

U.S. Department of Homeland Security  
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass. 3/F  
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Washington, D.C. 20536

IDENTIFYING CASE INFORMATION  
REPRODUCED FROM THE  
OFFICIAL RECORDS OF THE  
IMMIGRATION AND NATURALIZATION SERVICE

FILE: [REDACTED] Office: LOS ANGELES

Date:

OCT 29 2003

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Adjustment of Status under Section 245(a) of  
the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT:

PUBLIC COPY

INSTRUCTIONS: This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Interim District Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on certification. The interim district director's decision will be withdrawn.

The applicant initially entered the United States on a K-1 fiancée visa on October 25, 1990. She did not marry the petitioner, nor did she leave the United States. On July 8, 1992 she married [REDACTED]. On September 14, 1994 [REDACTED] became a United States (U.S.) citizen and on September 16, 1994 he submitted a Form I-130, Petition for Alien Relative, on her behalf. A Form I-485, Application for Adjustment of Status, was submitted on the same date. On February 3, 1995 the applicant submitted written notice to withdraw her Form I-485, indicating that she realized she was not eligible to adjust status as she had come to the United States on a K visa. On June 19, 1996 the applicant and her daughter left the United States with advance parole in order to apply for an immigrant visa in China. They returned on September 7, 1996, without the visa being issued, and were paroled into the United States, to be placed in exclusion proceedings. In September 1998 the applicant submitted an I-360 self-petition as the spouse of an abusive U.S. citizen. That petition was approved on May 10, 1999. On June 9, 1999 the applicant submitted an application to adjust status based on the approved I-360. It is that application that is the subject of this certification.

In her decision the interim district director determined that the applicant was ineligible to adjust status under section 245(a) of the Immigration and Nationality Act (the Act) because she failed to marry the petitioning U.S. citizen of her K-1 fiancée petition and was therefore barred from adjusting pursuant to section 245(d) of the Act and 8 C.F.R. § 245.1(c)(6)(i). The director also stated that the applicant was ineligible under 8 C.F.R. § 245.1(c) because she was in removal proceedings pursuant to section 235(b)(1) or section 240 of the Act.

On certification, counsel asserts that the applicant is no longer in K-1 status as she was paroled into the United States, and is not in removal proceedings as she was placed in exclusion proceedings prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>1</sup>

The AAO finds counsel's assertions persuasive. The two issues will be addressed separately below.

Section 245(a) of the Act, 8 U.S.C. § 1255, states in pertinent part:

<sup>1</sup> It is noted that numerous other procedural and historical issues were raised by both the interim district director and counsel, however, those issues will not be discussed in this decision as they are not germane to the issues at hand.

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or [sic] may be adjusted by the Attorney General [now, Secretary, Department of Homeland Security (Secretary)], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

(1) the alien makes an application for such adjustment,

(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and

(3) an immigrant visa is immediately available to him at the time his application is filed.

Section 245(d) of the Act states:

The Attorney General [Secretary] may not adjust, under subsection (a), the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 216. The Attorney General [Secretary] may not adjust, under subsection (a), the status of a nonimmigrant alien described in section 101(a)(15)(K) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K).

The regulation at 8 C.F.R. § 245.1(c) lists categories of aliens ineligible to apply for adjustment to lawful permanent resident status and states in pertinent part:

(6) Any alien admitted to the United States as a nonimmigrant defined in section 101(a)(15)(K) of the Act, unless:

(i) In the case of a K-1 fiance(e) under section 101(a)(15)(K)(i) of the Act or the K-2 child of a fiance(e) under section 101(a)(15)(K)(iii) of the Act, the alien is applying for adjustment of status based upon

the marriage of the K-1 fiance(e) which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 fiance(e) pursuant to section 214.2(k) of this chapter;

Section 101(a)(15)(K) describes an alien who is the fiancée or fiancé of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission or is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien.

On September 7, 1996 the applicant returned to the United States after an unsuccessful attempt to obtain an immigrant visa. Her travel to China was authorized by advance parole issued in June of 1996. The Form I-212, Authorization for Parole of an Alien into the United States, notes that the bearer is authorized "to enter the United States as an alien paroled pursuant to section 212(d)(5) of the Immigration and Nationality Act." An I-94 contained in the record confirms that the applicant was paroled into the United States for exclusion proceedings on September 23, 1996.

The applicant was paroled into the United States in a separate, authorized, entry. As such, she is no longer an alien described in section 101(a)(15)(K), the status she held upon her first entry in 1990. She, therefore, is not subject to the provisions of section 245(d) of the Act or 8 C.F.R. § 245.1(c)(6). As an alien paroled into the United States she is eligible to adjust status under section 245(a) of the Act.

The second issue noted by the interim district director in her denial was the fact that the applicant is in removal proceedings and is, therefore, ineligible to apply for adjustment of status pursuant to 8 C.F.R. § 245.1(c) which reads in pertinent part:

*Ineligible aliens.* The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act:

. . . .

8) Any arriving alien who is in removal proceedings pursuant to section 235(b)(1) or section 240 of the Act;.... (Added effective 4/1/97; 62 FR 10312)

On September 23, 1996 the applicant was placed in exclusion proceedings under section 236 of the former Act. IIRIRA went into effect on April 1, 1997. IIRIRA section 309 states the following with respect to aliens in proceedings during the

transition period:

Effective dates; transition

(a) IN GENERAL.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

. . .

(c) Transition for aliens in proceedings.-

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.-Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date-

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

The applicant was placed into exclusion proceedings prior to the enactment of IIRIRA. Section 309 clearly states that aliens who were already in proceedings were not subject to the new amendments. The current restriction found in 8 C.F.R. § 245.(1)(c)(8) was not found in either the former Act or in the regulations in effect at the time the applicant was placed in exclusion proceedings. Therefore, the director's finding that she is ineligible to adjust based on the fact that she is in removal proceedings is in error.

The AAO finds that the interim district director erred in both findings of ineligibility for adjustment of status. As such, the director's decision is withdrawn and the application may be approved.

In a separate decision, the interim district director also denied the application of [REDACTED] aka [REDACTED] daughter of the principal applicant. The daughter's denial was based on the denial of her mother's application. That reasoning is no longer valid as the AAO has determined that the mother's application is approvable. However, [REDACTED] is now over 21 years of age and is no longer eligible as a derivative beneficiary of her mother's I-360 petition. Her application must be denied on that ground. Nevertheless, once her mother attains permanent residence status, her mother may file an I-130 immigrant visa petition on her behalf and she may apply to adjust status through that process.

**ORDER:** The March 13, 2003 decision of the interim district director is withdrawn.