U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15234509

Date: MAY 1, 2023

Certification of Houston, Texas 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).

The Director of the Houston, Texas Field Office denied the Form I-485, concluding that the Applicant was in deportation proceedings and U.S. Citizenship and Immigration Services (USCIS) did not have jurisdiction to adjudicate her request for adjustment of status. Specifically, the Director determined that the Applicant's travel abroad with advance parole documents while she was in Temporary Protected Status (TPS) did not serve to execute her outstanding order of deportation, and jurisdiction over the adjustment therefore rested solely with the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). The matter is now before us on certification pursuant to 8 C.F.R. § 103.4(a).

On certification, the Applicant states that when she filed the instant Form I-485 she relied on USCIS's prior practice of granting adjustment of status to TPS recipients who had deportation orders and who returned to the United States with TPS-based travel documents. She avers that the Director improperly adjudicated her Form I-485 pursuant to the subsequent USCIS Policy Manual update,[1] which clarified that a TPS beneficiary's foreign travel does not execute an outstanding deportation order. The Applicant claims in the alternative that this guidance does not apply in her case, because she last traveled outside the United States with an adjustment-based advance parole document and should be therefore considered an "arriving alien" for the purposes of adjustment of status under section 245 of the Act.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review,

[1] The Applicant further asserts that the update is invalid, because at the time it was added to the USCIS Policy Manual neither the Department of Homeland Security nor USCIS was led by a lawfully serving Secretary (or Acting Secretary) or Director (or Acting Director), respectively. She generally references the Appointments Clause of the U.S. Constitution and the Federal Vacancies Reform Act, but does not explain specifically how they relate to her claim. Furthermore, we note that like the Board of Immigration Appeals, we lack jurisdiction to consider constitutional challenges to a USCIS action. *See*, e.g., *Matter of Fuentes-Campos*, 21 I. & N. Dec. 905, 912 (BIA 1997) (*citing Matter of C-*, 20 I&N Dec. 529 (BIA 1992)). Accordingly, we will not address the Applicant's assertion concerning the update's validity.

we will affirm the Director's decision to deny the Applicant's adjustment of status request for lack of jurisdiction.

I. LAW

To be eligible for adjustment of status under section 245(a) a noncitizen must be inspected and admitted or paroled into the United States, apply for such adjustment, be admissible to the United States, be eligible to receive an immigrant visa, and have an immigrant visa immediately available at the time the adjustment application is filed. Section 245(a) of the Act.

USCIS does not have jurisdiction to grant or deny a request for adjustment of status under section 245 of the Act in any case in which the noncitizen is a respondent in removal or deportation proceedings before EOIR unless the noncitizen has been placed in proceedings as an "arriving alien." 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1).

"Arriving alien" means, in relevant part, an applicant for admission coming or attempting to come into the United States at a port-of-entry. 8 C.F.R. § 1.2. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act [8 U.S.C. § 1182(d)(5)], and even after any such parole is terminated or revoked. *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). Permission to travel may be granted pursuant to USCIS' advance parole provisions, but those regulations must be construed in light of section 304(c) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. 102-232, 105 Stat. 1733, 1749 (Dec. 12, 1991) (8 U.S.C. § 1254a note, *infra*. 8 C.F.R. § 244.15.

Section 304(c) of MTINA, provides in pertinent part:

> (1) In the case of an alien [provided temporary protected status under section 244 of the Act] whom the [Secretary of Homeland Security] authorizes to travel abroad temporarily and who returns to the United States in accordance with such authorization—
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> (A) the alien shall be inspected and admitted in the same immigration status the alien had at the time of departure if—
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> (i) in the case of an alien described in paragraph (2)(A), the alien is found not to be excludable on a ground of exclusion referred to in section 301(a)(l) of the Immigration Act of 1990, or
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> (ii) in the case of an alien described in paragraph (2)(B), the alien is found not to be excludable on a ground of exclusion referred to in section 244A(c)(2)(A)(iii) of the Immigration and Nationality Act; and

(B) the alien shall not be considered, by reason of such authorized departure, to have failed to maintain continuous physical presence in the United States for purposes of section 244(a) of the Immigration and Nationality Act if the absence meets the requirements of section 244(b)(2) of such Act.

