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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

FILE: [REDACTED] Office: TEXAS SERVICE CENTER

Date: FEB 08 2011

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:

[REDACTED]

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 has filed a motion for the AAO to reopen or reconsider its prior decision. The motion will be granted. The AAO's previous decision will be affirmed and the application will remain 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). As the facts and procedural history were adequately addressed in our previous decision, dated September 2, 2010, we shall repeat only certain facts as necessary here. 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 failed to maintain lawful status for more than 180 days. The director did not find persuasive the applicant's argument that she failed to maintain a lawful status through no fault of her own.

In our September 2, 2010 decision, we noted that 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. We found that as neither the applicant's spouse's employer nor its counsel was designated by regulation to act on the applicant's behalf, she could not 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 or its counsel's inaction.

On motion, current counsel states that the applicant's failure to maintain her nonimmigrant status was through no fault of her own because the attorney who was representing the applicant's spouse's employer was authorized by regulation to file an I-539 application on the applicant's behalf.<sup>1</sup> Counsel contends that the attorney who represented the employer of the applicant's spouse was also representing the applicant. Counsel submits an affidavit from the applicant's spouse's employer's attorney, who declares: "[I]t is my practice and the routine practice of my firm . . . to file I-539 applications for dependent spouses and children of the employees/employers whom I and the firm represent." Counsel states that the attorney who represented the applicant's spouse's employer has acknowledged her failure to file a Form I-539 extension application on the applicant's behalf and that there is no reason why the application would not have been approved had it been filed timely. Counsel also notes that there are humanitarian considerations for approving the application such as the applicant being the mother of two U.S. citizen children and the diagnosis of Kawasaki Disease of one of her children. As supporting evidence, the applicant submits a personal affidavit, an affidavit of the attorney who was representing her husband's employer with her husband's immigration matters, documents relating to the applicant's child's diagnosis of Kawasaki Disease, and approval notices of the applicant's spouse's H-1B petition extensions.

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<sup>1</sup> The applicant's current counsel is a member of the same firm as the attorney who represented the employer of the applicant's spouse.

The term *no fault of the applicant* is defined at 8 C.F.R. § 245.1(d)(2)(i), in pertinent part as: “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 . . . .”

Counsel’s contention that the attorney who was representing the applicant’s spouse’s employer was also authorized to represent the applicant has no merit. Representation before U.S. Citizenship and Immigration Services (USCIS) is governed by Title 8, Code of Federal Regulations, Part 292. The regulation at 8 C.F.R. § 292.4(a) requires the proper execution of a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, in order for an attorney’s appearance to be recognized by USCIS. While it may have been a standardized practice in the attorney’s firm to file I-539 extension applications for spouses and children when extending the status of H-1B principals, such a practice does not equate to being designated by regulation to act on behalf of an individual, as specified at 8 C.F.R. § 245.1(d)(2)(i). The applicant has not presented any evidence that she had retained the attorney who was representing her spouse’s employer to file a Form I-539 extension application on her behalf prior to the expiration of her H-4 status in 2005. The evidence in the record indicates that the applicant did not become aware of the lapse in her H-4 status until 2008 when she went to renew her passport, at which time the attorney of her spouse’s employer filed the Form I-539 extension application on her behalf and concurrently submitted a Form G-28 to authorize her representation of the applicant. The execution of a Form G-28 three years after the applicant’s H-4 status had elapsed is not evidence of the attorney’s representation of the applicant in 2005.

Ultimately, the alien bears the responsibility of complying with the terms and conditions of his or her nonimmigrant status while in the United States, including the requirement to timely file applications for extensions of nonimmigrant status. As the applicant cannot demonstrate that her spouse’s employer’s attorney was designated by regulation to act on her behalf, she cannot establish that her failure to maintain her nonimmigrant status was through no fault of her own. Accordingly, the applicant is not eligible to adjust her status to that of a lawful permanent resident.

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 AAO’s prior decision, dated September 2, 2010 is affirmed. The application remains denied.