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U.S. Citizenship
and Immigration
Services

L2



FILE: Office: WASHINGTON DISTRICT OFFICE Date: OCT 24 2006

IN RE: Applicant: 

APPLICATION: Application for Adjustment of Status to that of Person Admitted for Permanent Residence under Section 245(a) of the Immigration and Nationality Act; 8 U.S.C. § 1255(a).

ON BEHALF OF APPLICANT:



PHOTOCOPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Washington District Office, denied the application for adjustment of status and then certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the district director will be affirmed.

The applicant is a native and citizen of the United Kingdom. His mother adjusted her status to permanent resident based on her K-1 status and marriage to a U.S. citizen. The applicant seeks to adjust his status to permanent resident under section 245(a) of the Immigration and Nationality Act (INA, the Act); 8 U.S.C. § 1255(a), based on his K-2 status as a derivative of his mother.

The applicant's mother entered the United States in K-1 status as the fiancée of a U.S. citizen, [REDACTED]. She married [REDACTED] on July 26, 2002. The applicant obtained a K-2 visa on April 23, 2003, and entered the United States in K-2 status on April 24, 2003. The applicant's mother adjusted her status to permanent resident on May 7, 2003. Subsequently, on May 23, 2003, the applicant filed the present Form I-485 application to adjust his status to permanent resident based on his K-2 status. The applicant reached 21 years of age on July 29, 2003, approximately one month after he filed his Form I-485 application. On August 16, 2004, the applicant's mother filed a Form I-130, Petition for Alien Relative, on behalf of the applicant. Citizenship and Immigration Services (CIS) denied the present Form I-485 application on February 2, 2006. The applicant filed two motions to reconsider the denial, on March 2, 2006 and April 14, 2006.¹

The district director denied the motion and certified her decision to the AAO. The district director noted that, by filing his Form I-485 application, the applicant was presenting himself for admission as the minor child of the fiancée of a U.S. citizen. However, as of that date, May 23, 2003, the applicant's mother had already married and adjusted her status to permanent resident. Thus, the district director concluded that the applicant was no longer eligible to adjust his status pursuant to his K-2 status.

The district director further observed that the applicant had aged out of eligibility to adjust his status as the minor child of his mother, as he reached age 21 prior to the adjudication of the present application. The district director noted that the provisions of the Child Status Protection Act (CSPA), Public Law 107-208, 116 Stat. 927, did not protect the applicant from aging out of eligibility, as a Form I-130 petition was not filed on his behalf until August 16, 2004, when he had reached age 22.

The district director explained that section 216 of the Act is not relevant to the present matter, as it "pertains to those who have already been admitted as permanent residents on a conditional basis, not those who are applying to adjust their status to that of permanent resident." *Decision of the District Director* at 3. The district director further noted that section 245(d) of the Act does not support the applicant's eligibility in the instant case, as, regarding those in K status, it merely "instructs [CIS] to only adjust K-1's and K-2's to a permanent resident on a conditional basis." *Id.*

Upon review, the AAO agrees with the district director that the applicant is not eligible to adjust his status to permanent resident pursuant to K-2 status. However, the AAO makes this determination solely due to the fact that the applicant reached age 21 prior to the adjudication of his Form I-485 application.

The applicant's eligibility to adjust his status under the present application is based on his K-2 status, as

¹ The motion filed on March 2, 2006 contained an erroneous alien number for the applicant. The district director accepted the second motion filed on April 14, 2006 as timely.

described in the regulation at 8 C.F.R. § 214.2(k)(6)(ii) and sections 101(a)(15)(K) and 245 of the Act. Though the applicant's mother filed a Form I-130 petition on his behalf, she did so on August 16, 2004, over one year after the applicant filed the present Form I-485 application. Thus, the Form I-130 petition does not serve as a basis for approval of the applicant's present Form I-485 application. The district director analyzed whether the Form I-130 petition prevented the applicant from aging out of eligibility pursuant to the CSPA. However, as the Form I-130 petition is not a basis for the applicant's eligibility under the present application, the date that the petition was filed is irrelevant to the present matter.