II. FACTS AND PROCEDURAL HISTORY

The relevant facts in this case are not in dispute. The Applicant, who is a national of Honduras, entered the United States in 1987 without being inspected, admitted, or paroled. She was apprehended and placed in deportation proceedings[2] pursuant to former section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), as a noncitizen who entered the United States without inspection. Because the Applicant did not appear for the scheduled immigration hearing, in [redacted] 1987 an Immigration Judge ordered her deported from the United States in absentia. The Applicant remained in the United States and was later granted TPS. In 2015 she obtained a Form I-512L, *Authorization for Parole of an Alien Into the United States*, pursuant to section 244(f)(3) of the Act as a TPS recipient. The Applicant traveled abroad and returned to the United States with this Form I-512L on two separate occasions—in January and May 2016. In 2018 she filed the instant Form I-485, seeking to adjust status to that of a lawful permanent resident under section 245(a) as a parent of a U.S. citizen. While the Form I-485 was pending, USCIS extended the Applicant's TPS through January 2020. In July 2018 the Applicant obtained an adjustment-based advance parole document and traveled abroad. She was last paroled into the United States with that document in July 2019.

USCIS initially denied the Applicant's Form I-485 in September 2019, concluding in part that by leaving the United States after having been ordered deported she triggered inadmissibility under section 212(a)(9)(A) of the Act.[3] In December 2019, however, a footnote was added to the USCIS Policy Manual to clarify the effect of travel outside the United States by TPS beneficiaries who have final removal orders.[4] The footnote explained that pursuant to section 304(c) of MTINA, as in effect since 1991, a TPS beneficiary with an outstanding final removal order does not execute that order if he or she received prior authorization to travel abroad, departed from the United States, and returned with a valid advance parole document. *See generally* 7 *USCIS Policy Manual* A.3(D) n. 19, https://www.uscis.gov/policy-manual.

The Director reopened the Applicant's Form I-485 in July 2020 and again denied it in September 2020, concluding that because the Applicant was a TPS recipient when she traveled outside of the United States with TPS- and adjustment-based advance parole documents, pursuant to MTINA provisions she did not execute her deportation order. The Director determined that the Applicant

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[2] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996), which took effect on April 1, 1997, eliminated the distinction between deportation and exclusion proceedings by merging them into removal proceedings for all noncitizens regardless of whether they were charged as being inadmissible or deportable from the United States.

[3] Section 212(a)(9)(A) of the Act provides in relevant part that any noncitizen, other than an arriving alien who has been ordered removed or departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

[4] *See* Policy Alert PA-2019-12, Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal (Dec. 20, 2019).

therefore remained in deportation proceedings[5] and, as she was not an "arriving alien" USCIS was without jurisdiction to adjudicate her request for adjustment of status under section 245 of the Act.

On certification, the Applicant asserts that the 2019 update constitutes a new USCIS policy with respect to travel abroad of TPS recipients, and that the Director erred by applying it retroactively in her case. She further states that even if her travel abroad with a *TPS-based* advance parole document had no effect on her immigration status, USCIS now has jurisdiction over her Form I-485 because she was last paroled into the United States based on an *adjustment-based* advance parole document and is therefore an arriving alien.

