U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15445667

Date: AUG. 3, 2022

Certification of Long Island Field Office Decision

Form I-485, Application to Adjust Status

The Applicant, a beneficiary of an approved employment-based immigrant visa petition seeks to adjust status to that of a lawful permanent resident under section 245(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(a).

The Director of the Long Island Field Office in Holtsville, New York denied the Form I-485 concluding that the Applicant was barred from adjustment of status by section 245(c) of the Act, because he initially entered the United States without inspection and did not continuously maintain a lawful status in the United States. The Director further determined that the Applicant did not qualify for the exception to this bar in section 245(k) of the Act, because neither a grant of Temporary Protected Status (TPS), nor his return from abroad with a TPS-based travel document satisfied the requirement of lawful admission to the United States mandated by that section.

The matter is now before us on certification. *See* 8 C.F.R. § 103.4(a)(1). Upon review, we will remand the matter to the Director for further proceedings consistent with our opinion below.

I. LAW

Section 245(a) of the Act provides in relevant part that the status of a noncitizen who was inspected and admitted or paroled into the United States may be adjusted to that of a lawful permanent resident if the noncitizen makes an application for such adjustment, is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and an immigrant visa is immediately available at the time the adjustment application is filed.

Any noncitizen who seeks adjustment of status in a category other than an immediate relative or a special immigrant and who "continues in or accepts unauthorized employment prior to filing an 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" is ineligible to adjust status under section 245(a) of the Act. Section 245(c)(2) of the Act.

Section 245(c)(7) of the Act prohibits noncitizens who are beneficiaries of employment-based visa petitions from adjusting status if they are not in a lawful nonimmigrant status on the date of filing.

Section 245(k)(2) of the Act allows noncitizens who are beneficiaries of employment-based visa petitions to adjust status pursuant to section 245(a) notwithstanding subsections (c)(2), (c)(7), and (c)(8), if they (1) were present in the United States pursuant to a lawful admission on the date of filing an application for adjustment of status and (2) have not failed to maintain continuously a lawful status for an aggregate period of more than 180 days since their last lawful admission to the United States.

When determining whether an applicant is eligible for the section 245(k) exemption, U.S. Citizenship and Immigration Services (USCIS) only considers the time period following the applicant's most recent lawful admission. *See* 7 *USCIS Policy Manual* B.8(E)(3), https://www.uscis.gov/policy-manual. In other words, even if the applicant commits violations described in section 245(c) of the Act for more than 180 days, then departs and is lawfully admitted to the United States, the applicant may qualify for the exemption in section 245(k) of the Act so long as his or her violations do not total more than 180 days in the aggregate since that most recent lawful admission. *Id.*

TPS recipients "may travel abroad with the prior consent" of the Department of Homeland Security (DHS). Section 244(f)(3) of the Act, 8 U.S.C. § 1254a(f)(3). Section 304(c)(1)(A) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. 102-232, 105 Stat. 1733, 1749 (December 12, 1991) (codified as amended at section 244 of the Act, Note 3), provides in pertinent part that a TPS recipient whom the Secretary of Homeland Security authorizes to travel abroad temporarily and who returns to the United States in accordance with such authorization "shall be inspected and admitted in the same immigration status the alien had at the time of departure . . . ."

II. ANALYSIS

The record reflects that the Applicant initially entered the United States in 1997 without inspection and admission or parole. In August 2002 USCIS granted him TPS. The Applicant subsequently obtained permission to travel abroad on that basis and was issued a Form I-512, Authorization for Parole of an Alien into the United States. Upon his most recent return from foreign travel in 2016, the Applicant presented the Form I-512 to a U.S. Customs and Border Protection official, who placed a parole stamp on the document and noted "TPS" as the purpose for the parole. The Applicant remained a TPS beneficiary during his foreign travel and through 2018, when he filed the instant request for adjustment of status based on an approved employment-based visa petition classifying him as a skilled worker under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). He represented on the Form I-485 that he was last "inspected at a port of entry and paroled" as a TPS recipient in 2016.

The Applicant did not dispute that he was subject to the adjustment bars in section 245(c) of the Act, as he initially entered the United States without inspection, worked without authorization,[1] and did not continuously maintain lawful status in the United States prior to filing his Form I-485. Nevertheless, he asserted that he was eligible for the exemption in section 245(k) of the Act because he was "lawfully admitted" to the United States in 2002 through the grant of TPS or, in the alternative because his

[1] The Applicant indicated on his Form I-485 that after entering the United States in October 1997 he worked without authorization until he obtained TPS. According to USCIS records, the Applicant was first granted employment authorization in June 2001 based on his pending request for TPS.

"lawful admission" to the United States occurred in 2016 when he returned to the United States with the TPS-based travel document.

