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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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

A1

FILE: [REDACTED] Office: TEXAS SERVICE CENTER

Date: DEC 06 2010

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 has certified to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application remains 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. 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. On notice of certification, the director informed the applicant that he had 30 days to supplement the record with any additional evidence that he wished the AAO to consider. On notice, counsel submits a brief and copies of documents already included in the record.

Section 245(a) of the Act states:

The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, 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(c) of the Act states:

[S]ubsection (a) shall not be applicable to . . . (2) subject to subsection (k), an alien . . . who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States

The regulation at 8 C.F.R. § 245.1 states, in pertinent part:

(d) Definitions –

* * *

(2) No fault of the applicant or for technical reasons. The parenthetical phrase “other than through no fault of his or her own or for technical reasons” shall be limited to:

(i) 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

A review of the record reveals the following facts and procedural history. The applicant was admitted to the United States as a B-2 visitor for pleasure on January 13, 2001, with authorization to remain until July 12, 2001. On May 9, 2001, the applicant’s brother submitted a Form I-130, Petition for Alien Relative, on the applicant’s behalf that was approved on September 10, 2009. On February 1, 2007, [REDACTED] filed a Form I-140, Petition for Alien Worker, on the applicant’s behalf that was approved on December 7, 2007. The applicant filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, on July 7, 2007 seeking to adjust his status based upon the pending I-140 Petition.

In his initial November 12, 2009 denial decision, the director determined that the applicant was ineligible to adjust his status under sections 245(a) or (k) of the Act because he failed to maintain a lawful immigration status for a period of time that exceeded 180 days. The director noted that the applicant was the beneficiary of an I-130 Petition that had been filed prior to April 30, 2001; however, because the applicant was not physically present in the United States on December 21, 2000, he also could not adjust his status under section 245(i) of the Act.

Counsel filed the first motion on December 14, 2009, claiming that the applicant’s failure to maintain his nonimmigrant status was due to no fault of his own. Counsel submitted a letter from the applicant’s former attorney, who stated that the applicant “was apparently not advised that he needed to maintain status to apply for residency,” and former counsel concluded that that the applicant was not at fault for failing to maintain his nonimmigrant status. Counsel also submitted a letter from the applicant’s brother, who stated that he told the applicant that he did not need to change or extend his nonimmigrant status because a Form I-130 had been filed on his behalf. The applicant’s brother stated further that the applicant’s former attorney did not advise him that he was no longer maintaining his nonimmigrant status or needed to maintain such status. Counsel finally submitted a letter from the applicant, who stated that he relied on his brother and his former attorney for advice and that “any violation of status that occurred was totally due to the inaction of others and completely beyond my control.”

In his February 16, 2010 decision, the director dismissed the applicant’s motion pursuant to 8 C.F.R. § 103.5(a)(4) because it did not meet either the requirements of a motion to reopen or a motion to reconsider. Counsel filed a second motion on March 18, 2010, stating that the director should not have dismissed the previous motion and should have considered the merits of the arguments concerning the applicant’s claims that his failure to maintain status was due to no fault of his own.

In his June 29, 2010 decision on the applicant’s second motion, the director found unpersuasive the

applicant's claims that he was not at fault for failing to maintain a lawful nonimmigrant status. The director noted that the applicant's brother was not someone who was designated by regulation to act on the applicant's behalf simply because he filed a Form I-130 naming the applicant as a beneficiary. The director also was not persuaded by the claim that the applicant's former attorney was at fault for the applicant failing to maintain his nonimmigrant status because, according to the director, the former attorney was not an authorized representative for the applicant until July 2007, which was long after the expiration of the applicant's authorized stay in the United States.

Subsequent to the director's June 29, 2010 decision on the applicant's second motion, counsel requested that the director certify the matter to the AAO for review, which the director did on October 5, 2010. The director informed the applicant that he had 30 days to supplement the record before the AAO. On notice of certification, counsel states that the applicant relied upon his brother, who acted as the applicant's "attorney-in-fact" and counseled the applicant based upon his flawed understanding of the Legal Immigration and Family Equity (LIFE) Act. Counsel further asserts that the applicant's former counsel, whom he retained in 2002, also conveyed flawed information to the applicant because the former attorney believed that the applicant was physically present in the United States on December 21, 2000 and was, therefore, eligible to adjust his status pursuant to section 245(i) of the Act. Counsel contends that the applicant had no control over either his brother or his former attorney, two individuals whom the applicant trusted to provide sound legal advice to him. Counsel contends further that U.S. Citizenship and Immigration Services (USCIS) interprets the phrase "other than through no fault of his own" at 8 C.F.R. § 245.1(d)(2) too narrowly and in support of his assertions cites: *Mart v. Beebe*, No. Civ. 99-1391-JO, 2001, WL 13624 (D. Or. Jan. 5, 2001); *Alimoradi v. USCIS*, CV 08-02529 (C.D. Cal. Aug. 28, 2008); and *Wong v. Napolitano*, 2010 WL 916274 (D. Or. March 10, 2010).

Preliminarily, we will address a procedural error committed by the director when certifying this case. The director issued his decision on the applicant's second motion on June 29, 2010. In July 2010, counsel wrote a letter to the director requesting that the matter be certified to the AAO and provided his reasons why the matter at hand involved an unusual or complex legal issue. In response to counsel's letter, the director issued a decision to again deny the application, which he certified to us for review. However, the director's actions were in error. When counsel requested that the director certify the matter to us for review and the director intended to honor counsel's request, the director was required to first issue a Service motion to reopen pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(ii), and provide the applicant with a 30-day period to submit a brief or other evidence. Only after that thirty day period had expired or the applicant had waived the time period would the director have been able to render a decision on the Service motion, a decision which he then could have certified to the AAO for review.¹ Although the director committed a procedural error in not issuing a Service motion to reopen, we find the error to be harmless, as counsel provided a brief in support of his reopening request. We, therefore, will not withdraw the director's decision for this procedural error, as the applicant has been provided an opportunity through the certification process

¹ Only when an officer reconsiders a previously-issued decision and intends to take favorable action may he or she combine the motion and the favorable decision in one action. 8 C.F.R. § 103.5(a)(5)(i).

to once again supplement the record.

We do not concur with counsel that the appropriate course of action was to certify this matter to the AAO for review pursuant to 8 C.F.R. § 103.4(a)(1) because the matter involves an unusually complex or novel issue of law or fact.

The regulation at 8 C.F.R. § 245.1(d)(2)(i) requires that the individual or an organization failing to take an action must be, by regulation, designated to act on the applicant's behalf. Although counsel refers to the applicant's brother as the applicant's "attorney-in-fact," the record contains no evidence that the applicant's brother was entitled to represent him pursuant to 8 C.F.R. § 292.1. More importantly, however, the beneficiary of a family-based visa petition is not an affected party. 8 C.F.R. § 103.3(a)(1)(iii)(B). Thus, neither the applicant's brother nor his former counsel could have been considered someone designated by regulation to act on the applicant's behalf.

The decisions of the district courts in Oregon and California cited by counsel have no precedential value. In contrast to the precedential authority of the case law of a United States circuit court, USCIS is not bound to follow the published decision of a United States district court. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The applicant has failed to establish that his failure to maintain a lawful status was through no fault of his own. The applicant failed to maintain a lawful status for more than 180 days, which makes him ineligible to adjust his status pursuant to sections 245(a) or (k) of the Act, and he was not physically present in the United States on December 21, 2000, which makes him ineligible to adjust his status pursuant to section 245(i) of the Act. Thus, the director's decision to deny the application was correct.

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 director's decision to deny the application is affirmed. The application is denied.