U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: LEE, MYOUNG SOOK
Riders:098-772-715 098-772-838

A 098-772-839

Date of this notice: 3/27/2014

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Wendtland, Linda S.
Donovan, Teresa L.

Lulseges
Userteam: Docket

Files: A098 772 839 - Newark, NJ
A098 772 838
A098 772 715

Date:

MAR 27 2014

In re: MYOUNG SOOK LEE
JAE EUN LEE
JI EUN LEE a.k.a. Jie Eun Lee

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: David K. S. Kim, Esquire[1]

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law (all respondents)

APPLICATION: Adjustment of status

The respondents, a mother and her two children and all natives and citizens of South Korea, appeal from the Immigration Judge's January 24, 2012, decision denying their applications for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a).[2] The appeal will be sustained and the record will be remanded.

We review an Immigration Judge's factual findings, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all remaining issues, including issues of law, discretion, and judgment, de novo. 8 C.F.R. § 1003.1(d)(3)(ii). Because the respondent filed her adjustment application prior to May 11, 2005, it is not governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42, 45 (BIA 2006).

The procedural history of this case is as follows. The respondent was admitted to the United States as a visitor on or about July 27, 2004, with authorization to remain until July 26, 2005 (I.J. at 1). On February 18, 2005, ATC Healthcare Services, Inc. filed an Immigrant Petition for Alien Worker (Form I-140) on behalf of the respondent with United States Citizenship and Immigration Services ("USCIS"). The respondent simultaneously filed an Application to Register Permanent Residence or Adjust Status ("I-485") (I.J. at 1).

[1] On March 6, 2012, the respondents filed an affidavit stating that they are no longer represented by Elihu S. Massel, Esquire.

[2] The applications of the two children are based on the application for adjustment of status filed by their mother, the principal respondent. Therefore, this appeal will concern itself with the qualification of the mother for the benefits sought.

On December 4, 2005, USCIS approved the I-140. The approval notice (Form I-797) reflects that the petitioner was changed from ATC Healthcare Services to Onward Healthcare, Inc. In a written decision dated May 3, 2006, USCIS denied the respondent's adjustment application because she did not submit the certification required under section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C).

On July 25, 2006, the respondent filed a second I-485 with USCIS (I.J. at 2). In a written decision dated December 29, 2006, USCIS denied the respondent's I-485 for two reasons. First, she was inadmissible because she did not submit the certification required under section 212(a)(5)(C) of the Act. Second, she was barred from adjustment under section 245(c)(2) of the Act because she failed to maintain continuously lawful status. She was unable to benefit from section 245(k) of the Act, because she failed to maintain continuously a lawful status for more than 180 days. 8 C.F.R. § 1245.1(d)(1).

On November 28, 2006, the respondent filed a third I-485 with USCIS (I.J. at 2). In a written decision dated August 13, 2007, USCIS denied the respondent's I-485 because she failed to maintain continuously lawful status for more than 180 days. On October 13, 2007, the respondent filed a fourth I-485 with USCIS (I.J. at 2). On September 15, 2008, USCIS administratively closed the respondent's case because she was the subject of these removal proceedings (I.J. at 2).

On October 25, 2007, the Department of Homeland Security (DHS) issued the respondent a Notice to Appear. In these proceedings, the respondent renewed her I-485, based on her earlier approved I-140 (I.J. at 2; Tr. at 11, 32). The Immigration Judge denied the respondent's I-485. Like USCIS, the Immigration Judge determined that she was ineligible because she failed to maintain continuously lawful status for a period that exceeded 180 days under sections 245(c) and (k) of the Act (I.J. at 5-6). This appeal followed.

The sole issue on appeal is whether the respondent is eligible for adjustment of status. *See generally Matter of Alarcon*, 20 I& N Dec. 557, 559 (BIA 1992) (setting forth statutory eligibility requirements for adjustment of status, including lawful admission to the United States, filing an application, eligibility for and availability of an immigrant visa, and admissibility to the United States).

