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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

PUBLIC COPY



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

17

[REDACTED]

Date: **MAY 12 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 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 two subsequently filed motions to reopen or reconsider, the last of 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 reconsider its prior decision. The motion will be granted. The AAO's previous decision will be affirmed and the application will remain denied.

As the facts and procedural history were adequately documented in our previous decision, we shall repeat only certain facts as necessary here. 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, and affirmed his determination when ruling on the applicant's subsequently filed motions, because the applicant did not establish that his failure to maintain his nonimmigrant status was through no fault of his own and he was, therefore, ineligible to adjust his status under section 245 of the Act.

In our December 6, 2010 decision, we noted that the record contained no evidence to establish that the applicant's brother was entitled to represent him pursuant to 8 C.F.R. § 292.1, and 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 brother or prior attorney were at fault for the applicant's failure to maintain his lawful nonimmigrant status.¹

On motion, counsel states that the reasoning in our prior decision is flawed because the applicant's brother, who was acting as his attorney-in-fact, met the definition of "reputable individual" at 8 C.F.R. § 292.1(a)(3) and that any advice the applicant obtained from his brother "carries the weight of authority in understanding the actions of the applicant." Counsel also states that the applicant consulted with an immigration attorney during the 2002 through 2007 years, who also failed to provide him with sound legal advice. Counsel asserts that the applicant fell out of status through no fault of his own due to the inaction of two individuals "designated by the common law and the regulations to act on his behalf and over whose actions he had no control and that inaction has been acknowledged by the individuals." Counsel also requests that the applicant be provided a personal interview so that he may appear with his brother, who had advised him in his immigration matters.

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

¹ We also noted that the director committed a procedural error when certifying the matter to us for review but found it to be a harmless error that was not prejudicial to the applicant.

individual's appearance to be recognized by USCIS pursuant to 8 C.F.R. § 292.1. Counsel states on appeal that the applicant's brother represented him as a "reputable individual" pursuant to 8 C.F.R. § 292.1(a)(3); however, the record does not contain a properly executed Form G-28 or the evidence cited at 8 C.F.R. § 292.1(a)(3)(i) – (iv) authorizing the brother's representation. Therefore, the applicant cannot now claim that his brother was authorized by regulation to act on his behalf in any capacity recognized under 8 C.F.R. § 292.1.

More importantly, as stated in our prior decision, the beneficiary of a visa petition is not an affected party. 8 C.F.R. § 103.3(a)(1)(iii)(B). Counsel states on motion that our prior decision neglected to reflect that the applicant had received unsound legal advice when he was seeking to adjust his status through an employment-based I-140 petition rather than through the alien relative petition that his brother filed on his behalf. Regardless of which underlying petition the applicant was pursuing, we reach the same conclusion; the applicant was not an affected party in either matter. The record contains a Form G-28 that the I-140 petitioner signed, which authorized [REDACTED] to represent it in the I-140 proceedings, and which listed the applicant as the beneficiary. Thus, only the I-140 petitioner was the affected party in that proceeding, not the applicant. On motion, counsel submits a Form G-28 that the applicant signed on December 9, 2002, authorizing Mr. [REDACTED] to represent him in connection with a labor certification petition (Form ETA-750). As the labor certification process falls under the jurisdiction of the Department of Labor, counsel's submission of this form is not evidence of Mr. [REDACTED] representation of the applicant in any matter before legacy Immigration and Naturalization Service pursuant to 8 C.F.R. § 292.4(a).

Ultimately, the applicant bears the responsibility of complying with the terms and conditions of his nonimmigrant status while in the United States, including the requirement to timely file applications for extensions of nonimmigrant status. The applicant cannot show that either his brother or Mr. [REDACTED] was designated by regulation to act on his behalf and he, therefore also 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.

Regarding counsel's request for a personal interview so that the applicant may appear with his brother and explain why the applicant is not at fault for failing to maintain lawful nonimmigrant status, we note the regulation at 8 C.F.R. § 103.3(b), which provides for oral argument before the AAO. In this instance, counsel identified no unique factors or issues of law to be resolved and the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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 December 6, 2010, is affirmed. The application remains denied.