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United States District Court, D. Oregon.
 Veronica MART; et al., Plaintiffs,

v.

David V. BEEBE, District Director of United States
 Immigration and Naturalization Service, Portland,
 Oregon; et al., Defendants.

No. CIV. 99-1391-JO.

Jan. 5, 2001.

[John S.J. Marandas](#), Marandas & Perdue, Portland, OR, for plaintiffs.

[Craig J. Casey](#), Assistant United States Attorney, District of Oregon, United States Attorney's Office, Portland, OR, Steven J. Kim, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, DC, for defendants.

OPINION AND ORDER

JONES.

*1 Plaintiffs Veronica Mart, her husband Julian Mart and their two minor children, Adelina and Paul, challenge the Immigration and Naturalization Service's ("INS" or defendant) decision denying Veronica Mart's application for adjustment of status under § 245 of the Immigration and Nationality Act ("INA"), [8 U.S.C. § 1255](#). Both sides now move for summary judgment. For the reasons that follow, plaintiffs' motion is GRANTED; defendant's motion is DENIED.

PROCEDURAL HISTORY

Plaintiffs filed a complaint with this court on September 30, 1999. After a hearing held October 8, 1999, the court dismissed plaintiffs' suit for lack of jurisdiction but invited plaintiff to file an amended complaint.

Plaintiffs filed an amended complaint on January 10, 2000, asking the court to: (1) review the decision to deny their adjustment of status application; (2) declare that plaintiffs are not statutorily ineligible for adjustment of status under INA § 245(a); (3) declare that plaintiffs are entitled to adjust their status; and (4) compel the district director "to amend plaintiffs'

file so as to remove any indication that they were statutorily ineligible to adjust status to lawful permanent residents and that they are otherwise eligible to adjust status." Amended Compl. ¶¶ 33, 34. Defendant filed an amended answer.

On January 20, 2000, defendant moved to dismiss the amended complaint on the grounds that INA § 242(a)(2)(B) divests the district court of subject matter jurisdiction over denials of applications for adjustment of status. [8 U.S.C. 1252\(a\)\(2\)\(B\)](#). In a published opinion, I found that INA § 242(a)(2)(B) does not divest the district court of jurisdiction to review final INS decisions denying adjustment of status where the plaintiff is not involved in a removal proceeding or subject to a removal order.^{FN1} On that basis, I denied defendant's motion to dismiss.

^{FN1}. See also [Fu v. Reno, 2000 WL 1644490 \(N.D. Tex. Nov 1, 2000\)](#) (holding that, with regard to INS actions not related to deportation or removal, [8 U.S.C. § 1252\(g\)](#) does not divest subject matter jurisdiction, which arises under [28 U.S.C. § 1331](#) and [5 U.S.C. § 701](#).)

On August 1, 2000, defendant filed a Motion [38] for Judgment on the Pleadings, or in the Alternative for Summary Judgment. Plaintiff filed a cross Motion [51] for Summary Judgment. They allege that the Director misinterpreted INA § 245(c)(2). As an alternative basis for relief, plaintiffs allege that defendant should have granted their adjustment application under INA § 245(i). Both motions are now before the court.

RELEVANT FACTS

Veronica Mart and her family were among 90,000 aliens randomly selected in 1999 by the INS from a much larger group of applicants and offered the opportunity to apply for a visa under the Diversity Immigrant Visa Program. Mrs. Mart timely paid her application fee and submitted her application. The INS denied her application, on August 16, 1999, and also denied her request for reconsideration, on September 20, 1999. The statutory window under which the Marts were eligible to adjust under the 1998-99 Diversity Visa program expired at midnight,

September 30, 2000.

In its denial letter, the INS stated that “[Veronica Mart] is not eligible for the benefits of Section 245 of the Immigration and Nationality Act, as amended and this application is therefore denied.” Administrative Record (“AR”), p. 30. That decision was based upon Veronica Mart’s failure to maintain a lawful status in the United States after April 13, 1992:

*2 The applicant was admitted as a non-immigrant (B-2) on October 14, 1991 until April 13, 1992. Her authorized stay in the United States was not extended. Her husband subsequently filed an application for political asylum in the United States on October 24, 1991. That application for political asylum was denied on October 12, 1993. * * * An Immigration Judge denied her husband’s application on March 28, 1995. The Board of Immigration Appeals upheld the decision of the Immigration Judge on September 29, 1995. The filing of an application for political asylum does not preserve an alien’s lawful immigration status. Only if the application for political asylum has been granted would the alien be considered to be in lawful immigration status as provided for in [8 CFR 245.1\(c\)\(1\)\(iv\)](#). The application for asylum was not granted in this case.