On appeal, the respondent argues that the Immigration Judge erred by not applying the governing regulation at 8 C.F.R. § 1245.2(a)(5)(ii).[3] In pertinent part, the regulation provides that an applicant whose adjustment application has been denied by USCIS "retains the right to renew" the application in removal proceedings. According to the regulation, when an applicant renews an adjustment application in removal proceedings, "the applicant does not need to meet the statutory requirement of section 245(c) of the Act [continuous lawful status], or § 1245.1(g) [visa availability], if, in fact, those requirements were met at the time the renewed application was initially filed with [USCIS]." 8 C.F.R. § 1245.2(a)(5)(ii). The respondent argues that she

[3] On appeal, the respondent references the regulatory provisions pertaining to the DHS. We cite to the Regulations applicable to the Executive Office for Immigration Review, located in Chapter V of Title 8.

need not satisfy the 245(c) requirements because she satisfied those requirements when she initially applied for adjustment of status in February 2005.

We agree with the respondent's appellate argument. We will remand the case for the Immigration Judge to consider whether the respondent can benefit from 8 C.F.R. § 1245.2(a)(5)(ii). The respondent relies in particular on a sentence that was added to the regulation in 1989. The purpose of the amendment was to allow an alien whose nonimmigrant stay expires while an adjustment application is pending with the Service the opportunity to renew the application before an Immigration Judge in deportation proceedings if the application was denied by the district director. *See* 54 Fed. Reg. 294400-01 (July 12, 1989). On remand, the respondent must establish that when she initially applied for adjustment of status with USCIS she was not barred under section 245(c) of the Act and that a visa was available as required by 8 C.F.R. § 1245.1(g).

To benefit from this regulation, the respondent must also establish that she is "renewing" her adjustment application in removal proceedings. We have held that an application may be considered "renewed" only when it is based on the same facts and reviewed according to circumstances as they existed when the original application was filed. *Matter of Lasike,* 17 I&N Dec. 445 (BIA1980). *See also Matter of Huang*, 16 I&N Dec. 362.1 (BIA 1978) (holding that when an alien renews an adjustment application in proceedings pursuant to 8 C.F.R. § 245.2(a)(4) (1978) (a predecessor to 8 C.F.R. § 1245.2(a)(5)(ii)), the resubmitted application must be based on the same facts and circumstances as existed with the original application). We explained that an adjustment application will be treated as *new*, not renewed, if the applicant was statutorily ineligible for adjustment based on the circumstances as they existed when the application was originally denied by USCIS; and, if the present application is based on circumstances which have occurred since the denial. *See also Brito v. Mukasey,* 521 F. 3d 160 (2d Cir. 2008) (for purposes of 8 C.F.R. § 1245.2(a)(1)(ii), finding that the Immigration Judge had no jurisdiction over arriving alien's adjustment application because it was a *new* application, rather than renewed, as it was predicated on a visa petition filed by different United States citizen spouse). On remand, the Immigration Judge should make specific findings of fact as to whether the renewed application should be treated as a new application or a renewed one.

An issue in this particular case is whether the respondent's adjustment application should be treated as new since it is based on circumstances which have occurred since USCIS denied the application. The respondent's adjustment application was originally denied because she was found inadmissible under section 212(a)(5)(C) of the Act for failing to submit the requisite certification. According to the respondent, she now possesses the certification. *See* Respondent's Brief at 6. However, unlike Huang and Lasike, there is no indication that the respondent was ineligible for the visa classification sought. Unlike, Brito, there is no indication that the resubmitted adjustment application was predicated on a new visa petition. Rather, her ineligibility for adjustment was based on her inadmissibility under section 212(a) of the Act.

