



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

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

In Re: 5924482

Date: JULY 15, 2021

Certification of Washington Field Office Decision

Form I-485, Application to Adjust Status

The Applicant has requested to adjust his status to that of a lawful permanent resident under section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255, by filing a Form I-485, Application to Register Permanent Residence or Adjust Status (adjustment of status application). The Director of the Washington Field Office in Fairfax, Virginia denied the application, concluding that the Applicant was barred from adjusting his status under sections 245(c)(2) and (7) of the Act, 8 U.S.C. §§ 1255(c)(2) and (7), because he had not continuously maintained a lawful status since entry into the United States and was not in a lawful nonimmigrant status at the time of filing for adjustment. The matter is now before us on certification. *See* 8 C.F.R. § 103.4(a)(1).

On certification, the Applicant asserts that he is eligible to adjust status pursuant to section 245(a) of the Act and that he is not barred by sections 245(c)(2) or (7) because he was in lawful status when he filed his application and because his inability to maintain his lawful nonimmigrant status was through no fault of his own or for technical reasons.

The Applicant bears the burden of establishing eligibility for the requested immigration benefit. Section 291 of the Act, 8 U.S.C. § 1361. To meet his burden in these proceedings, the Applicant must show that he satisfies the relevant statutory criteria, is not subject to any bars to adjustment, and merits a favorable exercise of discretion. Section 245 of the Act; 8 C.F.R. § 245.1. Upon review, we will affirm the Director's decision to deny the adjustment of status application.

I. LAW

Section 245(a) of the Act provides that the status of noncitizens who were inspected and admitted or paroled into the United States may be adjusted to that of a lawful permanent resident if they are eligible to receive an immigrant visa and are admissible to the United States and have an immigrant visa immediately available at the time the adjustment application is filed. In addition, noncitizens who seek adjustment of status in a category other than immediate relatives of U.S. citizens or certain special immigrants must demonstrate that they are not subject to any of the bars to adjustment set forth in section 245(c) of the Act.

Section 245(c)(2) of the Act disqualifies from adjustment noncitizens who are in unlawful immigration status on the date of filing an adjustment application, have “failed (other than through no fault of [their] own or for technical reasons)” to maintain continuously a lawful status since entry into the United States, or have accepted unauthorized employment prior to filing an adjustment application.

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, subsequent to a lawful admission, they have not for an aggregate period exceeding 180 days failed to maintain continuously a lawful status, engaged in unauthorized employment, or otherwise violated the terms and conditions of their admission.

II. ANALYSIS

The issues before us on certification are: 1) whether the Applicant, through the filing of an asylum application, maintained a lawful status after the expiration of his nonimmigrant visitor status for the purposes of sections 245(c)(2) and 245(c)(7) of the Act, and 2) whether his asylum request, which was pending when he applied for adjustment of status and subsequently denied, was a request to maintain lawful status that qualified him for the technical violation exception under section 245(c)(2).

The Director determined that the Applicant was ineligible to adjust status pursuant to section 245(c)(7) of the Act, which specifically bars applicants from adjusting status based on employment if they are not in a lawful nonimmigrant status on the date of filing the Form I-485. The Director further determined that the Applicant was barred from adjustment under section 245(c)(2) of the Act because he did not continuously maintain a lawful status after being admitted to the United States in January 2015, and he did not establish that he qualified for an exception to this requirement. The Director determined that the Applicant did not meet the criteria under section 245(k)(2) of the Act for exemption from the section 245(c)(2) and (c)(7) bars to adjustment because he had failed to maintain a lawful status for over 180 days subsequent to his last lawful admission prior to filing for adjustment of status.

The Applicant does not contest that his nonimmigrant status expired on July 26, 2015, while his asylum request was pending. He asserts that he was nevertheless maintaining lawful status in the United States after July 2015 because U.S. Citizenship and Immigration Services (USCIS) authorized him to remain and work in the United States until a decision was made on his asylum application. He further argues that he failed to maintain his nonimmigrant status for “technical reasons,” because USCIS did not timely act on his asylum request, and that his failure to extend his nonimmigrant status after applying for asylum was through “no fault” of his own. He claims that the exception in section 245(c)(2) of the Act therefore applies in his case and allows him to adjust his status despite not having maintained lawful nonimmigrant status.

