U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-M-Y-

DATE: OCT. 23, 2015

CERTIFICATION OF TEXAS SERVICE CENTER DECISION

APPLICATION: I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS

The Applicant, a native and citizen of South Korea, seeks to adjust status to Lawful Permanent Resident. *See* Immigration and Nationality Act (the Act) § 245, 8 U.S.C. § 1255. The Director, Texas Service Center, denied the application. The Applicant filed a motion to reopen and reconsider the Director's decision. On motion, the Director determined that the I-485 should be approved and certified the decision to this office. The matter is now before us on certification. The decision of the Director on motion is affirmed, and the application is approved.

The record reflects that the Applicant entered the United States with a valid B-2 nonimmigrant visa on September 6, 2001, with permission to remain until March 5, 2002. The Applicant was subsequently granted a change of nonimmigrant status to H-4 on April 2, 2002, with a validity period of August 20, 2001 to August 19, 2004, and again, on February 1, 2003, with a validity period of September 13, 2002 to March 26, 2005. On or around August 22, 2005, an extension of stay request was submitted on behalf of the Applicant, which was ultimately denied on January 30, 2006. On March 29, 2006, the Applicant submitted a second extension of stay request, which was ultimately approved on May 27, 2006, with a validity period of March 28, 2006 until August 19, 2007. The Applicant again obtained extensions of stay covering the combined period of August 20, 2007 through August 20, 2015. The extensions of stay issued by USCIS referenced the same number as the Applicant's initial Form I-94, Departure Record, which was issued when she was admitted with a B-2 visa on September 6, 2001. The record establishes that on April 17, 2013, the Applicant submitted the Form I-485.

The record establishes that the principal H-1B nonimmigrant, the Applicant's father, maintained valid H-1B status at all times, as evidenced by the H-1B approval notices in the record. The Applicant's father was granted a change of nonimmigrant status to H-1B on August 10, 2001, with a validity period of August 20, 2001 to August 19, 2004. The Applicant's father again obtained extensions of stay covering the combined period of September 13, 2002 to August 20, 2015. The Applicant's father was granted lawful permanent resident status in the United States as of August 17, 2013.

In an initial decision issued on November 1, 2013, the Director determined that the Applicant had not established that she had maintained lawful nonimmigrant status from March 27, 2005 through March

27, 2006. The Director further found that the Applicant had not established that her failure to maintain lawful status continuously since entry into the United States was through no fault of her own or for technical reasons, as required under section 245.1(d)(2)(i) of Title 8 of the Code of Federal Regulations (C.F.R.). The Form I-485 was consequently denied.

On December 4, 2013, the Applicant filed a Motion to Reopen and Reconsider. In a decision on that motion issued on September 23, 2014, the Director determined that the Applicant does merit favorable discretion to adjust status pursuant to section 214(a) of the Act. The Director found that the Applicant meets the requirements as detailed in 8 C.F.R. § 245.1(d)(2)(i) because her status violation was due to the inaction of another. The Director thus found that the Applicant's I-485 should be approved. The decision was certified to us specifically to address one issue that the Director deemed novel:

1. Whether former counsel's law office qualifies as an "organization" for purposes of an "organization's" acknowledgement of inaction in causing a lapse in nonimmigrant status.

Based on a thorough review of the record, we find that the Applicant's adjustment application should be approved on the basis that the Applicant's apparent failure to maintain continuously a lawful status was based on a USCIS technical error, as detailed below. Consequently, it is unnecessary in this particular case to address the question raised by the Director on certification.

Section 245(a) of the Act grants permission to individuals to become lawful permanent residents of the United States by applying for adjustment of status. However, section 245(c) of the Act restricts individuals from applying for adjustment of status.

Section 245(c) of the Act states, in pertinent part:

> Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) shall not be applicable to . . . (2) subject to subsection (k), an alien . . . 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. . .

8 C.F.R. § 245.1(d), which relates to section 245(c)(2) of the Act, states in pertinent part:

> 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:
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> (ii) A technical violation resulting from inaction of the Service (as for example, where an applicant establishes that he or she properly filed a timely request to maintain status and the Service has not yet acted on that request). . . .

The record establishes that the Applicant was granted an H-4 extension of stay despite filing her H-4 extension application after her status had expired pursuant to 8 C.F.R. § 214.1(c), which, at the time the extension was granted, stated, in pertinent part:

> (4) *Timely filing and maintenance of status.* An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, ***with any extension granted from the date the previously authorized stay expired***, where it is demonstrated at the time of filing that:
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> > (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
> > (ii) The alien has not otherwise violated his or her nonimmigrant status;
> > (iii) The alien remains a bona fide nonimmigrant; and
> > (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.
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> (5) *Decision in Form I-129 or I-539 extension proceedings.* Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. There is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539.

(Emphasis added).

The record establishes that the Applicant did in fact file her H-4 extension application after her status had expired, as detailed above. However, pursuant to 8 C.F.R. § 214.1(c)(4), failure to file an extension of stay request before the period of previously authorized status expired may be excused in the discretion of the USCIS, and any subsequent extension should be granted from the date the previously authorized stay expired. In this case, the record establishes that USCIS, in its discretion, granted the Applicant's untimely extension of status request on May 27, 2006, and issued the Applicant an I-94 Card to that effect.[1] However, USCIS failed to give the appropriate retroactive effect to the extension by granting it from the date the previously authorized stay expired, thus introducing an apparent gap in the dates of the Applicant's authorized period of stay.

A period of unlawful status found to result only from a "technical reason" or through no fault of the applicant does not invoke the section 245(c)(2) bar to adjustment of status. We find that the dates on the I-94 Card that was issued to the Applicant by USCIS on May 27, 2006 were in error. Pursuant to 8 C.F.R. § 214.1(c)(4), the H-4 extension of stay should have been valid from the date the Applicant's previously authorized stay expired. USCIS should have issued an I-94 Card to the Applicant with a beginning validity date of March 27, 2005 rather than March 28, 2006. We thus find that the USCIS

[1] The Form I-797A that was issued to the Applicant on May 27, 2006 states as follows: "The above application for extension of stay is approved."

error with respect to the validity dates on the Applicant's H-4 extension of stay was a technical violation under 8 C.F.R. § 245.1, and thus the applicant's failure to maintain continuously a lawful status since entry into the United States was for a technical reason that was not her fault. Accordingly, the Applicant has established that she is eligible to adjust status.

ORDER: The decision of the Director on motion is affirmed, and the application is approved.

Cite as *Matter of J-M-Y-*, ID# 10824 (AAO Oct. 23, 2015)