U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-N-

DATE: JAN. 14, 2016

CERTIFICATION OF TEXAS SERVICE CENTER DECISION

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

The Applicant, a native and citizen of India, 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. A subsequent motion to reconsider was granted, and the Director again denied the application, pending certification. The matter is now before us on certification. The decision of the Director is affirmed, and the application is denied.

I. PERTINENT FACTS AND PROCEDURAL BACKGROUND

The Applicant's father was initially admitted to the United States on an H-1B visa in 1999, and the Applicant and other family members were admitted on H-4 visas in 2003. The Applicant's father's employer filed a Form I-140, Immigrant Petition for Alien Worker, to classify the Applicant's father under the employment-based, third-preference immigrant category, and the Applicant's father concurrently filed a Form I-485, Application to Register Permanent Residence or Adjust Status. The Applicant, his mother, and brother filed Form I-485 applications on June 17, 2003, as following-to-join beneficiaries. The Form I-140 was approved, and USCIS adjusted the Applicant's father, mother, and brother to lawful permanent resident status on November 2, 2004. However, the Applicant's Form I-485 remained pending, and in January 2005, visa availability in the Applicant's category retrogressed. The application was still pending due to visa unavailability when the Applicant's father naturalized on November 6, 2009.

The Director denied the Applicant's Form I-485 on June 29, 2012, determining that, as the child of a naturalized U.S. citizen, the Applicant could no longer derive status based on the approved Form I-140 and receive an immigrant visa under that category. The Applicant filed a motion to reconsider and on October 21, 2014, the Director withdrew the June 29, 2012 decision for the issuance of a new decision. On February 3, 2015, the Director issued a decision finding that the Applicant's ability to adjust status as a following-to-join dependent on the approved Form I-140 ended when the principal applicant, the Applicant's father, naturalized. The Director cited the Department of State Foreign Affairs Manual (FAM), specifically former 9 FAM 40.1 N7.2-4 9 (now 9 FAM-e 503.2-4(A)(f)) , in support of the decision. The Director denied the Form I-485 application and certified the decision to us for review.

On certification, the Applicant asserts that his family made numerous inquiries concerning his Form I-485 over the nine years it was pending. The Applicant states that although his father has now filed a Form I-130, Petition for Alien Relative, on his behalf, that petition has been assigned a priority date of July 30, 2012, in the first-preference category, a category that is presently current for petitions with a priority date of August 2007. The Applicant contends, however, that as he is still single, he effectively remains a year-old unmarried child under the provisions of the Child Status Protection Act (CSPA), and therefore he can adjust to lawful permanent resident status under section 203(d) of the Act. The Applicant argues that section 203(d) of the Act provides that he, as a following-to-join beneficiary, receives the same status as his father, and the U.S. Citizenship and Immigration Services Adjudicator's Field Manual (AFM) specifies in Chapter 23.5(k) that this entitlement exists "at any point after the principal's immigration." The Applicant asserts that nothing in the AFM dictates that a principal beneficiary's naturalization terminates the ability of a child to adjust as a derivative on a prior approved Form I-140.

The Applicant further contends that the FAM is not binding on USCIS, and that the section cited by the Director merely affirms USCIS policy that if an alien can be classified as an immediate relative, then he should not be given a visa number from the limited preference categories. The Applicant argues that such reasoning does not apply to his case, as his father naturalized after he reached the age of 21, and he could not therefore be classified as an immediate relative on the Form I-130 petition.

Finally, the Applicant argues that denial of his application is inequitable and contrary to the purposes of the immigration laws. The Applicant contends that he has resided lawfully and productively in the United States for over eleven years in anticipation of the same benefit afforded his family members, and though he has been granted Deferred Action for Childhood Arrivals (DACA), it does not afford him permanent status. The Applicant asserts that USCIS could have approved the adjustment application before the visa category retrogressed in 2004 or during a brief window of visa availability in 2007, when USCIS purportedly informed the Applicant that his application had been approved and a permanent resident card had been issued (though no card was received). The Applicant further asserts that USCIS officials advised him and his family that he remained a child under the CSPA but never informed them that his father's naturalization would adversely impact his status as a derivative beneficiary.

