



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF MATTER OF S-S-S-

DATE: JUNE 21, 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 that of a lawful permanent resident as the spouse or child of a principal adjustment applicant who is the beneficiary of an approved employment-based immigrant petition. *See* Immigration and Nationality Act (the Act) section 245, 8 U.S.C. § 1255. Under section 245 of the Act, a foreign national may apply to change status from nonimmigrant (or parolee) to immigrant status if a visa is immediately available, the foreign national has been inspected and admitted or paroled into the United States, and he or she is able to meet all of the required qualifications for permanent residence, including a favorable exercise of discretion.

The Director, Texas Service Center, denied the application. The Director determined that as the child of a naturalized U.S. citizen, the Applicant could no longer derive status as the child of a principal applicant for adjustment of status. The Applicant filed a Form I-290B, Notice of Appeal or Motion (motion to reopen and a motion to reconsider). The motion was dismissed as untimely. The Director subsequently reopened the decision *sua sponte*, withdrew the initial decision, and denied the application, pending certification. The Director found that the Applicant's ability to adjust status as a following-to-join dependent on the approved Form I-140, Immigrant Petition for Alien Worker, ended when the principal applicant, the Applicant's father, naturalized. The Director cited the Department of State (DOS) Foreign Affairs Manual (FAM), specifically former 9 FAM 40.1 N7.2-4 9 (now 9 FAM- 503.2-4(A)(f)) , in support of the decision.

The matter is now before us on certification. On certification, the Applicant states that she is eligible for adjustment of status under section 245 of the Act to that of lawful permanent resident as the derivative child of the principal applicant, her father, pursuant to section 203(d) of the Act. The Applicant states that she remains eligible for adjustment of status regardless of her father's naturalization as the "parent-child" relationship was established prior to the naturalization. The Applicant further states that the FAM, cited by the Director in the denial, is merely interpretive guidance and does not carry the force and effect of law.

We will affirm the initial decision of the Director, Texas Service Center, dated April 28, 2015, and deny the application.

I. LAW

The Applicant seeks to adjust status under section 245(a) of the Act, which 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 [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.

Furthermore, 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.

II. ANALYSIS

The Applicant asserts that she is still eligible for adjustment of status under section 203(d) of the Act, based upon the child/parent familial relationship that continues to exist between herself and her father. The Applicant contends that even though her father is no longer a lawful permanent resident, this change in status does not affect their child/parent relationship, and she is still a child in accordance with the Child Status Protection Act (CSPA). The Applicant further contends that the FAM is not binding on USCIS, and that though the FAM states that a derivative immigrant visa applicant must immigrate prior to the principal applicant's naturalization, it is silent on whether a derivative Form I-485 applicant must effectuate adjustment of status prior to the principal applicant's naturalization. The Applicant asserts that the FAM is interpretative and non-binding guidance and cannot be relied upon by USCIS because it substantially alters her rights and interests under the Act, in violation of the Administrative Procedure Act. Additionally, the Applicant states that she reasonably and detrimentally relied on advice from prior counsel and USCIS that her father's naturalization would not affect her case.

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

The Applicant's father's employer filed a Form I-140 to classify the Applicant's father under the employment-based, third-preference immigrant category. The Form I-140 was approved on April 6, 2004, and on June 16, 2004, the Applicant's father filed a Form I-485, Application to Register Permanent Residence or Adjust Status. The Applicant filed a Form I-485 application on the same

date as a following-to-join beneficiary. USCIS adjusted the Applicant's father to lawful permanent resident status on August 14, 2007. However, the Applicant's Form I-485 remained pending, her immigrant visa category retrogressed in August 2007, and her immigrant visa category did not become current again until after the Applicant's father naturalized to become a U.S. citizen on August 21, 2012.

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. Even though the Applicant maintains a familial relationship with her father, her father is no longer a lawful permanent resident, as he naturalized on August 21, 2012.

In order for the Applicant to obtain the same status as her father, she 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 her father, or in other words is a visa still available to her pursuant to the FAM or does the CSPA allow for her adjustment. Both of those questions are addressed below, with the result being that a visa is not available to the Applicant at this time and she is no longer protected by the CSPA.