AR, pp. 28-29.

Plaintiffs were not aware that they were required to apply to extend their visas beyond April 13, 1992 in order to maintain “lawful immigration status”. Although they were in frequent contact with the INS regarding their pending application for asylum, the INS never notified them that they needed to renew their visas. Because the INS regularly renewed the Marts’ work permits without question or condition, they assumed that they were in lawful status at all times.

There is no provision for further administrative appeal of the INS’ denial of the Marts’ application, except that she may renew her application if the INS initiates removal proceedings against her. The INS is not likely to take such a step. The Marts may file a new application if either Mrs. Mart or her husband is selected in a subsequent Diversity Immigrant Visa lottery. However, the INS will very likely deny any future application by the Marts, relying on the same interpretation of the law it used to deny their 1999 application. Plaintiffs argued for the first time in summary judgment that they were entitled to adjust under § 245(i). They submitted agency guidance from the INS indicating that Visa Lottery winners

who had applied to the Department of Labor for a labor certification before January 14, 1998 were presumed to be eligible to adjust under § 245(i) even if they were ineligible under § 245(a). Plaintiffs’ Ex.’s 1, 2. Plaintiffs aver that they qualified for this exception in 1999.

DISCUSSION

A. Plaintiffs’ claim is not moot

Defendant asserts that plaintiffs lack standing, among other reasons, because the injury resulting from denial of Mrs Mart’s adjustment of status application is not redressable. Defendant explains that, even if the court were to reverse the INS’ finding that Mrs. Mart failed to maintain continuous lawful status since her entry into the United States, plaintiffs could not adjust because their 1999 diversity immigrant visas expired September 30, 1999.^{[FN2](#)}

[FN2](#). In order to be eligible for an adjustment, an alien must (1) apply for adjustment, (2) be eligible to receive an immigrant visa and (3) have an immigrant visa immediately available to him at the time his application is filed. [8 U.S.C. § 1255\(a\)](#).

Even if defendant were correct, the above argument addresses only one of plaintiffs’ desired remedies. In addition to asking for a declaration that plaintiffs are entitled to adjust, plaintiffs also seek a declaration that they are not statutorily ineligible to adjust in the event Mrs. Mart or her husband are randomly selected in a future Diversity Immigrant Visa lottery. Without such a declaration, plaintiffs would likely be denied adjustment on the same basis as they were denied adjustment in 1999.

*3 While mootness ordinarily bars a challenge to an action that has already taken place, the court may allow a challenge where the action challenged is capable of repetition, yet likely to evade review. See [S. Pacific Terminal Co. v. ICC, 219 U.S. 498, 524-15 \(1911\)](#). The Ninth Circuit has held that agency actions fall within the capable of repetition exception to the mootness doctrine if “(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.” [Greenpeace Action v. Franklin, 14 F.3d 1324,](#)

1329 (9th Cir.1992).

In *Greenpeace Action*, plaintiffs challenged the Pacific Fishery Management Council's total allowable catch ("TAC") regulation for pollock for the 1991 fishing season. The agency argued that the plaintiffs' claims were moot because the 1991 fishing season had ended, the 1991 TAC had expired, and a new TAC was in effect. The court, however, concluded that the agency's actions fell within the capable of repetition exception, basing its conclusion on two factors. First, the challenged regulation was in effect for less than one year, making it difficult to obtain effective judicial review. Second, the major issue in the case was likely to recur because the agency had relied upon the same Biological Opinion in formulating the 1992 TAC as it had for the 1991 TAC. *Id.*; *Idaho Dept. of Fish & Game v. National Marine Fisheries Service*, 56 F.3d 1071, 1074-75 (9th Cir.1995).

Plaintiffs' position is analogous to plaintiffs' in *Greenpeace Action*. First, the Marts were not able to obtain effective judicial review because the INS did not make a final, reviewable decision on Mrs. Mart's eligibility to adjust status until September 20, 1999, only ten days before Mrs. Mart's diversity immigrant visa expired. Second, at the hearing held October 8, 1999 in this court, defendant's counsel represented that, should Mrs. Mart again be selected in the diversity immigrant visa lottery, the INS would likely deny her application for adjustment on the same basis that it denied the application this time. Because the INS' denial of Mrs. Mart's application is reasonably capable of repetition, her challenge at this time is not moot.

