ADJUSTMENT OF STATUS FOR EMPLOYMENT-BASED NONIMMIGRANTS WHO HAVE FAILED TO MAINTAIN LAWFUL STATUS

By Rajat P. Kuver

A Common Scenario

A company hires an attorney to prepare and file an H-1B extension petition for one of its employees. The H-1B petition is denied and the attorney files an appeal with the Administrative Appeals Office (AAO). The attorney does not re-file the H-1B petition. The attorney does not notify the alien employee that his or her unlawful presence clock is ticking while the AAO appeal is pending. The AAO appeal is denied after one year.

The company finds a new attorney who files a new H-1B requesting a nunc pro tunc request for extension of status. The new H-1B argues that the previous H-1B was denied due to the previous attorney's malpractice. The H-1B petition is approved, but with a starting date of when the second H-1B was filed.

The company has an approved I-140 petition for the alien employee whose priority date is current and the alien employee files an adjustment of status application. The adjustment of status application is denied under Section 245(c)(2) of the Immigration and Nationality Act (INA) because the alien failed to maintain status from the time his first H-1B was denied to the time his second (nunc pro tunc) H-1B was granted.

If the alien failed to maintain status for 180 days or less, then he can still adjust status pursuant to the forgiveness provision of Section 245(k) of the INA. However, if the alien failed to maintain status for over 180 days, then he would be barred from adjustment. Furthermore, if the alien was in unlawful status for 180 days or more, then he cannot visa process because of the three-year and ten-year bars under Section 212(a)(9)(B) of the INA. This article explains various solutions to these problems.

Section 245(c) of the Immigration and Nationality Act

Section 245(a) of the INA grants permission to individuals to become lawful permanent residents of the United States through an application process called "adjustment of status". However, Section 245(c) of the INA bars certain individuals from applying for adjustment of status:

> ...subsection (a) shall not be applicable to...(2) subject to subsection (k), an alien...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;...

8 Code of Federal Regulations 245.1(d)(2)(i)

8 C.F.R. 245.1(d)(2) is the regulation which defines INA 245(c)(2). This regulation states:

> *No fault of the applicant or for technical reasons.* The parenthetical phrase "other than through no fault of his or her own or for technical reasons" shall be limited to:
>
> (i) Inaction of another individual or organization designated by regulation to act

> on behalf of an individual and over whose actions the individual has no control, if the inaction is acknowledged by that individual or organization (as, for example, where a designated school official certified under Section 214.2(f) of this chapter or an exchange program sponsor under Section 214.2(j) of this chapter did not provide required notification to the Service of continuation of status, or did not forward a request for continuation of status to the Service);...

Although 8 C.F.R. 214.1(d)(2) is extremely narrow, there are a number of ways to argue that your client meets these regulatory requirements. The attorney who committed malpractice is an "individual" under 8 C.F.R. 245.1(d)(2)(i).[1]

The petitioner had no control over the actions of that attorney for a number of reasons. First, petitioner did not know the law and it relied on the attorney to explain what the law was. Therefore, the petitioer did not have the education and legal training to control the attorney's actions. Second, in some instances, the attorney hid information from the petitioner (for example, by not notifying petitioner of the documentary requirements contained in a Request for Evidence or not notifying petitioner that the alien's unlawful presence clock was ticking during the AAO appeal). It was, therefore, impossible for petitioner to control an act by the attorney of which the petitioner was not aware.

The regulation requires that the individual guilty of inaction, acknowledge that the inaction took place. However, the regulation does not require that this acknowledgment be in writing. The regulation also does not require that this acknowledgment be made directly by the guilty party to USCIS.[2] The regulation simply states that the individual guilty of inaction must acknowledge the inaction. Arguably, a statement by petitioner indicating that the attorney **did** acknowledge his inaction or mistake should meet the requirements of 8 C.F.R. 245.1(d)(2)(i).

8 Code of Federal Regulations 245.1(d)(2)(ii)

8 C.F.R. 245.1(d)(2) also states that the phrase, "No fault of the applicant or for technical reasons" also includes:

> (ii) A technical violation resulting from inaction of the Service (as, for example, where an applicant establishes that he or she properly filed a timely request to maintain status and the Service has not yet acted on that request)...

[1] This case involves inaction by an "individual" and, therefore, inaction by "an organization designated to act on behalf of an individual" is not relevant.

[2] Compare this with 8 C.F.R. 245.1(d)(2)(iii) which specifically requires a medical letter be provided to USCIS where a technical violation occurs due to physical inability. By contrast, 8 C.F.R. 245.1(d)(2)(i) does not require a letter from an individual guilty of inaction be provided to USCIS.