Section 101(a)(15)(K) of the Act describes those eligible for K status as follows:

(K) subject to subsections (d) and (p) of section 214, an alien who--

(i) is the fiancée or fiancé of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States who is the petitioner, is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien

The regulation at 8 C.F.R. § 214.2(k)(6)(ii) provides the following:

Nonimmigrant visa issued on or after November 10, 1986. Upon contracting a valid marriage to the petitioner within 90 days of his or her admission as a nonimmigrant pursuant to a valid K-1 visa issued on or after November 10, 1986, the K-1 beneficiary and his or her minor children may apply for adjustment of status to lawful permanent resident under section 245 of the Act. Upon approval of the application the director shall record their lawful admission for permanent residence in accordance with that section and subject to the conditions prescribed in section 216 of the Act.

Section 245 of the Act provides, in pertinent part, the following:

(a) 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 under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or 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.

(d) The Attorney General may not adjust, under subsection (a), the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 216. The Attorney General may not adjust, under subsection (a), 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 (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K).

Section 216 of the Act states, in pertinent part:

(a) In general.-

(1) Conditional basis for status.-Notwithstanding any other provision of this Act, an alien spouse (as defined in subsection (g)(1)) and an alien son or daughter (as defined in subsection (g)(2)) shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

(g) Definitions.-In this section:

(2) The term "alien son or daughter" means an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) by virtue of being the son or daughter of an individual through a qualifying marriage.

Section 101(b)(1) of the Act defines the term "child" as "an unmarried person under twenty-one years of age .

Section 214(d) of the Act states the following:

(1) A visa shall not be issued under the provisions of section 101(a)(15)(K)(i) until the consular officer has received a petition filed in the United States by the fiancée or fiancé of the applying alien and approved by the Secretary of Homeland Security. The petition shall be

in such form and contain such information as the Secretary of Homeland Security shall, by regulation, prescribe. Such information shall include information on any criminal convictions of the petitioner for any specified crime. It shall be approved only after satisfactory evidence is submitted by the petitioner to establish that the parties have previously met in person within 2 years before the date of filing the petition, have a bona fide intention to marry, and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien's arrival, except that the Secretary of Homeland Security in his discretion may waive the requirement that the parties have previously met in person. In the event the marriage with the petitioner does not occur within three months after the admission of the said alien and minor children, they shall be required to depart from the United States and upon failure to do so shall be removed in accordance with sections 240 and 241.

Throughout the provisions of the Act and regulation that apply to the adjustment of status of K-2 derivatives, reference is made to the status of the K-2 as a "child." For example, section 101(a)(15)(K)(iii) of the Act describes a K-2 derivative as a "minor child." The regulation at 8 C.F.R. § 214.2(k)(6)(ii) states that a K-1 beneficiary's "minor children may apply for adjustment of status to lawful permanent resident under section 245 of the Act." Section 245(d) of the Act provides that a K-1 beneficiary and her K-2 "minor child" may only be granted permanent residence on a conditional basis.

Counsel highlights that section 216 of the Act uses the terms "alien son or daughter" instead of "child." Counsel asserts that, as K-2 adjustment applications are subject to section 216 of the Act, it is sufficient for the applicant to establish that he is the son or daughter of his K-1 mother, without the need to meet the definition of "child" contained in section 101(b)(1) of the Act. Thus, counsel asserts that the fact that the applicant reached age 21 during the pendency of his Form I-485 application did not terminate his eligibility to adjust his status based on his K-2 status, i.e. he did not age out.

Counsel's contention regarding section 216 of the Act is not persuasive. Section 216 of the Act serves to set conditions on an individual's permanent resident status *after* eligibility has been established under other provisions of law and regulation. Section 216 of the Act is not a basis for eligibility itself, thus one does not apply for permanent residence under section 216. Therefore, the definitions of terms used in section 216 of the Act do not govern whether an individual qualifies for permanent residence. Accordingly, the applicant may not rely on the fact that section 216 of the Act uses the terms "son" and "daughter" as authority to support that he does not have to qualify as a "child" in order to adjust his status as a K-2 derivative.

The three provisions that create an avenue for a K-2 derivative to adjust his status to permanent resident are sections 101(a)(15)(K) and 245 of the Act, and the regulation at 8 C.F.R. § 214.2(k)(6)(ii). As discussed above, each of these provisions only refer to the eligibility of a K-1 beneficiary's "child," and none include the terms "son" or "daughter" in relevant sections.

Section 245(d) of the Act limits the Attorney General's (now Secretary of the Department of Homeland Security) authority to adjust the status of individuals in K status. The Secretary may only afford an individual in K status conditional permanent residency "as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K)." The Secretary "may not adjust" individuals defined by section 101(a)(15)(K) of the Act who do not meet this clause. Section 245(d) of the Act. Thus, after a qualifying marriage occurs,

the Secretary has authority to adjust the status of a K-1 beneficiary and his or her “minor child[ren].” *Id.* Accordingly, section 245(d) of the Act does not permit the Secretary to adjust the status of K-2 derivatives who do not meet the definition of “child” contained in section 101(b)(1) of the Act.