III. ANALYSIS

As this case arises in the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit), the relevant binding case law is *Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022). As does this case, *Duarte* involved TPS recipients with orders of removal who received authorization to travel abroad, styled as advance parole documents, and subsequently applied for adjustment of status. *Id.* at 1049-50. The Fifth Circuit held that given the specific mandate of MTINA that TPS recipients authorized to travel shall be inspected and admitted in the same immigration status they had at the time of departure, the more general parole authority in section 212(d)(5) of the Act does not authorize DHS to parole TPS beneficiaries into the United States (with the possible exception of those who had previously been paroled). *Id.* at 1058-60. Further, the *Duarte* court construed MTINA to mean that departure with TPS travel authorization did not result in the removal orders being executed; rather, they remained unexecuted following the individuals' return to the United States. *Id.* at 1053-54.

The Applicant traveled twice with TPS travel authorization in 2016, most recently in May of that year. *Duarte* requires us to determine that upon return from that travel the Applicant was admitted into her prior immigration status – Temporary Protected Status – and continued to be the subject of an unexecuted order of deportation. Because the Applicant was admitted to the United States in May of 2016, she was not an "arriving alien" when she applied for adjustment of status in 2018. *See id.* at 1061. Rather, she was a noncitizen in removal proceedings due to her unexecuted final order. Therefore, USCIS did not have jurisdiction over her adjustment application ab initio.

The Applicant contends that her travel after filing her adjustment of status application was a departure and return under parole that executed her removal order, as opposed to the Director's conclusion that travel under MTINA that did not result in execution of the removal order. There is no basis to distinguish this third trip from the other two with respect to the applicability of *Duarte*. The Applicant remained a TPS beneficiary at the time of that trip, so *Duarte* requires that she be considered admitted back into her status at the time of departure (TPS), and that her deportation order remains unexecuted. The Applicant avers that the Director's conclusion is the result of a USCIS policy change concerning travel abroad of TPS holders and should not be retroactively applied in her case, as her Form I-485 was filed before the 2019 update to the USCIS Policy Manual. She claims that prior to this update the USCIS policy was that it retained exclusive jurisdiction over adjustment applications of TPS beneficiaries who left the United States and returned with TPS-based Forms I-512L while under

[5] A noncitizen is considered to be "in proceedings" from the time the charging document is filed with the Immigration Court until the removal order is executed. 8 C.F.R. § 1245.1(c)(8).

outstanding exclusion/deportation/removal orders. This argument is unavailing, as *Duarte* now requires in the Fifth Circuit that the authorized travel of TPS beneficiaries be deemed an admission to the United States, with removal orders not executed by such travel. The extent to which USCIS policy may or may not have been consistent with *Duarte*, before the *Duarte* decision was issued is irrelevant, as *Duarte* is now the applicable binding case law in matters before USCIS arising in the Fifth Circuit. *See, e.g., Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 94-97 (1993) (general rule that judicial decisions must be given retrospective effect with respect to pending or future cases involving previous events).

IV. CONCLUSION

The Applicant had an outstanding order of deportation as a noncitizen present in the United States without inspection at the time she was granted TPS. Her subsequent travel abroad with TPS travel authorization resulted in her admission to the United States, and did not execute the order of deportation. Consequently, the Applicant was not eligible to obtain the benefit she requested from USCIS at the time she filed her application for adjustment of status with the agency, because she was a noncitizen in removal proceedings as a result of the 1987 unexecuted order of deportation, and as a noncitizen admitted to the United States, she was not an arriving alien; therefore, USCIS lacked jurisdiction to adjust her status to that of a lawful permanent resident. Her subsequent travel after applying for adjustment did not change that lack of USCIS jurisdiction, as that travel also was the travel of a TPS recipient resulting in her admission back into Temporary Protected Status, with an order of deportation that remains unexecuted. We reserve consideration of possible other grounds to affirm the Director's decision, including inadmissibility under section 212(a)(9)(A) of the Act and whether, even if her travel after filing the adjustment application were considered to have executed the order of deportation, her application could not be granted under 8 C.F.R. 103.2(b)(1) – requiring eligibility at time of filing as well as at time of adjudication – because she was not eligible for adjustment of status before USCIS at the time of filing as USCIS did not then have jurisdiction over her application.

ORDER: The application is denied.