U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: MAYNIGO, LORNA

A 094-876-389

Date of this notice: 7/31/2013

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:
Malphrus, Garry D.
Creppy, Michael J.
Mullane, Hugh G.

SchwarzA
Userteam: Docket

File: A094 876 389 – Los Angeles, CA Date:

In re: LORNA MAYNIGO JUL 31 2013

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David M. Sturman, Esquire

ON BEHALF OF DHS: Sandra D. Anderson
Chief Counsel

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

APPLICATION: Adjustment of status

The Department of Homeland Security has filed an unopposed motion to withdraw its appeal from the Immigration Judge's October 26, 2011, decision granting the respondent adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). The DHS has also advised that the respondent's background and security checks need to be updated. Accordingly, we will deem the DHS's appeal withdrawn and will remand the record to the Immigration Judge for updating of the required background and security checks.[1]

ORDER: The DHS's appeal is withdrawn.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

[1] The oral argument the Board requested in this case is canceled.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Los Angeles, California

File No.: A 094 876 389 October 26, 2011

In the Matter of	)	
	)	
LORNA MAYNIGO	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 237(a)(1)(B) - remained longer than permitted.

APPLICATIONS: Adjustment of status under Section 245(k) of the Immigration and Nationality Act.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
David Sturman	Nancy DeFrank

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 45-year-old native and citizen of the Philippines. She seeks adjustment of status on the basis of her skills as a market research analyst. For the reasons explained below, I will grant her application for adjustment of status under Section 245(k) of the Immigration and Nationality Act.

REMOVABILITY

The respondent was placed in these removal proceedings when the Notice to Appear was filed with the Immigration Court on March 9, 2011. She is charged with remaining beyond her period

of authorized non-immigrant stay. I do find that she is removable as charged and designate Philippines as the country of removal should that be necessary.

EVIDENCE

The evidence in this case consists of Exhibits 1 through 8. The exhibits include the following: Exhibit 1, Notice to Appear; Exhibit 2, application for adjustment of status; Exhibit 3, brief in support of eligibility; Exhibit 4, DHS brief in opposition; Exhibit 5, pleadings; Exhibit 6, respondent's supplemental documents; Exhibit 7, DHS supplemental brief; and Exhibit 8, proof of successorship in interest and related documents.

In addition to these eight exhibits, which have all be admitted into evidence, the respondent testified in the course of her hearing and based upon the respondent's testimony I find her to be totally credible. Her testimony was candid, responsive and she consistently appeared to be making a genuine effort to tell the truth. There is no reason to believe that she is not telling the truth and her recitation of events is supported by the documentary evidence in the record.

FACTS AND ANALYSIS

The respondent came to the United States on June 24, 2001 and changed her status to H-1B, professional working in a specialty occupation. Her H-1B status was valid until August 29, 2006 (Exhibit 2, page 14).

The respondent filed a timely application for an H-1B

extension on August 28, 2006 (Exhibit 2, page 16). This extension was denied by Citizenship and Immigration Services on March 7, 2007 (Exhibit 3, Tab 3). Thereafter, she filed an application for adjustment of status on June 29, 2007 (Exhibit 2, page 1, Tab A).

The respondent is the beneficiary of an approved I-140 employment-based visa petition. This petition has a priority date of February 13, 2004 which is current.

Note that the employer, Yasha Fabrics, changed its name to Sportec and Yasha Fabrics ceased to exist. This change of events is detailed and documented in Group Exhibit 8. The only issue is whether the respondent is eligible for adjustment of status under Section 245(a)(C) or 245(k).

Section 245(k) allows an employment-based immigrant to adjust status under the following conditions: (1) the applicant must be present pursuant to a lawful admission; (2) after being admitted pursuant to a lawful admission the applicant cannot have exceeded more than 180 days in the following: (a) "failed to maintain continuously" a lawful status; (b) engaged in unauthorized employment; or (c) otherwise violated the terms and conditions of admission. In other words, under Section 245(k) an employment-based immigrant may adjust status if she does not have more than 180 days in the aggregate of any of these three violations. She cannot have more than 180 days of failure to maintain continuously "a lawful status." She cannot have more

than 180 days of unauthorized employment or other type of violation of the terms and conditions of her admission.

