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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

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[REDACTED]

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Date: **NOV 10 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:

[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 Texas Service Center Director (the director), denied the application to adjust status (Form I-485) and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision shall be affirmed. 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. The director has denied the application because the applicant failed to maintain lawful nonimmigrant status for more than 180 days in the aggregate and is therefore ineligible to adjust his status under section 245(k) of the Act. On notice of certification, counsel requests that the matter be returned to the director for issuance of a new decision, as the director failed to address two arguments regarding why the applicant's failure to maintain a valid nonimmigrant status should have been excused. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Counsel's request for the AAO to return the matter to the director is denied, as the AAO can adequately address all evidence in the record upon certification.

The issue in this proceeding is whether the applicant's failure to maintain a valid nonimmigrant status was his fault. The periods in question are: from June 2001 through September 2001 when the applicant was attending school in New York; and from December 23, 2005, the date that the applicant's H-1B nonimmigrant status expired, until July 31, 2007, the date that he filed the Form I-485.

According to the record, the applicant initially entered the United States in 1997 as a B-2 visitor and was granted a change to F-1 student status by the legacy Immigration and Naturalization Service (INS) in August 1998 to attend Technical Career Institutes (TCI) in New York, New York. TCI granted the applicant Optional Practical Training (OPT) from July 1999 until July 2000. The record contains a letter, dated October 29, 2002, from The City College of The City University of New York, which states that the applicant was registered at City College from the Spring semester of 2001 through the Spring semester of 2002 without interruption. The letter also indicates that the applicant transferred to [REDACTED] where he was a full-time student at the time the letter was written.

The record contains evidence that the applicant changed his F-1 student status to H-1B nonimmigrant status, valid from January 10, 2003 until December 22, 2005, to work for [REDACTED] New York. In an August 24, 2009 affidavit, the applicant claims that in January 2005 he personally retained an attorney, A-B,² to renew his H-1B status. According to the applicant, A-B sent documents to IEH for signature in January 2006 and neither he nor IEH heard anything else from A-B- or U.S. Citizenship and Immigration Services (USCIS) about his H-1B extension. The applicant stated that he was surprised to learn that he did not have continuous lawful presence in the United States because he had

¹ This matter originally came before the AAO in November 2010 at which time we withdrew the director's decision due to a procedural error. As the procedural history was adequately documented in our prior decision, we shall not repeat the same here.

² Name withheld to protect identity.

done everything required of him to maintain his lawful status, including working and going to school.

The comptroller of IEH also submitted a letter, dated December 21, 2009. In this letter, the comptroller states that he is in receipt of a December 20, 2005 rejection notice (Form I-797) from USCIS that he had not seen prior to the date of the letter. According to the comptroller, had he seen the Form I-797 when it was issued, his company would have acted on it immediately. The comptroller opines that any inaction regarding the applicant's H-1B extension filing was the fault of IEH for not diligently pursuing the extension with the attorney, A-B.

Counsel states that the comptroller's acknowledgement that IEH never oversaw A-B's H-1B extension filing on the applicant's behalf is evidence that the applicant's failure to maintain a lawful status was not his fault. Counsel asserts that the applicant had no control over either A-B- or IEH, and that despite changing his status from an F-1 student to an H-1B nonimmigrant, the applicant still maintained his student status by attending school. According to counsel, the applicant was in a nonimmigrant status as defined in section 101(a)(15) of the Act, as required by 8 C.F.R. § 245.1(d)(1)(i), because he was a student.

The evidence that the applicant has presented does not demonstrate that his failure to maintain a lawful immigration status was due to no fault of his own.

The director noted that the applicant had failed to maintain a valid nonimmigrant status during the June 2001 through September 2001 time period. Counsel does not address this time period on certification by providing any evidence or arguments to establish that the applicant had maintained a lawful immigration status. The evidence in the record indicates that the applicant had received permission from OTC to attend school, as evidenced by a Certificate of Eligibility for Nonimmigrant (F-1) Student Status-For Academic and Language Students (Form I-20) in the record. Although the letter from The City College of the City University of New York indicates that the applicant was enrolled in its Spring semester 2001, no Form I-20 was submitted to establish that the applicant's transfer was lawful. 8 C.F.R. § 214.2(f)(8)(ii). Accordingly, we affirm the director's determination that the applicant did not maintain a lawful immigration status from June 2001 through September 2001, and the applicant has not established that his failure to maintain such status was through no fault of his own.

The director also noted that the applicant had failed to maintain a valid nonimmigrant status during the December 23, 2005 through July 31, 2007 time period. In counsel's December 2009 brief submitted with the applicant's motion to reconsider the director's denial decision, counsel maintained that IEH had retained and paid A-B to file the applicant's H-1B extension petition. Counsel asserts that the applicant had no control over either A-B or IEH, and that their inaction caused the applicant's failure to maintain lawful immigration status.

According to the applicant's August 2009 affidavit: "In 2005, I went to a lawyer by the name of [A-B] I gave him a check for \$600.00 as payment for the fee." Thus, the applicant admits that he, not IEH, retained A-B to extend his H-1B nonimmigrant classification.

Additionally, representation before 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 Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) in order for an attorney's appearance to be recognized by USCIS. The record contains no evidence that IEH retained A-B to extend the applicant's H-1B nonimmigrant classification, such as a properly executed Form G-28. The comptroller's letter also does not acknowledge that IEH had retained A-B's services to extend the applicant's H-1B nonimmigrant stay. Accordingly, counsel's assertions regarding A-B- being retained by IEH to extend the applicant's H-1B nonimmigrant status are disingenuous.

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 . . ." Thus, 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.

Regardless of whether IEH or the applicant retained A-B's services to extend the applicant's nonimmigrant stay, any failure on A-B's part to properly submit a timely visa extension request cannot be excused by the regulation at 8 C.F.R. § 245.1(d)(2)(i). A-B was not designated by regulation to act on the applicant's behalf because the beneficiary of an employment-based visa petition is not an affected party. 8 C.F.R. § 103.3(a)(1)(iii)(B). As the applicant cannot demonstrate that A-B 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.

Counsel maintains that despite A-B's failure to extend the applicant's H-1B nonimmigrant classification, the applicant may adjust his status under 8 C.F.R. § 245.1(d)(1)(ii) because he was attending school throughout his stay in the United States and therefore maintained a nonimmigrant student status. Counsel's arguments are misplaced. The record indicates that in January 2003, the H-1B petition that was filed on the applicant's behalf was approved along with the applicant's request to change his status from an F-1 nonimmigrant student to an H-1B nonimmigrant worker. Although the applicant may have been attending school during his stay in the United States, he was not a nonimmigrant student as described at section 101(a)(15)(F) of the Act because he did not request a change of nonimmigrant classification pursuant to section 248 of the Act at any time after changing to H-1B nonimmigrant status in 2003.

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. The applicant is ineligible to adjust his status to that of a lawful permanent resident under section 245(k) of the Act

because he failed to maintain a lawful nonimmigrant status for more than 180 days in the aggregate. Accordingly, we affirm the director's decision to deny the application.

ORDER: The director's decision, dated September 6, 2011, is affirmed. The application remains denied.