The Applicant was admitted to the United States on January 27, 2015, as a nonimmigrant visitor (B-2) for a six-month period until July 26, 2015. In February 2015, while in B-2 nonimmigrant status, he

filed a Form I-589, Application for Asylum and for Withholding of Removal (asylum application). USCIS later authorized the Applicant's employment in the United States based on the pending asylum application, and he began working in November 2015. In May 2016, the Applicant requested that his asylum interview be expedited, but the asylum office denied the request citing lack of resources. In February 2017, the Applicant's employer filed an employment-based immigrant visa petition to classify him as an unskilled worker under section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), and the Applicant concurrently filed the instant Form I-485 to apply to adjust status to that of a lawful permanent resident. In [] 2017, while the adjustment of status application was pending, the asylum office determined that the Applicant had not established eligibility for asylum and referred his claim to the Immigration Court through issuance of a Form I-862, Notice to Appear (NTA). An Immigration Judge dismissed the removal proceedings in [] 2018 on motion of the Department of Homeland Security (DHS). The Director's denial of the adjustment of status application followed.

A. Effect of Pending Asylum Application on Lawful Status

The Director determined that the Applicant was not in and maintaining lawful immigration status when he filed his adjustment application in February 2017 because his B-2 nonimmigrant status had expired and he had not been granted an extension or change of his nonimmigrant status. The Director further found that a pending asylum application did not create any new "lawful status" within the meaning of section 245(c) of the Act. We agree.

The regulation at 8 C.F.R. § 245.1(d)(1) defines "lawful immigration status" as limited to six categories and does not include a pending asylum application as one of the categories.¹ Furthermore, policy guidance issued by the former Immigration and Naturalization Service (INS) has consistently recognized that filing an application for asylum does not continue or extend lawful status for the purposes of section 245(c) of the Act. *See* Memorandum from Louis D. Crocetti, Associate Commissioner, *Policy Clarification Regarding the Effect of Filing for Asylum on Nonimmigrant Status* (Apr. 23, 1996) (Crocetti Memorandum). The Crocetti memorandum reaffirmed prior guidance stating that the act of applying for asylum does not have the effect of extending nonimmigrant status and does not confer any type of lawful immigration status upon an applicant. *Id.* at 1.

This interpretation is consistent with regulations governing asylum applications, which prescribe different post-adjudication procedures depending on an applicant's immigration status at the time a decision is rendered. Specifically, 8 C.F.R. § 208.14(c)(1) instructs that if asylum is not granted and the applicant appears deportable under section 237(a) of the Act,² the asylum officer must refer the application to an Immigration Judge for adjudication in removal proceedings. If the applicant is

¹ The six categories of individuals considered in lawful status are: (1) lawful permanent residents; (2) nonimmigrants admitted under 8 U.S.C. § 1101(a)(15) whose statuses either have been extended or have not expired; (3) refugees whose statuses have not been revoked; (4) asylees whose statuses have not been revoked; (5) parolees whose statuses have not expired, been revoked, or been terminated; and (6) persons eligible for benefits under the Immigration Nursing Relief Act of 1989 and who have filed their applications for adjustment of status on or before October 17, 1991. 8 C.F.R. § 245.1(d)(1).

² Individuals subject to removal under that section include noncitizens who were admitted to the United States as nonimmigrants under section 101(a)(15) of the Act and who have failed to maintain the nonimmigrant status in which they were admitted, or to which that status was changed. *See* section 237(a)(1)(C) of the Act, 8 U.S.C. § 1227(a)(1)(C).

maintaining valid immigrant, nonimmigrant, or temporary protected status, or has been paroled into the United States and the parole has not expired or been terminated, the officer must deny the application. 8 C.F.R. §§ 208.14(c)(2) and (3). Under the regulations, the pendency of an asylum request has no effect on a noncitizen's lawful immigration status, including his or her nonimmigrant status; a noncitizen "who was maintaining his or her nonimmigrant status at the time of filing an asylum application and has such application denied may continue in or be restored to that status, if it has not expired." 8 C.F.R. § 208.23.