When an H-1B petition with a nunc pro tunc request for extension of status is approved, the approval notice will usually not be back-dated to the date the alien originally fell out of status. Rather, the approval notice will begin on the date the nunc pro tunc H-1B petition was filed.

When this happens, one should argue (when submitting the adjustment application) that USCIS should have back-dated the H-1B approval notice to the date the original H-1B petition would have been granted were it not for the previous attorney's malpractice. The failure of USCIS to back-date constitutes a technical violation resulting from "inaction of the Service" under 8 C.F.R. 245.1(d)(2)(ii).

There are two reasons why the H-1B approval notice should have been back-dated. First, the H-1B extension which was ultimately approved was based upon a "nunc pro tunc" grant. The phrase "nunc pro tunc" means, "Now for then". Merriam-Webster Dictionary (2011). It is defined as, "used of a legal entry, judgment, or decree made currently to effect as of an earlier date when it ought to have been made, done, or recorded." Id. In essence, the term "nunc pro tunc" means that an event should be back-dated.

Second, the basis of the nunc pro tunc grant of H-1B extension was that the requirements of 8 C.F.R. 214.1(c)(4) had been met. That section of the C.F.R. states:

> An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, **with any extension granted from the date the previously authorized stay expired,** where it is demonstrated at the time of filing that: (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;...

(emphasis added).

This regulation specifically states that the extension granted must be from the date the previously authorized stay expired. Failure of USCIS to issue an H-1B with a correct start date is a "technical violation" by the Service.

Therefore, the adjustment applicant can establish that he falls under two separate exceptions of 8 C.F.R. 245.1(d)(2) and, therefore, his adjustment of status application should be approved.

INA 245(c) vs. 8 C.F.R 214.1(d)

Section 245(c) bars certain individuals from applying for adjustment of status:

> ...subsection (a) shall not be applicable to...(2) subject to subsection (k), an alien...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;...

The phrase, “other than through no fault of his own or for technical reasons” under 245(c) of the INA is broad. However, this same term is extremely narrow under USCIS regulations, 8 C.F.R. 245.1(d) which states:

> (2) No fault of the applicant or for technical reasons. The parenthetical phrase “other than through no fault of his or her own or for technical reasons” shall be limited to:
>
> (i) Inaction of another individual or organization designated by regulation to act on behalf of an individual and over whose actions the individual has no control, if the inaction is acknowledged by that individual or organization (as, for example, where a designated school official certified under Section 214.2(f) of this chapter or an exchange program sponsor under Section 214.2(j) of this chapter did not provide required notification to the Service of continuation of status, or did not forward a request for continuation of status to the Service);...
>
> (ii) A technical violation resulting from inaction of the Service (as, for example, where an applicant establishes that he or she properly filed a timely request to maintain status and the Service has not yet acted on that request)...
>
> (iii) A technical violation caused by the physical inability of the applicant to request an extension of nonimmigrant stay from the Service either in person or by mail...The explanation of such a technical violation shall be accompanied by a letter explaining the circumstances from the hospital or attending physician.
>
> (iv) A technical violation resulting from the Service’s application of the maximum five/six year period of stay for certain H-1 nurses only if the applicant was subsequently reinstated to H-1 status...

However, the Federal Courts have ruled that 8 C.F.R. 214.1(d) is too narrow and inconsistent with the intent of Section 245(c) of the Immigration and Nationality Act. Mart v. Beebe, No. Civ. 99-1391-JO, 2001 WL 13624 (D. Or. Jan. 5, 2001), ruled that additional exceptions should be permitted under 8 C.F.R. 214.1(d). In Mart, the B-2 visa status of Veronica Mart had expired while her husband’s application for political asylum was pending with the INS. The District Court found that she never applied for an extension of status because she was unaware of the need to do so. Her husband’s asylum application was eventually denied. Ms. Mart and her family received word from the U.S. Department of State that they had been selected to apply for a visa under the Diversity Immigrant Visa Program. She submitted an application to adjust status, but the INS denied her application under Section 245(c)(2) because she failed to maintain continuously a lawful status after the expiration of her B-2 status.

The Mart Court found that 8 C.F.R. 245(d)(2) need not impermissible limit excusable unlawful status to four narrowly defined circumstances, none of which applied to Ms. Mart’s case. The Court supported its reasoning with the fact that the regulation impermissibly limits the applicability of the words “or for technical reasons” found in INA 245(c)(2). The Court also agreed with Ms. Mart’s assertion that the regulation defied Congress’ intent that individuals who diligently tried to obey the law and have since their arrival contributed substantially to the

United States, ought not be precluded from adjustment because they were unaware of their duty to keep their non-immigrant status current while awaiting the INS decision on their request for asylum. The Mart decision provides persuasive authority for the proposition that the USCIS regulatory exceptions to the Section 245(c)(2) adjustment bars are too narrowly drafted.