B. Plaintiffs have exhausted their administrative remedies.

Defendant next asserts that plaintiffs' claim should be barred because plaintiffs have not exhausted their administrative remedies. Section 10(c) of the Administrative Procedures Act ("APA") explicitly requires that an aggrieved party exhaust all intra-agency appeals *mandated either by statute or by agency rule*. *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). Conversely, where an administrative appeal is available but not mandated, a party need not pursue that appeal prior to seeking judicial review. *Id.* at 154. See *Young v. Reno*, 114 F.3d 879, 881-82 (9th Cir.1997).

Defendant argues that 8 C.F.R. § 245.2(a)(5)(ii)

prohibits an alien from appealing the denial of an application to adjust status except in removal proceedings implemented by the INS.^{FN3} Defendant's Memorandum, p. 12. The relevant portion of that rule provides:

FN3. The two other regulations defendant cites are not on point. 8 C.F.R. § 245.2(a)(1), in relevant part, states:

after an alien ... is in deportation or removal proceedings, his or her application for adjustment of status under section 245 of the [INA] ... shall be made and considered only in those proceedings.

Id. This section mandates a procedure for a renewed application of adjustment, not an appeal of a denial of adjustment. Further, the rule does not apply to plaintiffs because they are not in deportation or removal proceedings.

The third regulation, 8 C.F.R. § 240.15 is also irrelevant. That regulation, which gives an alien the (discretionary) right to appeal a removal order to the Board of Immigration Appeals, does not apply to an appeal of the denial of an adjustment of status where the alien is not subject to removal proceedings.

*4 no appeal lies from the denial of an application by the director, but the applicant ... retains the right to renew his or her application in [removal] proceedings.

8 C.F.R. § 245.2(a)(5)(ii) (1999). Clearly the passage above contains no mandatory appeal language. To the contrary, it states explicitly that "no appeal lies from the denial of an application by the director." This section affirms what plaintiffs contend-that they have exhausted their administrative remedies. See *Young v. Reno*, 114 F.3d 879, 881-82 (9th Cir.1997); *Hu v. Reno*, 2000 WL 425174, *2 (N.D.Tex. Nov. 24, 1998)("The removal of aliens and the adjudication of immigrant applications are separate and distinct actions performed by the INS.") Furthermore, even if one were to construe the right to renew the application in deportation hearings as a right to appeal, which it is not, that right is optional and therefore not an exhaustion requirement. I find that plaintiffs have exhausted their administrative remedies.^{FN4}

FN4. The futility of pursuing any further administrative remedy provides an alternative justification for going forward

with plaintiff's case. If Mrs. Mart renews her application at removal proceedings (which the INS may never initiate) the INS will deny adjustment under § 245 because plaintiffs' provisional immigrant visas expired September 30, 1999. Accordingly, any further challenge in the administrative process is sure to be futile.

C. INA § 245 and related INS regulations

Finally, defendant challenges the merits of plaintiffs' claim. Since the plaintiffs do not dispute any material fact, the legality of the INS's decision is a question of pure law appropriate for disposition at summary judgment.

The court reviews the INS' purely legal interpretations of the INA de novo, but affords the agency deference where appropriate under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., (“Chevron”) 467 U.S. 837 (1984). Pedro-Mateo v. I.N.S., 224 F.3d 1147, 1150 (9th Cir.2000). When reviewing an agency's interpretation of its regulations, the court will affirm unless the agency's interpretation is plainly erroneous. Medberry v. Hegstrom, 786 F.2d 1389, 1391 (9th Cir.1986).

In this case plaintiffs challenge the INS' interpretation of INA § 245(c)(2), which provides that adjustment under § 245(a) “shall not be applicable to ... 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 U.S.C. § 1255(c)(2)(emphasis added). Plaintiff argues either that (1) plaintiffs have maintained a continuously lawful presence since entry into the United States or, in the alternative, (2) their unlawful status was for technical reasons or through no fault of their own.