The Applicant does not dispute that his nonimmigrant status expired on July 26, 2015, but he asserts that he was nevertheless maintaining lawful status in the United States after that date because USCIS authorized him to remain and work in the United States until a decision was made on his asylum application. However, not all periods of authorized stay are periods of "lawful status" within the meaning of section 245(c) of the Act, and there are situations in which a noncitizen is not considered to be unlawfully present despite being in an unlawful status.

As stated above, the term "lawful status" in the context of adjustment of status under section 245 of the Act includes the status of a noncitizen admitted to the United States as a nonimmigrant defined in section 101(a)(15) of the Act, *whose initial period of admission has not expired or whose nonimmigrant status has been extended*. 8 C.F.R. § 245.1(d)(1)(ii) (emphasis added).³ Nonimmigrant visitors are admitted to the United States for a minimum period of six months, but not more than one year, and may be granted extensions of temporary stay in increments of not more than six months. 8 C.F.R. § 214.2(b)(1).

The term "period of authorized stay" is used in the context of section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), which pertains to noncitizens who are inadmissible for being unlawfully present in the United States. Generally, a noncitizen present in the United States after the expiration of the status in which they were admitted is "unlawfully present"; however, certain noncitizens, including those who have a pending bona fide asylum application, do not accrue "unlawful presence" even if they are in unlawful status. Section 212(a)(9)(B)(ii)-(iii) of the Act; *see also Matter of L-K-*, 23 I&N Dec. 677, 680-81 (BIA 2004) (distinguishing unlawful status and unlawful presence); Memorandum from Donald Neufeld, Acting Associate Director for Domestic Operations Directorate, USCIS, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* 9-11 (May 6, 2009) (discussing distinctions between unlawful status and unlawful presence). Pursuant to section 212(a)(9)(B)(iii) of the Act, and as a matter of USCIS policy, there are several categories of noncitizens who are in unlawful status who do not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act.⁴ *Id.*

Courts have held that a pending application that results in a period of authorized stay but is not specifically included in the definition of "lawful immigration status" under 8 C.F.R. § 245.1(d)(1)

³ Because the Applicant last entered the United States as a nonimmigrant visitor, only that category is relevant here, and he does not claim to have held any other status listed at 8 C.F.R. § 245.1(d)(1).

⁴ These statutory and policy exception include, but are not limited to: minors who are under 18 years of age; certain battered noncitizens with properly filed pending applications for adjustment of status; nonimmigrants with pending requests for extension of status (filed on Form I-539, Application to Extend/Change Nonimmigrant Status, or included in the filing of Form I-129, Petition for a Nonimmigrant Worker); and noncitizens granted voluntary departure, stay of removal, or deferred action.

does not confer “lawful status” on a noncitizen. *See Chaudhry v. Holder*, 705 F.3d 289 (7th Cir. 2013) (pending adjustment application did not toll accrual of days without “lawful status” for adjustment of status purposes); *Dhuka v. Holder*, 716 F.3d 149, 158-59 (5th Cir. 2013) (affirming the Board of Immigration Appeals decision that a period of authorized stay for the purposes of section 212(a)(9)(B) of the Act was not equivalent to lawful status under section 245(c) as “the implementing regulation defining ‘lawful status’ for Section 1255(c) does not include a general category of aliens whose lawful status expired during the pendency of an application to adjust their status.”). Thus, the terms “lawful status” and “period of authorized stay” are not interchangeable, and because lawful status and lawful presence pursuant to a period of authorized stay are distinct concepts, “it is entirely possible for aliens to be lawfully present (i.e., in a ‘period of authorized stay by the [Secretary of Homeland Security]’) even though their lawful status has expired.” *Chaudhry, supra*, at 292 (citing *Matter of L-K-*, 23 I&N Dec. at 680-81). The definition of “lawful immigration status” in 8 C.F.R. § 245.1(d)(1) “expressly forecloses the argument that a ‘period of stay authorized by [the Secretary of Homeland Security]’ might also constitute ‘lawful status’ for purposes of [section 245 of the Act].” *Id.*

In finding that the pending asylum request did not continue or otherwise provide the Applicant with a lawful status, the Director relied, in part, on the decision of the U.S. District Court for the Southern District of Texas in *Kavafoglu v. Nielsen*, 2019 WL 172865 (S.D. Tex. Jan. 11, 2019). The applicants in *Kavafoglu* were admitted to the United States as nonimmigrant visitors and, like the Applicant in the present case, filed asylum requests prior to the expiration of their nonimmigrant status. The court held that the applicants did not have lawful immigration status on the day they submitted their application for adjustment of status, stating that the “mere filing of [an asylum] application, without more, d[oes] not create or establish any new, ‘lawful’ status. . . .” 2019 WL 172865 at 3 (citing *Dhuka*, 716 F.3d at 156). Although this decision is not binding on us in these proceedings,⁵ we find it persuasive, as it is consistent with the prior INS guidance, as explained in the Crocetti memorandum, concerning the effect of a pending asylum application on lawful nonimmigrant status.