Because the respondent in this case filed a timely application for extension of her H-1B status, she maintained a lawful status under the terms of Section 245(k) while that extension was pending. See 8 C.F.R. 274a.12(b)(2). This regulation provides for an automatic 240-day extension for timely-filed applications for adjustment of status. The 240 days extension allows the individual, an individual such as the respondent, to continue working legally in the United States pursuant to this automatic extension, which is incorporated in the regulations that apply to employer sanctions. Also CIS concedes that she was in an "authorized period of stay" while the extension petition was pending. See CIS denial, Exhibit 4, Tab B. That extension was denied on March 7, 2007 and she filed her application for adjustment of status on June 29, 2007, less than 180 days later.

I find that the only period during which the respondent "failed to maintain" continuously a lawful status under Section 245(k)(2)(A) was the period between March 7, 2007 and June 29, 2007. This is a period of approximately three-and-a-half months and significantly less than the aggregate of 180 days which is allowed under Section 245(k).

When CIS denied her adjustment of status, they reasoned that she was out of status since the expiration of her H-1B on August

29, 2006. They cite an internal memo regarding unlawful presence and caution that it is not the same as failure to maintain a lawful status. But then they applied the rule for unlawful presence. Section 245(k) does not use the term "unlawful presence." Rather, it uses the term "a lawful status" and allows adjustment unless the applicant has failed to maintain a lawful status for more than 180 days.

DHS urges the Court to apply the definition in 8 C.F.R. 245.1(b), but the Court notes that this is the definition for "lawful immigration status" and it relates to adjustment of status under Section 245(a) and the related bars in Section 245(c). As this Court is granting adjustment of status under Section 245(k), I find that this regulation is not applicable to the respondent's application for adjustment of status.

The Court notes that in the context of deportation and removal proceedings such as that in which the respondent is currently embroiled that ambiguities must be construed in favor of the alien. See Wong v. INS, 373 F.3d 952 (9th Cir. 2004). I find that this sentiment is particularly true in light of an individual like the respondent who has done everything in her power to maintain her status since coming to the United States. I note that if this application for adjustment of status is denied and the respondent is forced to consulate process, she would be subject to the three and possibly ten-year bar for unlawful presence and under Section 212(a)(9) and she would not

qualify for a waiver of that ground of inadmissibility. This is simply the consequences, therefore, for a denial of an application for adjustment of status and these circumstances would simply be too harsh for an individual who has clearly taken pains to maintain her status and file timely applications for extension as required.

The change in the employer's name, which is documented in Exhibit 8, does not negate the respondent's application for adjustment of status in this case for employment-sponsored immigration. The respondent argues that the current employer is a successor in interest to the original employer who filed the initial application for alien labor certification. However, the Court need not reach the issue with respect to successor in interest because the American Competitiveness Act for the 21st century clearly permits portability in this case. Moreover, the Board of Immigration Appeals has recognized that the Immigration courts can now determine portability; and given that the respondent is still working for the same business, albeit under the changed name that initially sponsored her labor certification, she is still working in the same or similar occupation and is, thus, eligible to continue with her application for adjustment of status.

For all of these reasons, I find that the respondent is statutorily eligible for adjustment of status under Section 245(k) and I find that she is deserving of a favorable exercise

of discretion. As stated above, denial of adjustment of status in this case would be tantamount to a total loss of the respondent's eligibility for immigration to the United States. That is because were she forced to remain outside of the United States for a three or ten-year period it is not reasonable to assume that they employer would continue with this case of employer-sponsored immigration.

Moreover, because the respondent is single and does not possess a qualifying spouse or parent for purposes of waiver of the three and ten-year bar, she would be unduly penalized for what I find to be a brief period in which she failed to maintain a lawful status under Section 245(k). I find that this is precisely the purpose of Section 245(k) to allow employment-based immigrants to adjust status despite short periods of disruption or gaps in their lawful status. And for all of these reasons, I find that the respondent is eligible to adjust status under Section 245(k) and deserving of a favorable exercise of discretion.

ORDER

IT IS HEREBY ORDERED the respondent's application for adjustment of status under Section 245(k) of the Immigration and Nationality Act is hereby granted.

MAUREEN O'SULLIVAN
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE MAUREEN S. O'SULLIVAN, in the matter of:

LORNA MAYNIGO

A 094 876 389

Los Angeles, California

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

June Gilbert/DB

June Gilbert, Transcriber
Free State Reporting, Inc.

December 7, 2011
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, and/or CD, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.