A Federal Court in California specifically dealt with the issue of an alien who failed to continuously maintain status under 8 C.F.R. 214.1(d) due to ineffective assistance of counsel. In Alimoradi v. USCIS, CV-08-02529, U.S. District Court, Central District of California (February 10, 2009), the alien worker, Dr. Alimoradi, who entered the United States on an F-1 student visa, was offered U.S. employment by a structural engineering firm. The general counsel of the employer firm, Dr. Naeim, filed an I-140 visa petition on behalf of Dr. Alimoradi as an "outstanding professor or researcher" as well as an H-1B petition. Although Dr. Naeim was an attorney, he did not enter an appearance on Dr. Alimoradi's behalf when filing the I-140 petition, nor did he indicate on the petition that he was Dr. Alimoradi's attorney or representative. The I-140 was approved in August 2005 and Dr. Alimoradi's Optional Practical Training (OPT) Employment Authorization Document (EAD), was valid until January 2006. In September 2005, after receiving the OPT employment authorization, Dr. Alimoradi personally filed an adjustment of status application which Dr. Naeim reviewed numerous times. Dr. Naeim believed that the filing of the adjustment application would provide Alimoradi one more source of work authorization. In August 2007, USCIS sent Dr. Alimoradi a Request for Evidence (RFE) regarding his adjustment application, in which USCIS requested evidence of employment authorization from January 2006 to August 2007. This was the first time that Dr. Alimoradi became aware that his employment authorization had lapsed after January 2006.

USCIS denied the adjustment application because Dr. Naeim was not designated by agency regulation to act o Dr. Alimoradi's behalf and because Dr. Alimoradi maintained control over Dr. Naeim. Therefore, USCIS argued, the requirements of 8 C.F.R. 245.1(d)(2)(i) had not been met.

However, the Court overturned USCIS and approved Dr. Alimoradi's adjustment application because his lapse in status was "through no fault of his own or for technical reasons" under INA 245(c)(2). The Court reasoned that "Dr. Naeim had given him incorrect legal advice." The Court cited to and analyzed INA 245(c)(2) and its "implementing regulations limits" providing interpretation of "no fault of his own or for technical reasons" under 8 C.F.R. 1245.1(d)(2). The Court held that even though Dr. Alimoradi had a general familiarity with the employment authorization process, that did not indicate his fault because of the degree to which he relied on Dr. Naeim's advice, as well as the technical complexity of this area of law. The Court stated, "It is hard to imagine a circumstance where a person has less control over their employment authorization than when, as with Dr. Alimoradi, his employer's general counsel mistakenly informs him that his employment authorization requirements have been satisfied."

Wong v. Napolitano, _____, also involved an alien who was allowed to adjust status despite failing to maintain status under 8 C.F.R. 214.1(d) because of ineffective assistance of counsel. In that case, Wong was in the U.S. in H-1B status valid from February 2002 to January 2005 to work for UNIPAK. In September 2002, APACSA company filed an H-1B petition for Wong. Wong began working for this new company, but USCIS ultimately denied the petition in March 2003. APACSA appealed to the Administrative Appeals Office (AAO). The AAO denied the appeal in April 2004. Wong stopped working for APACSA in May 2004.

In May 2004, RX Direct company filed an H-1B petition for Wong. In its petition, RX Direct stated that the APACSA petition was "pending" and "being appealed". USCIS approved the

RX Direct H-1B petition valid from July 2004 to May 2007. RX also obtained an approved I-140 for Wong and then Wong filed an adjustment application based on that approved I-140 in July 2007. USCIS denied the adjustment because Wong had accrued approximately a year and an half of unauthorized employment at APACSA.

Wong argued that she fell out of status because she relied on incorrect advice given to her by an attorney. However, that attorney did not acknowledge his mistake and, therefore, all of the requirements of 8 C.F.R. 245.1(d)(i) had not been met. Nevertheless, the U.S. District Court overturned the USCIS decision and held that 8 C.F.R. 245.1(d)(2) was unreasonably narrow:

> However, limiting the no fault and technical violation exception to only four circumstances does not maintain fidelity with Congressional intent as manifested in the statute and is not a reasonable construction. Wong should have been given the opportunity to show that her reasonable reliance in good faith on the advice of counsel rendered her without fault in accumulating a period of unauthorized stay.

These three cases clearly indicate that ineffective assistance of counsel does constitute “no fault of the alien” or a “technical violation” under INA 245(c)(2). Therefore, where an alien falls out of status due to an attorney’s negligence, he is still eligible for adjustment of status pursuant to the broad language of INA 245(c)(2) despite the narrow language of 8 C.F.R. 245.1(d)(2).