



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

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

In Re: 16898860

Date: NOV. 15, 2022

Certification of Chicago, Illinois Field Office Decision

Form I-485, Application to Adjust Status

The Applicant 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), as a derivative of his spouse who is a beneficiary of an approved employment-based immigrant visa petition.

The Director of the Chicago, Illinois Field Office denied the Form I-485 concluding that the Applicant was barred from adjustment of status by sections 245(c)(2) and (7) of the Act, because she initially entered the United States without inspection, did not continuously maintain a lawful status in the United States, and was not in a lawful nonimmigrant status at the time of filing for adjustment. The Director further determined that the Applicant did not qualify for the exception to those bars in section 245(k) of the Act, because she was not present in the United States pursuant to a lawful admission as required under 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), 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 their 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 Applicant initially entered the United States in 1995 without inspection and admission or parole. In 2000, 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 return from foreign travel in December 2014 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 in his foreign passport noting "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 as a derivative of his spouse, who is the beneficiary of an approved employment-based visa petition classifying her as a skilled worker under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). The Applicant represented on his Form I-485 that he was last "inspected at a port of entry and admitted" in December 2014.

As stated, the Director determined that the Applicant was precluded from adjusting his status under sections 245(c)(2) and (7) of the Act and, because he was last "paroled" into the United States with a TPS-based travel document he was ineligible for the exemption in section 245(k) of the Act, which requires in part "a lawful admission."

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 provides 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)¹; see also 7 USCIS Policy Manual B.2(A)(5), *supra*.

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 INS² 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 the United States 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-authorized travel as an admission by applying a five-factor test (*Retail Union Test*).³ *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). “In most instances, when the officer determines that an applicant meets all other eligibility requirements and merits adjustment of status in the exercise of discretion, it would be appropriate for the officer, on a case-by-case basis, to deem the prior parole to be an admission under [MTINA].” 7 USCIS Policy Manual, *supra*, at B.2(A)(5).

¹ Available at <https://www.uscis.gov/sites/default/files/document/memos/PM-602-0188-RescissionofMatterofZ-R-Z-C-.pdf>.

² Former Immigration and Naturalization Service.

³ *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.

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, traveled abroad, returned to the United States with that document in 2014, and was inspected and paroled into the United States by DHS at a designated port of entry. 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 Applicant is eligible for adjustment of status as a matter of law and discretion when all relevant evidence and facts are considered, but for the Applicant's previous parole vis-a-vis admission. If so, the Director should determine whether the current policy should be applied retroactively in the Applicant's case under the *Retail Union* Test.

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