We have long held that an application for adjustment of status is a continuing one, such that "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, *supra* at 562. Therefore, we do not consider the respondent's resubmitted adjustment application as new solely because of a change in circumstances related to her admissibility. Finally, nothing in the regulations indicates that an

Immigration Judge's ordinary power and duty to receive evidence and adjudicate an application for adjustment of status is diminished or restricted when the application is renewed in removal proceedings. *Matter of Herrera Del Orden*, 25 I&N Dec. 589, 593 (BIA 2011).

Additionally, at the time of adjustment, the applicant must show the continued existence of an offer of employment as set forth in the I-140 and demonstrate an intent to accept the offer of employment. Although, an applicant is not required to evince an intent to remain at the certified job indefinitely. *See Yui Sing Tse v. INS*, 596 F.2d 831, 835 (9th Cir. 1979) (finding that an alien need not intend to remain at the certified job forever, but at the time of obtaining lawful permanent resident status both the employer and the alien must intend that the alien be employed in the certified job). *See also Matter of Tien*, 17 I&N Dec. 436 (BIA 1980), *rev'd Pei-Chi Tien v. INS*, 638 F.2d 1324 (5th Cir. 1981). Based on the foregoing, the respondent's appeal will be sustained and the case will be remanded to the Immigration Judge for further proceedings consistent with this decision.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Teresa L Davara

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

File No.: A 098-772-839 (Lead) **A 098-772-838 (Rider 1)** **A 098-772-715 (Rider 2)**	:	
In the Matters of	:	
Myoung Sook LEE, and **Jae Eun Lee, and** **Ji Eun Lee,**	:	**In Removal Proceedings**
Respondents.	:	

ON BEHALF OF RESPONDENT
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Facts and Procedural History

Myoung Sook Lee ("Respondent"), Jae Eun Lee ("Rider 1"), and Ji Eun Lee ("Rider 2") are all natives and citizens of South Korea. Respondent is the mother of Rider 1 and Rider 2. They all entered the United States ("U.S.") as B-2 non-immigrants on or about July 27, 2004 with authorization to remain until July 26, 2005. When discussed collectively, Respondent, Rider 1, and Rider 2 will be referred to as "Respondents."

Respondent is a registered nurse. (Respondent's June 27, 2011 Submission, Tab B; Letter from Respondent's Counsel filed January 17, 2012). On February 18, 2005, Respondent's employer, ATC Healthcare Services, Inc., filed an Immigrant Petition for Alien Worker ("Form I-140") on her behalf to the U.S. Citizenship and Immigration Services (the "Service" or "USCIS"). (*See* Respondent's June 27, 2011 Submission, Tab A). Respondent also filed her first Application to Register Permanent Residence or Adjust Status ("Form I-485") on the same day.[1] (*See* Record of Proceedings, Respondent's Application for Adjustment of Status date stamped February 18, 2005). These filings occurred before Respondent's authorization to remain in the

[1] Rider 1 and Rider 2 filed Forms I-485 as Respondent's derivatives.

U.S. expired on July 26, 2005. Respondent's Form I-140 was approved on December 3, 2005. (*See* Respondent's June 27, 2011 Submission, Tab A). However, her first Form I-485 was denied on April 14, 2006. (*See* Record of Proceedings, Respondent's Application for Adjustment of Status date stamped February 18, 2005 showing denial stamp for April 14, 2006).

Respondent filed a second Form I-485 on July 25, 2006. (*See* Record of Proceedings, USCIS Denial Notice dated January 16, 2007). Before the second Form I-485 was adjudicated, Respondent filed a third Form I-485 on November 28, 2006. (*See* Record of Proceedings, Respondent's Application for Adjustment of Status date stamped November 28, 2005). Her second Form I-485 was denied on December 29, 2006. (*See* Record of Proceedings, Respondent's Application for Adjustment of Status showing denial stamp for December 29, 2006). Her third Form I-485 was denied on April 30, 2007. (*See* Record of Proceedings, Respondent's Application for Adjustment of Status showing denial stamp for April 30, 2007).