After careful review of the record and the Applicant's assertions, we affirm the Director's determination that due to the naturalization of the Applicant's father, an immigrant visa for the Applicant as a following-to-join beneficiary is no longer available based on the prior approved Form I-140 (filed by the Applicant's father's employer). Moreover, although the Applicant's child status may have been protected by the CSPA under the employment-based Form I-140 for which he was a following-to-join beneficiary, that protection does not transfer to the new family-based Form I-130 filed by his naturalized father on his behalf.

II. APPLICABLE LAW AND ANALYSIS

A. Adjustment of Status and Following-to-Join Children Under the Act

Section 245(a) of the Act provides:

> 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 as a VAWA self-petitioner 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 203(d) of the Act provides:

> A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

The Applicant asserts that, as a following-to-join beneficiary, section 203(d) of the Act accords him the same status received by his father, who adjusted to lawful permanent resident status on November 2, 2004, regardless of his father's subsequent naturalization. The Applicant also contends that he retains this following-to-join status despite his 22 years of age, as he is still considered a child for the purposes of his father's approved Form I-140 under the CSPA.

Section 245(a) of the Act indicates that two requirements for adjustment of status under section 245 are that an applicant is eligible to receive an immigrant visa and that an immigrant visa number is immediately available. Section 203(d) of the Act indicates that a following-to-join child is entitled to the same status as the primary beneficiary. *See Matter of Estrada*, 23 I&N Dec. 180, 187 (BIA 2013). As section 203 of the Act refers to the allocation of immigrant visas, section 203(d) pertains to the adjustment of status of accompanying or following-to-join beneficiaries to the same status as the primary beneficiary of the visa petition. The Applicant's father is no longer a lawful permanent resident, as he naturalized on November 6, 2009. In order for the Applicant to obtain the same status as his father, he would have to obtain citizenship. However, section 203(d) of the Act does not apply to naturalization and the Act does not otherwise allow for following-to-join on naturalization applications. The question, therefore, is whether the Applicant retains eligibility for the same status as that previously held by his father.

B. Allocation of Immigrant Visas and Following-to-Join Children under FAM

In applying for adjustment of status, the Applicant sought the allocation of an immigrant visa number from the DOS as an employment-based, third-preference immigrant. 9 FAM-e 503.2-4(A)(f) states that when a principal applicant becomes a naturalized citizen, the principal alien should file a relative petition for the family member who was previously a following-to-join beneficiary. As such, in accordance with the FAM, upon the Applicant's father's naturalization on November 6, 2009, the Applicant was no longer eligible for following-to-join benefits and the appropriate avenue for seeking adjustment of status became as a beneficiary of a family-based petition, the Form I-130 filed by Applicant's father on the Applicant's behalf on July 30, 2012.

The Applicant asserts that the FAM is not binding on USCIS. However, 8 C.F.R. § 245.2(a)(5)(ii) indicates that an application for adjustment of status for a preference applicant shall not be approved until an immigrant visa number has been allocated by the Department of State (DOS). This applies both to the Applicant's eligibility for adjustment of status as an employment-based, third-preference immigrant, and currently as the unmarried son of a U.S. citizen, as a first-preference, family-based immigrant. As the DOS has jurisdiction over the allocation of the Applicant's visa, and the approval of his Form I-485 is dependent upon this allocation, it is appropriate for us to look to the provisions of the FAM in assessing the Applicant's eligibility to adjust status. *See* section 203(e)(2), (3) of the Act. Because DOS would no longer allocate an immigrant visa number to the Applicant as an employment-based, third-preference immigrant, he is ineligible to adjust status based on the prior approved Form I-140.

C. The Child Status Protection Act

The Applicant's argument that he remains eligible pursuant to the CSPA does not accurately reflect the remedy provided by the provisions of that Act. The CSPA is meant to protect derivative children who age-out during the pendency of their applications for adjustment of status where the application remains pending due to administrative delays. If an applicant is protected by the CSPA, they will legally remain under 21, even after they turn 21 years of age, and remain eligible for the same visa petition priority date as their parent, if certain conditions are met. The formula for calculating the age of a child, and determining whether the child is covered by the CSPA, is found at section 203(h)(1) of the Act and generally provides that for the purposes of the CSPA, age is determined by the age of the derivative beneficiary on the date on which an immigrant visa number becomes available for their parent reduced by the number of days during which the applicable petition remains pending.