Section 245(d) of the Act circumscribes the Secretary’s authority to adjust the status of an individual defined by section 101(a)(15)(K) of the Act, not the Secretary’s authority to accept an application as properly filed. Thus, section 245(d) of the Act must be satisfied at the time a Form I-485 application is adjudicated, and a K-2 derivative must continue to be a “minor child.” Section 245(d) of the Act

Counsel notes that section 214(d) of the Act only refers to the admission of a K-1 beneficiary and her “minor children” as nonimmigrants, thus it does not impose a requirement that a K-2 derivative be a minor child at the time of adjustment of status. However, section 214(d) is limited to factors relating to an individual’s eligibility for a K visa and K nonimmigrant status in the United States, and it does not address eligibility requirements for a K-2 derivative to adjust his status to permanent resident.

Counsel distinguishes the differences in admission requirements and permitted stays for K-2 derivatives of K-1 beneficiaries, and K-4 derivatives of K-3 beneficiaries. Counsel notes that K-4 children must depart on or before their 21st birthday should they fail to adjust their status before that time. Counsel suggests that, as such a requirement is not included in the provisions applicable to K-2 derivatives, K-2 derivatives may adjust even after their 21st birthday.

The AAO is not inclined to follow counsel’s reasoning in this regard. The provisions relating to K-4 derivatives were enacted subsequent to the provisions relating to K-2 derivatives, thus the legislation regarding K-2 derivatives was not modeled in light of or in contrast to the portions of the Act and regulations addressing K-4 derivatives. Inferences from the admission requirements of K-4 derivatives do not serve as a sufficient basis to show that K-2 derivatives may adjust their status after they reach age 21.

It is noted that counsel and the district director both correctly determined that the CSPA does not prevent the applicant from aging out in the present matter. Specifically, the CSPA does not apply to applications for adjustment of status based on K nonimmigrant status.

Based on the foregoing, the applicant is not longer eligible to adjust his status to permanent resident pursuant to his K-2 derivative status, as he reached age 21 prior to the adjudication of his Form I-485 application. For that reason, the application may not be approved and the director’s decision will be affirmed.

The district director observed that the applicant had aged out of eligibility to adjust his status under the present application due to the fact that he reached age 21 prior to adjudication. Yet, she primarily based her denial on the finding that the applicant was no longer the minor child of the fiancée of a U.S. citizen, due to the fact that his mother had already married and adjusted her status to permanent resident. However, the applicant’s mother’s marriage and adjustment of status did not terminate the applicant’s eligibility.

The U.S. Department of State Foreign Affairs Manual, 9 FAM 41.81, note 16, provides the following:

Child of Alien K-1 Fiancé(e)

Department of Homeland Security (DHS) and the Department [of State] have agreed that the

child of a K-1 principal alien may be accorded K-2 status if following to join the principal alien in the United States even after the principal alien has married the U.S. citizen fiancé(e), and acquired lawful permanent resident (*LPR*) status. However, the cutoff date for issuance of a K-2 visa is one year from the date of the issuance of the K-1 visa to the principal alien. After one year, and provided that the alien qualifies, the filing of an immediate relative or second preference petition would be required.

As the applicant was granted a K-2 visa within one year of the date that his mother obtained her K-1 visa, he was properly granted a visa and admission in K-2 status. The Act and regulations are silent on whether a K-1 principal's marriage and subsequent adjustment terminates a K-2 derivative's eligibility to also adjust pursuant to K status. K-2 status is designed as an antecedent to adjustment of status in order to allow a child to accompany or follow to join a K-1 parent. It is evident that a K-2 child's following to join his permanent resident parent is ineffective if he is not also afforded a means to permanent residency. Thus, in light of 9 FAM 41.81, note 16, the AAO finds the fact that a child may be afforded K-2 status after his K-1 parent has already married and adjusted to be adequate evidence of DHS policy that such K-2 child may also adjust his status to permanent resident after his parent has done so. Accordingly, the AAO will withdraw the district director's findings regarding the applicant's ineligibility due to his mother's prior marriage and adjustment.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that he is eligible for adjustment of status. The applicant has not met that burden and the present application may not be approved.

ORDER: The director's decision is affirmed.