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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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Date:

**FEB 02 2012**

Office: TAMPA, FLORIDA

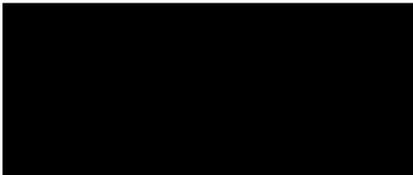
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IN RE:

Applicant: 

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:



**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 District Director, Tampa, Florida, denied the application to register permanent residence or adjust status (Form I-485) and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed and the application will remain denied.

The applicant seeks to adjust her status to that of a lawful permanent resident pursuant to section 245(a) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1255.

*Applicable Law*

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(d) of the Act states, in pertinent part:

The [Secretary of Homeland Security or] Attorney General may not adjust . . . the status of a nonimmigrant alien described in section 101(a)(15)(K) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage of the nonimmigrant . . . to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K).

The regulation at 8 C.F.R. § 245.1(c)(6) prohibits the ability to adjust status in the United States to:

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

- (i) In the case of a K-1 fiancé(e) under section 101 (a)(15)(K)(i) 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 fiancée(e)....

Regarding the parole of aliens into the United States, section 212(d)(5)(A) of the Act states:

The [Secretary of Homeland Security] may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the [Secretary of Homeland Security], have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

#### *Factual and Procedural History*

The applicant is a native and citizen of Colombia, who initially entered the United States in October 2004 in K-1 status based upon an approved alien fiancée petition (Form I-129F) filed on her behalf by her first husband, J-E-S.<sup>1</sup> The applicant and J-E-S- were married within 90 days of her entry, and the applicant filed her first application to adjust status (Form I-485) shortly thereafter. The applicant was subsequently issued an advance parole document (Form I-512) based upon her pending Form I-485. The applicant left the United States for a trip to Columbia during which time J-E-S- received an annulment of their marriage.<sup>2</sup> Upon the applicant's return on September 29, 2005, she presented the Form I-512 to the inspecting officer at the U.S. port-of-entry, at which time she was paroled into the United States. On or about August 29, 2006, the applicant was subsequently served with a Notice to Appear (NTA), placing her into removal proceedings before the Dallas, Texas Immigration Court.

In January 2007, the applicant married her second husband, P-W-<sup>3</sup>, who filed an alien relative petition (Form I-130) on her behalf that was ultimately approved. Removal proceedings against the applicant were terminated by the Dallas, Texas Immigration Court on June 12, 2009. The applicant filed her second Form I-485, which is the subject of this certification, in December 2009. She is seeking to adjust her status based upon her marriage to P-W-. The director denied the application, finding that section 245(d) of the Act precluded the applicant from adjusting her status based upon a marriage that was not to the K-1 fiancé petitioner. As required by the regulation at 8 C.F.R. § 103.4(a)(2), the director issued to the applicant a Notice of Certification (Form I-290C) informing her that she was certifying her denial decision to the AAO for review and that she had 30 days to supplement the record. On notice of certification, counsel submits a brief.

#### *Analysis*

The director determined that section 245(d) precluded the approval of her second Form I-485 because the applicant was not adjusting her status based upon her first marriage to J-E-S-, the spouse who had submitted the fiancée petition on her behalf. The director noted that utilizing an

<sup>1</sup> Name withheld to protect the individual's identity.

<sup>2</sup> District Court, Tarrant County, Texas, Case No. [REDACTED] dated August 29, 2005.

<sup>3</sup> Name withheld to protect the individual's identity.

advance parole document to enter the United States “does not erase the bar imposed by INA Section 245(d).”

In response to the director’s notice of certification, counsel maintains that the applicant’s prior status as a K-1 nonimmigrant has no relevance to the instant application because, subsequent to her entry in K-1 nonimmigrant status, she left the United States and was paroled upon her return making her an arriving alien when her parole status terminated. Counsel asserts that had Congress intended to apply a bar to any alien who held K-1 nonimmigrant status in the past, section 245(d) of the Act would have been worded accordingly. Counsel maintains further that an alien’s last entry into the United States is determinative of eligibility to adjust status and that since the applicant’s last entry was pursuant to parole, she can adjust her status under section 245(a) of the Act. *Ibragimov v. Gonzalez*, 476 F.3d 125 (2d Cir. 2007).

There is no dispute that the issuance of an NTA to the applicant in August 2006 terminated her parole and she became an applicant for admission into the United States, or an arriving alien.<sup>4</sup> 212(d)(5)(A) of the Act. There is also no dispute that the applicant is seeking to adjust her status to someone other than the K-1 petitioner. Thus, the question to be resolved is whether the applicant, who was paroled into the United States after her initial admission as a K-1 fiancée, remains subject to the bar to adjustment under section 245(d) of the Act. We find that she is subject to the bar and, therefore, ineligible to adjust her status under section 245(a) of the Act based upon her marriage to P-W-.

The regulation at 8 C.F.R. § 245.1(c) defines aliens who are ineligible to apply for adjustment of status. Specifically, the regulation at 8 C.F.R. § 245.1(c)(6) prohibits “any alien admitted to the United States as a nonimmigrant defined in section 101(a)(15)(K) of the Act” from adjusting status unless such adjustment is based upon the marriage to the K-1 petitioner that was contracted within 90 days of the applicant’s entry into the United States. Parole is not an admission into the United States. Section 101(a)(13)(B) of the Act, 8 U.S.C. § 1101(a)(13)(B). Despite her parole into the United States the applicant remains an alien described at 8 C.F.R. § 245.1(c)(6) because she is “any alien admitted . . . as a nonimmigrant defined in section 101(a)(15)(K) of the Act.” Her use of an advance parole document to depart and reenter the United States was not an admission and it did not relieve her of ineligibility under Section 245(d) of the Act.

Aliens who apply for and receive K-1 nonimmigrant visas are subjected to a number of strictures that Congress carefully designed for the purpose of avoiding marriage fraud. *Birdsong v. Holder*, 641 F.3d 957 (9<sup>th</sup> Cir. 2011). *See also Kalal v. Gonzales*, 402 F.3d 948 (9<sup>th</sup> Cir. 2005); *Markovski v. Gonzales*, 486 F.3d 108 (4<sup>th</sup> Cir. 2007). An advance parole document is not intended to be used as a means to circumvent the strict and precise restrictions placed on K-1 visa entrants. Counsel’s citation to *Ibragimov v. Gonzalez, Supra*, has no bearing on our decision, as it does not involve an

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<sup>4</sup> The regulation at 8 C.F.R. § 1.1(q) defines the term *arriving alien*, in pertinent part, as: an applicant for admission coming or attempting to come into the United States at a port-of-entry . . . .

alien who was initially admitted to the United States as a K-1 nonimmigrant and sought to adjust status based upon a marriage to someone other than the K-1 petitioner.

*Conclusion*

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In these proceedings, the petitioner bears the burden of proof to establish her eligibility for the benefit she is seeking. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369 BIA 2010). Here, that burden has not been met.

**ORDER:** The director's decision is affirmed. The application remains denied.