



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 06 2013** Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION: Application for Employment Authorization (Form I-765) pursuant to 8 C.F.R. §274a.12(c)(8).

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. 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.

Thank you,

Ron M. Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, approved the Application for Employment Authorization (Form I-765) and certified his decision to the Administrative Appeals Office (AAO) for review.¹ The director's decision will be affirmed. The application for employment authorization remains approved.

The applicant is seeking employment authorization based on her claim to asylum under Section § 208 of the Immigration and Nationality Act (the ACT).² The applicant's request for asylum is before an Immigration Judge (IJ) within the jurisdiction of the Executive Office for Immigration Review (EOIR). The IJ administratively closed the asylum proceeding by joint consent of the applicant and the trial attorney on May 8, 2008.

The sole issue in this proceeding is whether the applicant's administratively closed asylum proceeding maintains her eligibility for employment authorization under 8 C.F.R. § 274a.12(c)(8).

Applicable Law

Eligibility for Employment Authorization Based on a Pending Asylum Claim

8 C.F.R. § 274.a.12(c)(8) states:

An alien who has filed a complete application for asylum or withholding of deportation or removal pursuant to 8 C.F.R. § 208, whose application:

- (i) Has not been decided, and who is eligible to apply for employment authorization under § 208.7 of this chapter because the 150-day period set forth in that section has expired. Employment authorization may be granted according to the provisions of § 208.7 of this chapter in increments to be determined by the Commissioner and shall expire on a specified date; or
- (ii) Has been recommended for approval, but who has not yet received a grant of asylum or withholding or deportation or removal.

The burden of proof is upon the applicant to demonstrate eligibility for the requested benefit by a preponderance of the evidence. The "preponderance of the evidence" standard requires that the

¹ The regulation at 8 C.F.R. § 103.4(a)(1) states that a director may certify a case to the appropriate appellate authority "when the case involves an unusually complex or novel issue of law or fact."

² (b) Eligibility. The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) [8 USC § 1101(A)(42)(A)].

evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (*Comm'r* 1989).

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Factual and Procedural History

The applicant filed a Form I-589, Application for Asylum and Withholding of Removal, before an IJ in Miami, Florida on October 5, 2006. The IJ administratively closed the asylum proceeding through an official order on May 8, 2008. On February 28, 2011, in response to the director's February 15, 2011 Request for Evidence, counsel for the applicant furnished a "complete copy" of the IJ's order administratively closing the applicant's pending asylum application. Counsel stated in his letter that the application was administratively closed by the IJ at the joint consent of the trial attorney and the court, and was to be re-calendared after the Department of Justice issued regulations which would presumably impact the applicant's asylum application.³ According to counsel, the applicant agreed to the administrative closing of her asylum application with the understanding from the IJ and the trial attorney that the applicant would continue to receive work authorization. Counsel asserted that the trial attorney had stated on the record that he would "make a notation in the Department's computer system that the Department wanted for work authorization to continue."⁴

On November 20, 2012, the applicant submitted a Form I-765, Employment Authorization Request, the required filing fee, photographs, a copy of the applicant's prior work authorization card and a copy of counsel's February 28, 2011 letter. A new Request for Evidence was sent to the applicant and counsel on January 24, 2013 which stated in pertinent part: "USCIS records indicate that an Immigration Judge entered a decision on your case but it cannot be determined what was decided." Counsel responded on January 31, 2013, submitting the same information and evidence he provided in his November 20, 2012 letter. On February 7, 2013, the director approved the applicant's employment authorization request and on the same date issued a Notice of Certification to the AAO for review.

The director informed the applicant that she had 30 days to supplement the record with any evidence that she wishes the AAO to consider. Neither counsel nor the applicant has submitted any additional evidence for the AAO to consider, and the AAO considers the record complete.

³ As stated previously, the only issue to be discussed on notice of certification concerns whether the applicant's administratively closed asylum proceeding maintains her eligibility for employment authorization.

⁴ The applicant's record does not contain any such information that may have been entered in the Department of Justice computer system.

Analysis

Agency regulations enumerate three essential elements for the grant of employment authorization to aliens seeking asylum or withholding of deportation or removal: (1) a valid request for asylum or withholding of deportation or removal; (2) the request remains undecided; and (3) 150 days have passed since filing the request, not counting any delays by the applicant.⁵ (The recommended approval provision of 8 C.F.R. § 208.7(a)(1) does not apply to the applicant's case.)

