

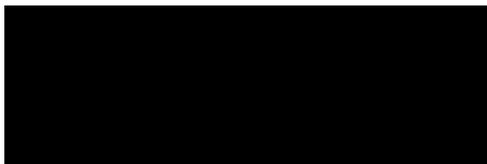
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



A1

FILE:



Office: TEXAS SERVICE CENTER

Date: FEB 08 2011

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 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 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 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 previous 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.¹

On motion, counsel states that a U.S. petitioner is 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 states that even if the AAO's legal reasoning is correct according to a strict reading of the law, it is contrary to the spirit of the law. Counsel maintains that the applicant has 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.

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"

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. The applicant's employer's former attorney represented the applicant's employer only; his representation did not extend to the applicant because, as noted in our prior decision, the beneficiary of an employment-based visa petition is not an affected

¹ 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.



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party. 8 C.F.R. § 103.3(a)(1)(iii)(B). As the applicant cannot demonstrate that his employer's attorney was designated by regulation to act on his behalf, he cannot establish that his failure to maintain his nonimmigrant status was through no fault of his own. Accordingly, the applicant is not eligible to adjust his 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 21, 2010, is affirmed. The application remains denied.