



U.S. Citizenship
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JUL 09 2009

File: [REDACTED] Office: TEXAS SERVICE CENTER (MESQUITE, TEXAS) Date:
SRC 07 234 50747

IN RE: Applicant: [REDACTED]

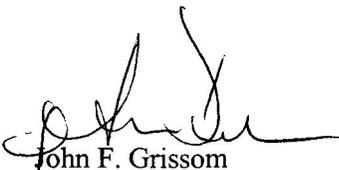
Petition: Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant to
Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF PETITIONER:

[REDACTED]

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.


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Texas Service Center Director, Mesquite, Texas, denied the application for adjustment of status (Form I-485) and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed in part and withdrawn in part. The application will be denied.

The applicant is a native and citizen of South Korea who filed this application for adjustment of status to that of a lawful permanent resident under section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1255.

The record includes the following pertinent facts and history. The applicant entered the United States on October 1, 2002 on a nonimmigrant B-2 visa. The nonimmigrant B-2 visa expired March 31, 2003. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status on February 27, 2003, (WAC 03 113 55566) prior to the expiration of her B-2 nonimmigrant status. The Form I-485 was denied on September 23, 2004 for the applicant's failure to submit a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS) in compliance with section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The applicant subsequently filed the following Forms I-485:

1. WAC 05 027 52793 on November 4, 2004, denied April 25, 2005 for lack of CGFNS certificate;
2. EAC 05 186 52216 on June 8, 2005, denied November 30, 2005 for lack of CGFNS certificate;
3. WAC 06 088 52370 on January 25, 2006, denied December 4, 2006 for lack of a CGFNS certificate;
4. LIN 07 067 50343 on November 30, 2006, denied April 12, 2007 for failure to submit a CGFNS certificate with application; and
5. SRC 07 234 50747 on June 22, 2007, the application that is the subject of this appeal. The applicant submitted her CGFNS certificate issued November 17, 2006.

The director determined that the applicant's legal nonimmigrant status expired March 31, 2003, the expiration date of her period of authorized stay as a B-2 nonimmigrant. The director further determined that the subsequent denial of the applicant's initial Form I-485 on September 24, 2004 precluded the applicant from a legal nonimmigrant status and thus, the applicant was out of status as of the date on the denial of the initial adjustment application, September 24, 2004. The director concluded: "once the applicant falls out of lawful nonimmigrant status, the mere filing of any future application for adjustment of status does not, in and of itself, accord a lawful 'status' or cure any violation of a nonimmigrant visa incurred by the alien." The director further concluded that the applicant did not qualify for section 245(k) of the Act, as the record shows that she failed to maintain, continuously, a lawful status, or engaged in unauthorized employment, or otherwise violated the terms and conditions of her nonimmigrant visa for a period in excess of 180 days since her last lawful admissions.

Counsel for the applicant asserts that section 245(a) and section 245(c) of the Act rather than restricting and regulating the applicant's eligibility to apply for adjustment of status, extends the applicant's ability to apply for adjustment of status. Counsel contends that section 245(k) of the Act applies to the applicant and that section 245(k) allows the authorized period of stay to be the equivalent of lawful status for the purpose of adjustment of status. Counsel cites various memoranda issued by government agencies regarding grounds of inadmissibility and unlawful presence that reference an alien's period of authorized stay. Counsel asserts that in this matter, the applicant's unlawful presence in the United States is less than 180 days in the aggregate and thus she qualifies for adjustment of status under section 245(c) and section 245(k) of the Act.

The law in pertinent part states:

Section 245(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 as a VAWA self-petitioner 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(c) 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 (other than an immediate relative as defined in section 201(b) or a special immigrant described in section 101(a)(27)(H),(I),(J), or (K) of this title) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or 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; . . . (7) any alien who seeks adjustment of status to that of an immigrant under section 203(b) and is not in a lawful nonimmigrant status; or (8) any alien who was employed while the alien was an unauthorized alien, as defined in section 274A(h)(3), or who has otherwise violated the terms of a nonimmigrant visa.

* * *

Section 245(k) An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 203(b) (or, in the case of an alien who is an immigrant described in section 101(a)(27)(C) under section 203(b)(4) may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and (c)(8), if-- (1) the alien, on the date of filing an application for adjustment of status, is present in

the United States pursuant to a lawful admission; (2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days—(A) failed to maintain, continuously, a lawful status; (B) engaged in unauthorized employment; or (C) otherwise violated the terms and conditions of the alien's admission.

Counsel in this matter has failed to distinguish between the applicant's accrual of unlawful presence and the applicant's lawful status in the United States. This distinction is of significant importance when applying the benefit of section 245(k). Some aliens who are actually present in an unlawful status, are, nevertheless protected from accruing unlawful presence. But if an alien's unlawful status continues for more than 180 days, in the aggregate, the alien is ineligible for the benefit of section 245(k) of the Act, even if he or she has accrued no unlawful presence for the purpose of section 212(a)(9)(B) of the Act.

In this matter, the applicant's filing of Forms I-485 protects her from accruing unlawful presence; however, the applicant has not been in lawful status since the expiration of her period of authorized stay as a B-2 nonimmigrant on March 31, 2003. The AAO observes that the director incorrectly found that the applicant was out of status as of the date on the denial of the initial adjustment application, September 24, 2004. The applicant was out of lawful status as of the date her period of authorized stay in B-2 status expired on March 31, 2003. The AAO withdraws the director's determination to the contrary. Although the applicant was protected from accruing unlawful presence from the date of filing the Form I-485, the filing of the Form I-485 did not transform her stay to a lawful status. Counsel's assertion that section 245(k) somehow allows the authorized period of stay to be the equivalent of lawful status for the purpose of adjustment of status is without merit. The AAO reiterates that the accrual of unlawful presence is different from and must be distinguished from an individual's unlawful status. The applicant in this matter has not met the requirements of section 245(k) as she has failed to maintain a lawful status since her last lawful admission expired on March 31, 2003 and this failure to maintain lawful status has been well over 180 days.

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. Here, the applicant has not met her burden. Accordingly, the AAO affirms the director's denial of the Application for Adjustment of Status.

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