In this case, the applicant's judicial proceeding for the asylum request was administratively closed. As pointed out by the director, neither the INA nor agency regulations take into consideration the effect of administratively closing a request for asylum or withholding of deportation or removal. However, the issue of administrative closure has been considered by several of the Federal courts. The Ninth Circuit has noted that "[a]n order administratively closing a case is a docket management tool that has no jurisdictional effect." *Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005). The Third Circuit has found that "an order merely directing that a case be marked closed constitutes an administrative closing that has no legal consequence other than to remove that case from the [court's] active docket." *Penn W. Assocs., Inc. v. Cohen*, 371 F.3d 118, 128 (3d Cir. 2004). Additionally, the eleventh Circuit concluded that an administratively closed case had no legal effect because "the order appealed from is not 'final.'" *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 312 F.3d 1349, 1355 (11th Cir. 2002). Finally, the Fifth Circuit has written "we hold that administratively closing a case is not a dismissal or final decision." *South La. Cement, Inc. v. Van Aalst Bulk Handling, B.V.*, 383 F.3d 297, 302 (5th Cir. 2004); *cf. CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 250-51 (5th Cir. 2006) (holding that "a fully 'dismissed' case is removed from the docket, terminated indefinitely, and restarted only upon the filing of a new complaint. That is not the case here.")

USCIS is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit. *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the Administrative Procedures Act, even when they are published in private publications or widely circulated). Nevertheless, while the reasoning underlying a district judge's decision or other non-precedential decision does not have to be followed as a matter of law, the adjudicator should give its analysis due consideration. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993; *see also Indiana Nat. Corp. v. Rich*, 554 F. Supp. 864, 868 (S.D. Ind. 1982), *rev'd* on other grounds, 712 F.2d 1180 (7th Cir. 1983).

⁵ For aliens seeking a request for asylum, an additional requirement of waiting an extra 30 days (not counting any delays by the applicant) is added to these essential elements before employment authorization may be granted by USCIS. This extra requirement is not imposed by agency regulations or aliens solely seeking withholding of deportation or removal. The applicant is not solely seeking withholding in this case.

The mandatory number of 150 days has passed since the applicant filed the asylum request with the EOIR. Additionally, the 30 extra days of agency regulation at 8 C.F.R. § 208.7(a)(1), not counting any delays by the applicant, have passed according to the EOIR's clock.⁶ The joint request administratively closing the asylum request appears to make the asylum application remain "undecided" within the meaning of 8 C.F.R. § 274a.12(c)(8) because the IJ has made an interlocutory or non-final order rather than dismissing the case.⁷ The AAO agrees with the director that even though the asylum claim may remain administratively closed for an unknown indefinite period of time, thus providing the applicant with a seemingly indefinite employment authorization, based on all the facts concerning the applicant's administratively closed asylum claim, the AAO finds that the applicant is eligible for employment authorization by a preponderance of the evidence.

Conclusion

Based on a review of the file, USCIS records, and case law, the AAO finds that the applicant is eligible for employment authorization based on an administratively closed asylum claim. Pursuant to section 291 of the Act, 8 U.S.C. 1361, the burden of proof is upon the applicant to establish that she is eligible for the requested benefit. The applicant has met that burden.

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

⁶ USCIS' reliance on the clock governed by the asylum offices and EOIR for determining which delays are caused or requested by the asylum applicant forms the cornerstone of USCIS' administrative procedures for granting employment authorization for aliens pursuing a request for asylum or withholding of deportation or removal. See 8 C.F.R. § 208.7(a)(2); see also U.S. Department of Justice memorandum, dated August 4, 2000, entitled "Revised Operating Policy and Operating Procedures, No. 00-01 Asylum Request Processing," p.3, 16-17; cf. *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987) (holding that agency memoranda articulate internal guidelines for service personnel -- they do not establish judicially enforceable rights -- that "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") Asylum or withholding applicants who have never reached the 150-day time period (not counting delays by the applicant) are barred from being granted employment authorization by law. However, once 15 days have passed for applicants seeking withholding, USCIS may grant them employment authorization under 8 C.F.R. § 274a.12(c)(8). Applicants seeking asylum (along with withholding of deportation or removal) must still wait an additional 30 days by law in which USCIS must grant or deny the employment authorization request as agency regulations state in § 208.7(a)(1)

⁷ Black's Law Dictionary, 832 (8th Ed. 204), defines interlocutory as interim or temporary, not constituting a final resolution of the whole controversy. See *Nix v. Hedden*, 149 U.S. 304, 306 (1893) (holding that while dictionaries are not of themselves evidence, they may be referred to as aids to the memory and understanding of the courts).