Even assuming the Applicant remained a child under the CSPA for purposes of the approved Form I-140, the naturalization of the Applicant's father rendered the applicant ineligible for allocation of a visa number in the employment-based, third-preference category. The applicant can establish eligibility for allocation of a visa number in the family-based, first-preference category. The remedy, if any were available to the Applicant, would not be to retain eligibility for allocation of visa number in the employment-based category, but rather to be converted to the new family-based category and retain the original visa petition priority date. However, this remedy is not available for

the transition from an employment-based to a family-based petition. And even for the family-based categories where it is permitted, it is not available in scenarios involving a change in the petitioner. For example, 8 C.F.R. § 204.2(a)(4) allows for the conversion of certain family-based petitions from one category to another, allowing a child to remain protected once his or her parent's status changes through naturalization, but this is limited to situations where the parent was the original petitioner. Here, the original petitioner was the Applicant's father's employer, and there is no provision under the CSPA that allows for the conversion of a petition in which the petitioner does not remain the same.

Additionally, within the family-based context, the Board of Immigration Appeals (the Board), in *Matter of Zamora-Molina*, 25 I&N Dec. 606, 610-611 (BIA 2011), determined that a second-preference family-based applicant who converted to the first-preference category upon the naturalization of his mother could not transfer CSPA child status from his prior category.[1] As the applicant in *Zamora-Molina* could not transfer CSPA child status, he was not eligible for classification as an immediate relative, as he was 22 years of age at the time of his mother's naturalization. *Id.* The record reflects that the Applicant was over 21 years of age on July 30, 2012, the date on which his father submitted a Form I-130 on his behalf. Further, the Supreme Court, in *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191 (2014), held that priority date retention for CSPA purposes applies only to aged-out derivative beneficiaries who qualify or could have qualified as principal beneficiaries upon automatic category conversion, without seeking a new sponsor/petitioner. The Applicant, as an unmarried child over 21 who does not qualify for automatic category conversion, can neither be categorized as an immediate relative of his naturalized father for Form I-130 purposes nor retain the priority date of his father's approved Form I-140. *See generally* USCIS Policy Memorandum PM-602-0118, *Updated Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Following the Supreme Court Ruling in Scialabba v. Cuellar de Osorio* (June 25, 2015), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/20150625_Post_Cuellar_de_Osorio_PM_Effective.pdf.

D. Processing of Form I-485

The Applicant asserts that denial of the Form I-485 is inequitable because USCIS failed to complete adjudication at two different times when a visa was available, but informed him in 2007 that the application had in fact been approved only to later inform him that it had not. The Applicant contends further that denial is inequitable because USCIS informed him and his father that the CSPA would prevent the Applicant from aging out on his original Form I-485 application based upon the approved Form I-140, but failed to notify them concerning the impact of the father's naturalization on the Form I-485 application.

[1] The Board noted that section 201(f) of the Act establishes rules for determining whether aliens are immediate relatives. *Id.* According to section 201(f) of the Act, the determination of whether an alien satisfies the child requirement for immediate relative status is based on the alien's: 1) age on filing of the immediate relative petition, 2) age on parent's naturalization date in the case of a petition initially filed for an alien child's classification as a family sponsored immigrant under section 203(a)(2)(A), or 3) age on marriage termination date.

The record reflects, and the Applicant acknowledges, that the Applicant's Form I-485 application was not adjudicated on the same date as his family members because USCIS was still awaiting the results from required background checks. The Applicant's background checks cleared as early as March 31, 2005, but visa availability in the Applicant's category had already retrogressed in January 2005. We acknowledge that USCIS, in response to a case status request, mistakenly advised the Applicant in 2007 that his application had been approved and a permanent resident card sent to him, when in fact the application had not been approved. Additionally, USCIS may have failed to notify the Applicant and his father concerning the full effect of the Applicant's father's naturalization on the Applicant's pending Form I-485 in response to their inquiries. Although we regret any inaccurate or incomplete information that USCIS may have provided to the Applicant or his father, we lack authority to provide equitable relief in this proceeding and grant the benefit sought notwithstanding the Applicant's ineligibility.

III. CONCLUSION

The Applicant is no longer eligible for adjustment of status under the Form I-140 for which he was previously a following-to-join beneficiary. The Applicant is now the beneficiary of a Form I-130 filed by his U.S. citizen father on his behalf; however, an immigrant visa is not immediately available to him for that petition. Therefore, the Applicant remains ineligible for adjustment of status at this time.

In application proceedings, it is the Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The decision of the Director is affirmed, and the application is denied.

Cite as *Matter of J-N-*, ID# 13305 (AAO Jan. 14, 2016)