Respondent filed a fourth and final Form I-485 on October 13, 2007. (*See* USCIS Decision to Administratively Close Application to Adjust Status, dated September 15, 2008).

On October 25, 2007, the Department of Homeland Security ("DHS") issued each of the Respondents a Notice to Appear ("NTA"). (Exhibits 1A, 1B, and 1C). The NTAs charged Respondents with deportability pursuant to INA §237(a)(1)(B), in that after admission as non-immigrants under INA § 101(a)(15), they remained in the U.S. for a time longer than permitted in violation of the INA or any other law of the U.S. (*Id.*). During a hearing held on May 29, 2008, Respondents conceded proper service of the NTA. However they disputed the factual allegations contained in the NTA and denied the charge of removability.

During the May 29, 2008 hearing, Respondents expressed their intent to renew their adjustment of status applications based on Respondent's approved I-140 petition.

On September 15, 2008, Respondent's Form I-485 was administratively closed because she was currently in removal proceedings. (*See* USCIS Decision to Administratively Close Application to Adjust Status, dated September 15, 2008).

Respondents continue to assert their eligibility for adjustment of status in their latest submission to the Court dated January 17, 2012.

II. Legal Standard & Analysis

A. Adjustment of Status under INA §245(a)

An alien who was inspected and admitted or paroled into the U.S. may be eligible to apply for adjustment of status under INA §245(a), 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 or her at the time the application is filed. *See* INA §245(a); *see also* 8 C.F.R. §1245.1.

B. Bars to Adjustment of Status under INA §245(c) and Exceptions under INA §245(k)

Under INA § 245(c)(2), an alien is ineligible for adjustment of status if the alien "[i]s in unlawful immigration status on the date of filing the application for adjustment of status or 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." INA § 245(c)(2). The alien is also ineligible to adjust status if he or she "[s]eeks adjustment of status to that of an immigrant under section 203(b) and is not in lawful non-immigrant status." INA § 245(c)(7). "Lawful immigration status," in the context of INA § 245(c)(2), is defined as the status of a non-immigrant whose initial period of admission has not expired or whose non-immigrant status has been extended. 8 C.F.R. § 1245.1(d)(1)(ii).

INA § 245(k) provides relief from the above-stated bars to certain aliens who are eligible to receive an employment-based immigrant visa under INA § 203(b). In order to benefit from the relief afforded under INA § 245(k), an alien must have been present in the U.S. pursuant to a lawful admission on the date of filing the application for adjustment of status. INA § 245(k). Additionally, subsequent to such lawful admission, the alien must not have engaged in the following actions for an aggregate period exceeding 180 days: (1) failed to continuously maintain a lawful status, (2) engaged in unauthorized employment, (3) or otherwise violated the terms and conditions of the alien's admission. *Id.*[2]

III. Legal Analysis

A. 180-Day Counting Period and Tolling Via Applications for Adjustment of Status

There are no precedent Board of Immigration Appeals ("Board") or Third Circuit Court of Appeals decisions that directly address when the 180-day counting period under INA § 245(k) starts and ends and how an application for adjustment of status under INA § 245(a) would effect those start and end dates. Additionally, there are no federal regulations that discuss the 180-day counting period.

A plain reading of INA § 245(k), in conjunction with INA § 245(c)(2) and 8 C.F.R. § 1245.1(d)(1)(ii) suggests that the 180-day counting period generally starts when the alien's status expires, is revoked, or is violated; policy memoranda reveals that USCIS also takes this position.[3] *See Bokhari v. Holder*, 622 F.3d 357, 358, 361 (5th Cir. 2010) (beginning the 180-day count after the respondent fell out of status or was no longer authorized to stay in the U.S.).