Here, the Applicant filed for asylum while in a nonimmigrant status, but his initial period of admission expired in July 2015, and he did not maintain continuously a lawful status (in this case his nonimmigrant visitor status) since entry into the United States. Although the Applicant was in a period of authorized stay while his asylum request was pending, it did not extend or restore his nonimmigrant status or otherwise bring it within the definition of “lawful immigration status” in 8 C.F.R. § 245.1(d)(1). Rather, like the applicants in *Kavafoglu*, at the time the Applicant applied for adjustment of status, he was not in or maintaining a lawful immigration status, but only permitted to remain in the United States during the pendency of his asylum application. This authorization to remain in the United States while the application is pending “does not equate to a right protected by law . . . sufficient to confer ‘lawful’ immigration status.” *Id.* (citing *Dhuka*, 716 F.3d at 156). By extension, a grant of employment authorization made to an individual by virtue of a pending asylum application also does not confer lawful immigration status. *See e.g. Xiao Lu Ma v. Sessions*, 907 F.3d 1191 (9th Cir. 2018).

⁵ In contrast to the precedential authority of published decisions of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

B. The Applicant is Barred from Adjustment under Section 245(c)(7) of the Act

Although the Applicant was in a period of authorized stay while his asylum request was pending, his initial period of nonimmigrant admission expired in July 2015, and after that date he was not maintaining a “lawful immigration status” within the definition at 8 C.F.R. § 245.1(d)(1). We therefore agree with the Director’s determination that the Applicant is precluded from adjustment of status under section 245(c)(7) of the Act because he was not in or maintaining lawful immigration status when he filed for adjustment in 2017. As stated, that section prohibits noncitizens from adjusting status based on an employment-based petition if they are not in a lawful nonimmigrant status at the time of filing for adjustment.⁶

The Director determined that the Applicant did not qualify for the exception under section 245(k)(2) of the Act, which allows beneficiaries of employment-based visa petitions to adjust status, notwithstanding the bar at section 245(c)(7), if their failure to maintain a lawful status subsequent to a lawful admission did not exceed an aggregate period of 180 days. Here, the Applicant’s lawful nonimmigrant status expired in July 2015, and when he applied for adjustment of status in February 2017, he had been in unlawful status for over a year. We therefore agree with the Director’s determination that the Applicant does not meet the criteria for exemption under section 245(k)(2) of the Act from the section 245(c)(7) bar because when he filed his adjustment application, he had failed to maintain lawful status for over 180 days since his last lawful admission.⁷

III. CONCLUSION

The Applicant is seeking adjustment of status as the beneficiary of an employment-based petition and was not in a lawful nonimmigrant status when he filed the instant application, and he is subject to the bar at section 245(c)(7) of the Act. Because he does not qualify for the exception at section 245(k)(2) of the Act, he is ineligible for adjustment of status, and we need not determine whether he is also barred from adjustment pursuant to section 245(c)(2) of the Act or whether he qualifies for the technical violation exception.

We will affirm the Director’s decision to deny his application for adjustment of status under section 245(a) of the Act.

ORDER: The Director’s decision is affirmed and the application is denied.

⁶ There is a narrow exception to this rule for applicants who file adjustment applications while in a lawful nonimmigrant status and are subsequently paroled into the United States pursuant to an advance parole document. *See 7 USCIS Policy Manual, supra*, at B(5) (citing 62 Fed. Reg. 39417, 39421 (Jul. 23, 1997)).

⁷ The Applicant does not contend that he failed to maintain his lawful status for 180 days or less to meet the section 245(k)(2) exception to the section 245(c)(2) and (c)(7) requirements.