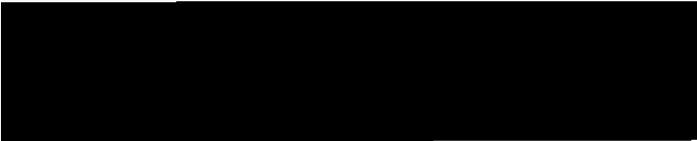




U.S. Citizenship
and Immigration
Services

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invasion of personal privacy

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 04 2008

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Adjustment of Status to that of Person Admitted for Permanent Residence under Section 245(a) of the Immigration and Nationality Act; 8 U.S.C. § 1255(a).

ON BEHALF OF APPLICANT:



PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the application for adjustment of status and then certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The applicant is a native and citizen of Colombia. She is married to a United States citizen who has filed an I-130 petition on her behalf. She is seeking Adjustment of Status to lawful permanent resident under section 245(a) of the Immigration and Nationality Act (INA, the Act); 8 U.S.C. § 1255(a).

The director determined that the applicant was ineligible for adjustment of status because she was admitted to the United States in K-2 status, derivative of her mother's K-1 admission as a fiancé of a United States citizen, and the applicant's application for adjustment of status was not based upon the marriage of her mother to the United States citizen upon whose fiancé petition the applicant's admission was based. *Decision of the Director*, July 6, 2006.

Counsel contends that because the applicant's mother married the United States citizen who petitioned for her within ninety days of admission to the United States, and because her mother obtained lawful permanent resident status based upon marriage to the same United States citizen, the applicant is eligible for adjustment of status.

The AAO will confine its review of this matter to the eligibility of the applicant to adjust status. As such, we do not endorse or affirm the comments in the director's decision concerning the bona fides of the marriage between the applicant's mother and the United States citizen petitioner, which are not relevant to the matter at hand. We also do not endorse or affirm the unsupported comments concerning Congressional intent found in the director's decision.

The entire record has been reviewed in reaching this decision.

The record indicates that applicant was admitted to the United States on January 24, 1998 as a K-2 non-immigrant, derivative of her mother's K-1 admission on the same date. On February 2, 1998, the applicant's mother married the United States citizen who filed the K-1 fiancé petition on her behalf. On March 15, 1998, the applicant's mother and the applicant submitted applications to adjust status. On October 28, 1998, the applications for adjustment of status were denied because the applicant's mother and the applicant did not appear for their interviews. The applicant's mother departed the United States before her scheduled interview, on July 1, 1998. The applicant has been present in the United States since her admission as a K-2 in January 1998. On November 7, 2003, the applicant's mother immigrated to the United States with an immigrant visa that was based upon her February 2, 1998 marriage to the United States citizen who had initially petitioned for her and her daughter as fiancé and derivative respectively. The applicant married her United States citizen husband on May 22, 2004. Subsequently, the applicant's husband filed an immediate relative petition on her behalf concurrently with her application for adjustment of status.

INA § 245(a), 8 U.S.C. 1255(a) provides, in pertinent part:

The status of an alien who was inspected and admitted ... into the United States ... may be adjusted by the Attorney General [Secretary of Homeland Security], 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.

INA § 101(a)(15)(K), 8 U.S.C. 1101(a)(15)(K) defines the “K” class of non-immigrants as including the minor child of 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.”

INA § 214(d), 8 U.S.C 1184(d) concerning the issuance of visa to the fiancée or fiancé of the citizen, reads in pertinent part:

In the event the marriage with the petitioner does not occur within three months after the admission of the said alien and minor children, they shall be required to depart the United States and upon failure to do so shall be removed in accordance with sections 240 and 241.

INA § 214(d) does not specifically address situations in which, as in the instant case, the marriage does occur in timely fashion but the fiancée does not adjust her status, leaving her minor child in the United States. The INA, as indicated above, does provide for the following:

1. The applicant [for adjustment of status to lawful permanent resident] must be eligible to receive an immigrant visa and be admissible to the United States.
2. The “K” non-immigrant class includes the *minor child* of the fiancé.
3. Authority has been delegated to the Attorney General (and through the Homeland Security Act of 2002 and the Department of Homeland Security Reorganization Plan of November 25, 2002, to the Secretary of Homeland Security) to adjust the status of eligible aliens *in his discretion*.

8 CFR § 245.1 states, in pertinent part:

(a) *General*. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the alien is eligible to receive an immigrant visa and an immigrant visa is immediately available at the time of filing of the application...

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

....

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

(i) In the case of ... the K-2 child of a fiancé(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 fiancé(e) which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 fiancé(e) pursuant to § 214.2(k) of this chapter....

The regulations, including the portion immediately above, are one example how the Secretary of Homeland Security exercises his discretionary authority as delegated by Congress over matters related to adjustment of status. The regulations make it clear that the applicant is ineligible for adjustment of status. The applicant was admitted to the United States in K-2 status. Her application for adjustment of status based upon her mother's marriage to the U.S. citizen who petitioned on her mother's behalf was denied. The applicant has been present in the United States and out of legal status since the denial of her application for adjustment of status. She is now married and over the age of 21, and therefore cannot be considered the minor child of her mother. (*See, INA § 101(b)(1), "The term 'child' means an unmarried person under twenty-one years of age...."*). Although the applicant's mother married the U.S. citizen who petitioned for both the mother and the applicant within ninety days, she did not adjust her status while in the United States, she later immigrated to the United States. The applicant did not depart the United States with her mother or return with her as an immigrant. She is not eligible to adjust her status today based upon the marriage of her mother to her mother's U.S. citizen fiancé because she no longer meets the requirements of such an adjustment as she is not a K-2, not a child, and her mother is not a fiancée seeking adjustment.

The applicant last was admitted to the United States as a K-2 child of fiancée. The regulations (8 C.F.R. § 245.1) make ineligible to apply for adjustment of status to lawful permanent resident, any alien "admitted to the United States as a non-immigrant defined in section 101(a)(15)(K) of the Act" unless the adjustment is based upon the marriage of the K-1 fiancée, in this case the applicant's mother, to her U.S. citizen petitioner. As indicated above the applicant cannot be lawfully adjusted at this time based upon her mother's marriage because she no longer is a child of a fiancée, as defined by the Act. 8 C.F.R. § 245.1 precludes any other avenue of adjustment for the applicant. Thus, the applicant is not eligible to adjust her status in the United States based upon her marriage to a United States citizen. The director appropriately denied the application to adjust status filed with her husband's I-130 petition.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that she is eligible for adjustment of status. The applicant has not met that burden.

ORDER: The director's decision is affirmed. The applicant is not eligible for adjustment of status in the United States.