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[2] USCIS interprets the 180 day grace period to refer to the total of all three types of violations rather than permitting 180 days for each type of violation. *See* USCIS Memo, Neufeld, Acting Assoc. Director, Domestic Operations, *Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Applications filed under Section 245(a) of the Immigration and Nationality Act*, HQDOMO 70/23.1-P AD06-07 (Jul. 14, 2008) at 3, *published on* AILA InfoNet at Doc. No. 08073061 ("July 2008 USCIS Memo").

[3] *Id.* at 5.

USCIS and has also indicated in policy memoranda that a properly filed adjustment of status application tolls the 180-day counting period for INA §245(k) purposes. *See* USCIS Memo, Neufeld, Acting Assoc. Director, Domestic Operations, *Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Applications filed under Section 245(a) of the Immigration and Nationality Act*, HQDOMO 70/23.1-P AD06-07 (Jul. 14, 2008) at 5, *published on* AILA InfoNet at Doc. No. 08073061. The Board adopted this policy in a recent unpublished decision. *Matter of Sarmiento*, A097 867 848, 2010 WL 5559137 (BIA 2010) (unpublished).[4] Thus, if an alien files for adjustment of status before he or she has accumulated an aggregate of 180 days in unlawful status and/or working without authorization, the counting of days in unlawful status ceases and the alien is not barred from relief provided under INA §245(k), pending the outcome of the decision.[5]

An issue arises when the alien's application for adjustment of status is denied and the alien applies for adjustment of status a second time, a circumstance which has arisen in the instant matter. While neither the Third Circuit Court of Appeals nor the Board have directly spoken to this issue in a precedent case, the aforementioned unpublished Board decision and USCIS policy memorandum are once again instructive.[6]

In a policy memorandum used for the training and guidance of USCIS personnel dated July 2008 ("July 2008 USCIS Memo"), USCIS states the following:

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[4] Notably, the proper filing of a Form I-485 has afforded aliens a "period of authorized stay" with respect to the tolling of the 180-day counting period under INA §245(k) which is similar to practices under another provision in the INA, namely INA §212(a)(9)(B). INA §212(a)(9)(B)(iv) tolls unlawful presence when a "nonfrivolous application for change or extension of status" is filed *before* the alien's authorized stay expires. Regulations have expanded the tolling practice to adjustment of status applications filed even after authorized stay has expired. *See* 66 Fed. Reg. 16383, 16386 (March 26, 2001) (stating "[A] properly filed application for adjustment of status under Section 245(i) of the Act (8 U.S.C. 1255(i)) places the alien in a 'period of stay authorized by the Attorney General' for purposes of section 212(a)(9)(B) and (C) of the Act (8 U.S.C. 1182(a)(9)(B) and (C))."); *see also Matter of Vazquez-Centeno*, 2004 WL 2374674 (BIA 2004) (unpublished decision); *Matter of Gamero de Cano*, 2006 WL 3088790 (BIA 2006) (unpublished decision) (stating "[The INS] stated, repeatedly, that the time during which a properly filed adjustment of status application is pending also constitutes a period of authorized stay under section 212(a)(9)(B)").

[5] This accords with regulations under INA §245(c), insofar as periods of pending, properly and timely filed applications to maintain or adjust status are not seen as periods of "unlawful status" that serve as bars to adjustment. *See* INA §245(c)(2); 8 C.F.R. §1245.1(d)(2)(ii). Under INA §245(c) an alien is still eligible to adjust status if he applies for adjustment or maintenance before the expiration of his prior status, and the USCIS fails to render a decision on his application prior to that expiration. The USCIS may still grant the application, as long as he was not in unlawful status at the time of applying, and has not failed to maintain lawful status since entry into the U.S.

[6] The Court notes that while USCIS policy memoranda that have not been embodied in the federal regulations are not binding on this Court, the policies contained in such memoranda can be adopted when appropriate. *See Matter of Briones*, 24 I&N Dec. 355 n. 7 (BIA 2007).

