorizes the same attorney to represent an H-1B beneficiary. As we have stated throughout these proceedings, the beneficiary of a visa petition is not an affected party. 8 C.F.R. § 103.3(a)(1)(iii)(B). Therefore, the applicant cannot claim that the inaction of the petitioner's former attorney caused his failure to maintain his H-1B nonimmigrant status.

In these proceedings, the applicant bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The applicant's submissions do not meet the requirements of a motion to reopen or reconsider, and the motion is dismissed pursuant to 8 C.F.R. § 103.5(a)(4) for failing to meet applicable requirements.

ORDER: The motion is dismissed. The AAO's prior decisions, dated September 21, 2010 and February 8, 2011, are affirmed. The application remains denied.