The Director determined, however, that neither the grant of TPS, nor the Applicant's return to the United States with a TPS-based travel document resulted in his "admission" to the United States. Thus, the Director concluded that the Applicant did not meet the "lawful admission" requirement in section 245(k) of the Act and could not benefit from the exemption therein to overcome the bars to his adjustment of status under section 245(a) of the Act.[2]

Subsequently to the Director's decision, USCIS updated its policy concerning the effect of foreign travel with TPS-based travel documents. The updated policy guidance clarifies that a TPS beneficiary whom DHS has inspected and admitted into TPS after such authorized travel is "inspected and admitted" for purposes of adjustment of status under section 245(a) of the Act and section 245(k) of the Act, even if the TPS beneficiary was present in the United States without admission or parole when initially granted TPS. *See* USCIS Policy Memorandum P-602-0188, *Rescission of Matter of Z-R-Z-C- as an Adopted Decision; agency interpretation of authorized travel by TPS beneficiaries*, 2 (July 1, 2022)[3]; s*ee also* 7 *USCIS Policy Manual*, *supra*, at B.2(A)(5).

In adjudicating an application for adjustment of status, or any other benefit request where relevant, USCIS will consider whether to apply this guidance to travel undertaken by the applicant before the issuance of the updated policy memorandum. *Id.* USCIS may apply the current policy retroactively and consider past travel to have resulted in an inspection and admission for purposes of section 245(a) of the Act, even if the policy or practice in place at the time the travel occurred instructed otherwise. *Id.* To be considered for retroactive application of current guidance: (1) the noncitizen must have obtained prior authorization to travel abroad temporarily on the basis of being a TPS beneficiary, (2) the noncitizen's TPS was not withdrawn, or the designation for their foreign state (or part of a foreign state) was not terminated or did not expire during their travel, (3) the noncitizen returned to the United States in accordance with the authorization to travel, and (4) upon return, the noncitizen was inspected by INS[4] or DHS at a designated port of entry and paroled or otherwise permitted to pass into the territorial boundaries of the United States in accordance with the TPS-based travel authorization. *Id.*

In cases arising outside of the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) USCIS must determine on a case-by-case basis whether a noncitizen who was paroled or otherwise permitted to enter after TPS-authorized travel under prior guidance, as in effect before July 1, 2022, should be treated as inspected and admitted for purposes of a given adjudication. *Id.* Where the distinction between admission and parole is critical to the outcome of the adjudication, USCIS must assess the individual case to determine whether to retroactively consider a prior return from TPS-

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[2] On certification, the Applicant does not renew his claim that he was admitted to the United States through the grant of TPS. We note that during the pendency of the certification the U.S. Supreme Court held that TPS is not an admission, and where a noncitizen was not lawfully admitted or paroled, 'TPS does not alter that fact." *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1815 (2021). We need not address this issue further, as it is no longer dispositive on the Applicant's eligibility for adjustment of status. See 7 *USCIS Policy Manual* B.2 (A)(5), *supra* (clarifying that although a grant of TPS is not in itself an admission for purposes of adjustment under section 245(a) of the Act, inspection and admission after TPS-authorized travel may satisfy the admission requirement of sections 245(a) and 245(k) of the Act under certain specific circumstances).

[3] Available at https://www.uscis.gov/sites/default/files/document/memos/PM-602-0188-RescissionofMatterofZ-R-Z-C-.pdf

[4] Former Immigration and Naturalization Service.

authorized travel as an admission by applying a five-factor test (Retail Union Test).[5] *Id.* *See also* USCIS Policy Memorandum P-602-0188, *supra*, at 15.

This five-factor test entails the following considerations: (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. *Id.* *See also* 7 *USCIS Policy Manual*, *supra*, at B.2(A)(5).

The Applicant's adjustment of status proceedings fall outside the Fifth Circuit's jurisdiction. The record reflects that the Applicant was issued a travel document as a TPS beneficiary in 2015, traveled abroad, returned to the United States with that document in February 2016, and was inspected and paroled into the United States at a designated port of entry by DHS. There is no evidence that the Applicant's TPS was withdrawn or otherwise terminated during his foreign travel. Lastly, the Applicant is seeking the exemption under section 245(k) of the Act, which requires him to establish in part that he was lawfully admitted to the United States. The distinction between "admission" and "parole" is therefore critical to adjudication of the Applicant's adjustment of status request.

Accordingly, we will return the matter to the Director to determine whether the current policy should be applied retroactively in the Applicant's case under the Retail Union Test criteria, and if so, whether the Applicant is otherwise eligible for adjustment of status as a matter of law and discretion when all relevant evidence and facts are considered.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with foregoing analysis.

[5] *Retail Wholesale and Department Store Union AFL-CIO v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972)—known as the *Montgomery Ward* test in the Ninth Circuit—as adopted by the Board of Immigration Appeals in Matter of *Cordero-Garcia*, 27 I&N Dec. 652, 657 (BIA 2019). *See* USCIS Policy Memorandum P-602-0188, *supra*, at 15.