> [I]f the same alien files a second application for adjustment of status, the period after which the non-immigrant status expired and during which the first adjustment of status application was pending counts against the 180-day period when considering eligibility for relief under 245(k) in the adjudication of the second adjustment of status application.

See July 2008 USCIS Memo at 5-6. In *Matter of Sarmiento*, a non-precedential opinion by the Board, the court followed USCIS's policy: "where a first application is denied and a second adjustment application is filed, the period after which the non-immigrant status expired and during which the first adjustment of status application was pending counts against the 180-day period." *Matter of Sarmiento*, A097867848, 2010 WL 5559137 (BIA 2010) (unpublished decision).

B. Respondent is Ineligible to Adjust Her Status

As Respondent has applied for an employment-based immigrant visa under INA § 203(b), she is potentially eligible for the exemptions contained in INA § 245(k). However, under the rule articulated in the July 2008 USCIS Memo and the unpublished decision of *Matter of Sarmiento* and in the absence of any law or regulation to the contrary, the Court has no choice but to deny Respondent's application for adjustment of status.

Respondent's authorization to remain in the U.S. ended on July 26, 2005. She applied for adjustment of status for the first time on February 18, 2005, just before her authorization expired. (*See* Record of Proceedings, Respondent's Application for Adjustment of Status date stamped February 18, 2005). Thus, the 180-day counting period did not begin on July 26, 2005 because Respondent's application for adjustment of status, which was already pending by said date, effectively stopped the 180-day clock. *See* July 2008 USCIS Memo at 5; *Matter of Sarmiento*, 2010 WL 5559137. Because Respondent filed her application for adjustment of status while she was still in lawful status, her application was deemed to be proper and timely and she was not considered to be in unlawful status during the time her first application for adjustment was pending. *See* INA §245(c)(2); 8 C.F.R. §1245.1(d)(2)(ii); July 2008 USCIS Memo at 5; *Matter of Sarmiento*, 2010 WL 5559137.

Notwithstanding the above, Respondent's first Form I-485 application was denied on April 14, 2006. (*See* Record of Proceedings, Respondent's Application for Adjustment of Status date stamped February 18, 2005 showing denial stamp for April 14, 2006). Consequently, the period after which Respondent's nonimmigrant status expired and during which her first adjustment of status application was pending counts against the 180-day period. *Id.* This is because, as USCIS stated in its memorandum, "a properly filed adjustment of status application, in and of itself, does not accord lawful status or cure any violation of a nonimmigrant visa." July 2008 USCIS Memo. Thus, the period that Respondent was out of status began on July 26, 2005 and continued until she filed her second Form I-485 on July 25, 2006, which is approximately 364 days. The period Respondent was out of status was far beyond the allowable 180 days. The analysis is the same for the subsequent Form I-485 filings as Respondent was already out of status beyond the allowable time limit by the time the later applications were filed.

Based on the foregoing, Respondent is ineligible to qualify for the exemption under INA § 245(k) and thus, is ineligible to adjust her status to that of a lawful permanent resident under INA § 245(a). Further, Respondent has not proffered any evidence to show that she is eligible to adjust her status under INA § 245(i).

IV. Conclusion

While the Court recognizes the public interest policies associated with adjusting the status of individuals equipped with skills that serve the U.S. economy and people in order to benefit the public interest, the Court is nevertheless forced to conclude that Respondent's case does not fall under the provisions of INA § 245(k).

Based on the foregoing, the Court will deny Respondent's application for adjustment of status. The Court will also deny the derivative applications for adjustment of status for Rider 1 and Rider 2.

ORDERS

IT IS ORDERED that Respondent does not fall under the provisions of INA § 245(k);

IT IS FURTHER ORDERED that Respondent is ineligible to adjust status under INA § 245(a);

IT IS FURTHER ORDERED that Rider 1 and Rider 2 are ineligible to adjust status under INA § 245(a) as derivatives.

11/24/10
Date

Frederic G. Leeds
Immigration Judge