B. Allocation of Immigrant Visas and Following-to-Join Children in the 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 503.2-4(A)(f) states that when a principal beneficiary becomes a naturalized citizen, the naturalized citizen 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 August 21, 2012, 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 Applicant's father asserts that he was advised that he could not file a Form I-130 on behalf of his daughter, currently 26 years of age. However, though the Applicant would not be categorized as an immediate relative due to her age, she is still eligible for Form I-130 beneficiary status as an unmarried child over 21. The record does not reflect that the Applicant's father has filed a Form I-130 on the Applicant's behalf, as recommended by the FAM.

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 DOS. This would apply to both to the Applicant's eligibility for adjustment of status as an employment-based, third-preference immigrant,

and as the unmarried daughter 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 her 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 the DOS would no longer allocate an immigrant visa number to the Applicant as an employment-based, third-preference immigrant, she is ineligible to adjust status based on the prior approved Form I-140.

The Applicant asserts that the FAM merely guides, but does not govern, and any mandatory language, such as that contained within the former FAM 40.1 N7.2-4 9 (now 9 FAM- 503.2-4(A)(f)), stating that a following-to-join derivative must immigrate to the United States prior to any naturalization as a U.S. citizen, substantially alters the Applicant's rights and interests under the Act. As such, the Applicant contends that the creation of the mandatory language contained in the FAM did not comply with the procedures of the Administrative Procedures Act and cannot be adopted by USCIS. It is, however, noted that current 9 FAM 503.2-4(A)(f) addresses following-to-join beneficiaries upon naturalization of a primary applicant, and does not contain similar mandatory language. Specifically, 9 FAM 503.2-4(A)(f) states that upon the naturalization of principal alien, the principal alien should file a relative petition for the following-to-join family member. Further, as provided above, the plain language of section 203(d) of the Act is sufficient to determine that the Applicant is not eligible to adjust status to lawful permanent resident status based upon her father's approved Form I-140, as her father is no longer a lawful permanent resident.

C. The Child Status Protection Act

The Applicant's argument that she remains eligible for adjustment of status 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, however, 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.* There is no indication that a Form I-130 has been filed on the Applicant's 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 her 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

Finally, the Applicant contends that her father spoke with an immigration attorney who stated that she did not believe his naturalization would impact his derivatives' Form I-485 adjudications, but that he should check with USCIS for affirmation. The Applicant's father asserts that he attended an appointment with an immigration officer and was erroneously advised that his naturalization would not impact his spouse's and daughter's ability to adjust status to that of a permanent resident. The Applicant's father further asserts that he was advised by immigration attorneys that he could not file a Form I-130, Petition for Alien Relative, on behalf of his daughter, as is over 21 years of age.

^[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 Applicant asserts that her father was given erroneous information that his naturalization would not impact his derivatives' pending Form I-485 applications by an immigration attorney and USCIS. However, although we regret any inaccurate or incomplete information or misunderstandings that may have occurred in the Applicant's father's oral communication with USCIS, we lack authority to provide equitable relief in this proceeding and grant the benefit sought notwithstanding the Applicant's ineligibility. The Applicant is no longer eligible for adjustment of status under the Form I-140 for which she was previously a following-to-join beneficiary. Therefore, the Applicant remains ineligible for adjustment of status at this time. As the Applicant has not demonstrated eligibility under Section 245 of the Act, we need not consider whether the Applicant warrants adjustment of status in the exercise of discretion.

III. CONCLUSION

The Applicant is not eligible to adjust her status to that of lawful permanent resident under section 245 of the Act as a visa is no longer available to her as a following-to-join child after the naturalization of her father, the principal beneficiary on the visa petition under which she seeks to adjust her status. The Applicant has the burden of proving eligibility for adjustment of status. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. The decision of the Director is affirmed, and the application is denied.

ORDER: The initial decision of the Director, Texas Service Center, dated April 28, 2015, is affirmed, and the application is denied.

Cite as *Matter of Matter of S-S-S-*, ID# [14344] (AAO June 21, 2016)