INS regulations limit what constitutes “lawful status” under INA § 245(c)(2). Relevant to plaintiff's claim, “lawful status” includes:

(ii) An alien admitted to the United States in nonimmigrant status as defined in section 101(a)(15) of the Act, whose initial period of admission has not expired or whose nonimmigrant status has been extended in accordance with part 214 of this chapter[.]

8 C.F.R. § 245.1(d)(1)(ii). Plaintiffs admitted at their deportation hearing that they remained in the United States beyond the April 13, 1992 expiration of their non-immigrant visas. Plaintiffs' Concise Statement of

Material Facts, ¶ 4. Accordingly, under 8 C.F.R. § 245.1(d)(1)(ii), they did not maintain a continuously lawful status at all times since their entry into the United States.

*5 Failure to maintain a continuously lawful presence may be excused, however, provided that an alien's unlawful status resulted from “no fault of his own or for technical reasons.” INA § 245(c)(2). The INS regulations limit the above phrase to four categories of applicants, none of which applies to Mrs. Mart. ^{FN5} Plaintiffs assert that Veronica Mart qualifies under 8 C.F.R. § 245.1(d)(2)(ii). However, by its terms that section applies where “an applicant properly filed a timely request to maintain status and the Service has not yet acted on that request” and “an individual whose refugee or asylum status has expired through passage of time, but whose status has not been revoked.” 8 C.F.R. § 245.1(d)(2)(ii). Neither category applies to Mrs. Mart, who did not file a timely request to maintain status and was never granted refugee or asylum status.

^{FN5}. 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 § 214.2(f) of this chapter or an exchange program sponsor under § 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); or

(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). An individual whose refugee or asylum status has expired through passage of time, but whose status has not been revoked, will be considered to have gone out of status for a technical reason.

(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 (as, for example, an individual who is hospitalized

with an illness at the time nonimmigrant stay expires). 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 in accordance with the terms of Public Law 101-656 (Immigration Amendments of 1988).

[8 C.F.R. § 245.1\(d\)\(2\)](#).

Plaintiffs finally challenge the rule itself, alleging that [8 C.F.R. § 245.1\(d\)\(2\)](#) defies Congress' intent that individuals such as the plaintiffs, who have diligently endeavored to obey the law and have contributed substantially to the United States (through their work and community involvement) since their arrival, not be precluded from adjustment because they were unaware of their duty to keep their non-immigrant visas current while awaiting the INS' decision on their request for asylum. I agree.

When reviewing the construction an agency has given a statute that it administers, the court first considers whether Congress has directly spoken to the precise question at issue. If Congress' intent is unambiguous, then the court must enforce the will of Congress. If, however, a statute is silent or ambiguous with respect to the specific issue, the question for the court is "whether the agency's answer is based on a permissible construction of the statute." [Chevron, 467 U.S. 837](#).

Defendant's elaboration of § 245(c)(2) is codified at [8 C.F.R. § 245.1\(d\)\(2\)](#). That subsection limits excusable unlawful status to four narrow circumstances. *Id.* I find that defendant's rule impermissibly limits the applicability of the words "or for technical reasons" in § 245(c)(2). Defendant's rule subverts that subsection's plain meaning: that any alien who falls into unlawful status "through no fault of his own or for technical reasons" is not precluded from adjusting status under § 245(a).

It is clear from the record that plaintiffs' lapse of lawful status is excusable as a mere technical violation. Had the INS granted plaintiffs asylum request, then it would have excused plaintiffs' violation. [8 C.F.R. § 245.1\(c\)\(1\)\(iv\)](#). Whether plaintiffs' asylum request was accepted or denied provides no rational basis for excusing plaintiffs'

conduct in one case, and not the other. Accordingly, I find that defendant abused its discretion when it found plaintiffs ineligible to receive an adjustment based upon the fact that plaintiffs' visa expired while their asylum request was pending.

CONCLUSION

*6 The Court remands this case to defendant to reconsider plaintiffs' application for adjustment under § 245(a) in light of this Opinion. On remand, defendant shall also determine plaintiffs' eligibility under § 245(i) in light of new evidence presented by plaintiffs in this summary judgment.

Defendant's Motion [38] for Summary Judgment is DENIED. Plaintiffs' Motion [51] for Summary Judgment is GRANTED.

DATED this ____ day of January, 2001.

D.Or., 2001.

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Not Reported in F.Supp.2d, 2001 WL 13624 (D.Or.)

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