



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

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

MATTER OF S-C-O-

DATE: AUG. 29, 2016

APPEAL OF MEMPHIS, TENNESSEE FIELD OFFICE DECISION

APPLICATION: FORM I-698, APPLICATION TO ADJUST STATUS FROM TEMPORARY  
TO PERMANENT RESIDENT (UNDER SECTION 245A OF THE INA)

The Applicant, a native and citizen of Nigeria, seeks to adjust from temporary resident to lawful permanent resident (LPR) status. *See* Immigration and Nationality Act (the Act) section 245A, 8 U.S.C. § 1255a. Foreign nationals who have continuously resided in the United States since they were granted temporary resident status under section 245A of the Act may adjust to lawful permanent resident status, if they are admissible to the United States, have not been convicted of a felony or three or more misdemeanors in the United States, and can demonstrate basic citizenship skills.

The Field Office Director, Memphis, Tennessee, denied the application. The Director concluded that the Applicant was not eligible to adjust status from temporary to permanent resident because he had not applied for adjustment from temporary to permanent resident status within 43 months from the date of approval of his application for temporary resident status. The Director also determined that the Applicant was arrested for three or more misdemeanors and that several criminal cases against the Applicant were retired, which could allow U.S. Citizenship and Immigration Services to reopen the application and render a different decision, as an applicant who has been convicted of any felony or three or more misdemeanors in the United States is ineligible for temporary resident status.<sup>1</sup>

The matter is now before us on appeal. In the appeal, the Applicant claims that he made a good faith effort to timely file his adjustment application by paying an individual who claimed to be an attorney to file the application on his behalf. The Applicant asserts that he subsequently found out that the individual was not an attorney and that he never filed the application. The Applicant asserts that because he made a good faith effort to timely file his application but unknowingly hired an individual who was engaged in the unlawful practice of law, the doctrine of equitable tolling should be applied, and the late filing should be excused.<sup>2</sup>

Upon *de novo* review, we will dismiss the appeal.

---

<sup>1</sup> *See* section 245A(b)(1)(C)(ii) of the Act.

<sup>2</sup> The Applicant cites *Mezo v. Holder*, 615 F.3d 616, 619 (6th Cir. 2010); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); and *Tapia-Martinez v. Gonzales*, 482 F.3d 417, 422 (6th Cir. 2007), as authority for the assertion that we should apply the doctrine of equitable tolling in the instant case.

I. LAW

The Applicant is seeking adjustment of status from temporary to permanent resident. To be eligible for adjustment from temporary to permanent resident under section 245A of the Act, an applicant must apply for such adjustment no later than 43 months from the date of the grant of temporary resident status. Section 245A of the Act provides, in pertinent part:

(b) Subsequent Adjustment to Permanent Residence and Nature of Temporary Resident Status.-

(1) Adjustment to permanent residence.-The [Secretary of Homeland Security ] shall adjust the status of any alien provided lawful temporary resident status under subsection (a) to that of an alien lawfully admitted for permanent residence if the alien meets the following requirements:

(A) Timely application after one year's residence.-The alien must apply for such adjustment during the 2-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status ....

....

(C) Admissible as immigrant.-The alien must establish that he-

....

(ii) has not been convicted of any felony or three or more misdemeanors committed in the United States.

The regulation at 8 C.F.R. § 245a.1(o) provides:

*Misdemeanor* means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 CFR 245a.1 (p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor.

Section 245A(f)(2) of the Act provides:

No review for late filings.-No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

The regulations at 8 C.F.R. § 245a.3(c)(3) further explain that an applicant who was previously granted temporary resident status pursuant to section 245A(a) of the Act who has not filed an application for permanent resident status under section 245A(b)(1) of the Act by the end of 43 months from the date of actual approval of the temporary resident application is ineligible for adjustment of status from temporary to permanent resident.

## II. ANALYSIS

As stated above, an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. The record reveals that the Applicant has the following criminal convictions:

1. A 1989 conviction for conspiracy under Tenn. Code Ann. § 40-21-109. The Applicant pled guilty and was ordered to pay a fine.<sup>3</sup>
2. A 1989 conviction for false statements in violation of Tenn. Code Ann. § 39-16-702. The Applicant was ordered to pay a fine and sentenced to 6 months of probation. This crime qualifies as a misdemeanor as it is punishable by imprisonment for a term of 1 year or less.
3. A 1989 conviction for disturbing peace/disorderly conduct in violation of Tenn. Code Ann. § 39-17-305. The Applicant was sentenced to 3 months of probation and was ordered to pay court costs. This crime qualifies as a misdemeanor as it is punishable by imprisonment for a term of 1 year or less.
4. A 1989 conviction for assault in violation of Tenn. Code Ann. § 39-13-102. The Applicant was sentenced to 3 months of probation and was ordered to pay court costs. This crime qualifies as a misdemeanor as it is punishable by imprisonment for a term of 1 year or less.
5. A 1990 conviction for unauthorized opening of mail in violation of 18 U.S.C. § 1703(b). The Applicant was sentenced to 1 month in prison, suspended; ordered to pay a fine; and placed on probation for 5 years. This crime qualifies as a misdemeanor as it is punishable by imprisonment for a term of 1 year or less.

The Applicant asserts that the Director erred in concluding that his retired criminal cases left the criminal court at liberty to reopen those cases and therefore also allow the Director to reopen the Form I-687 and render another decision. We find that the record reflects that notwithstanding the retired cases, the Applicant has been convicted of five misdemeanors and is thus ineligible for temporary resident status under section 245A(a)(4)(B) of the Act. Therefore, if the Director chooses to

---

<sup>3</sup> This conviction was based on a charge of failure to return rental property. Tenn. Code Ann. § 40-21-109, at the time of Applicant's conviction, stated that if a person who had not previously been convicted of a felony or misdemeanor was found guilty of, or pleads guilty to, a misdemeanor which is punishable by imprisonment, the court may, without entering a judgment of guilt, place him on probation and, upon satisfactory completion of the probation, dismiss the proceedings against him. Thereafter, the official record could be expunged. However, for immigration purposes and under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An individual remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

*Matter of S-C-O-*

reopen the Form I-687, the Applicant's convictions cited above serve as the basis for rendering a another decision.

With respect to the Applicant's Form I-698, section 245A of the Act states that to be eligible for adjustment of status from temporary to permanent resident under, an applicant must apply for such adjustment within 43 months of being granted temporary resident status.

The record reflects that the Applicant was granted temporary resident status on August 24, 2007. Accordingly, the 43-month eligibility period for filing for adjustment of status expired on March, 24, 2011. The Applicant did not file Form I-698 until November 26, 2013, 2 years and 8 months after the 43-month application period. The Director therefore denied the application and terminated the Applicant's temporary resident status.

On appeal, the Applicant asserts that because he made a good-faith effort to timely file his application but unknowingly hired an individual who was engaged in the unlawful practice of law, the doctrine of equitable tolling should be applied, and the late filing should be excused. However, no remedy is available for an applicant who assumes the risk of an unlicensed attorney or unaccredited representative to undertake representations on his behalf. *See* 8 C.F.R § 292.1; *see also Hernandez v. Mukasey*, 524 F.3d 1014, 1019 (9th Cir. 2008) ("non-attorney immigration consultants simply lack the expertise and legal and professional duties to their clients that are the necessary precondition for ineffective assistance of counsel claims"). We only consider complaints based upon ineffective assistance against accredited representatives. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel). In addition, the Applicant claims that he paid an unlicensed attorney \$450, gave him the filing fee and signed the completed Form I-698, the Applicant has not submitted evidence to support these statements.

The Applicant's statements on appeal have been considered. However, no statutory provision permits administrative review of denials of adjustment of status under section 245A of the Act based on a late filing.<sup>4</sup>

### III. CONCLUSION

The Applicant has the burden of proving eligibility for adjustment of status from temporary to permanent resident. Section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Accordingly, we dismiss the appeal. This decision constitutes a final notice of ineligibility.

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-C-O-*, ID# 11175 (AAO Aug. 29, 2016)

---

<sup>4</sup> Because we do not have the authority to review denials of adjustment of status under section 245A of the Act based on a late filing, we will not address whether the Applicant's criminal charges warrant the reopening of his Form I-687.