Ninth Circuit Court

Case: *Peters v. Barr*, No. 16-73509 (9th Cir. 2020) **Date:** April 2, 2020

Judges: Smith, Watford, Korman **Opinion:** Watford

Tags: Immigration, H1-B, lawful status, attorney negligence, UK, AOS, USCIS, I-129

Question(s) Presented: Is the negligence of an attorney contemplated in the phrase "through no fault of his own" in the statute indicating the sole exceptions to the bar for adjusting status if an applicant has not maintained continued lawful status?

Holdings: Yes, the parenthetical phrase in 8 U.S.C. § 1255(c)(2) reasonably includes the negligent actions of an applicant's attorney—in contrast to the regulation on that matter, which improperly narrows the exceptions (*see* 8 C.F.R. § 1245.1(d)(2)).

Rationale: Plain meaning of "no fault of his own" must encompass more than what the regulations say it does.

Facts: Citizen of UK here on tourist visa, then switched to H-1B visa for work. Attorney for her workplace failed to file requisite documents for an extension, and may have neglected to file a corrected application as well (unless it was lost by USCIS—attorney did not preserve any documentation of the filing that he swears he made). Petitioner did not know she was out of status until months after her visa expired. She attempted to file for adjustment of status but was denied. Appealed on the argument that the negligence of an attorney was contemplated by the phrase "through no fault of his own" in the statute.

Legal History, Prior Appeals & Trial Court Input:

2001: Came to US on B-1 visa, then changed to H1-B visa thru Nov. 2004.
2003: Employer petitioned for renewal. H1-B renewed thru July 2006.
June 2006: Employer requested renewal. Attorney forgot to include some documents that were newly required. I-129 application sent back to attorney, who swears he then submitted the corrected one, though there is no evidence that he had done so. USCIS informed Petitioner that she was out of status in Sept. 2006.
2007: Employer filed I-140 as first step for AOS. Lawyer filed for AOS. This was denied by USCIS because she was out of lawful status for >180 days.
2010: DHS commenced removal proceedings. Petitioner applied for AOS at those proceedings, IJ denied on grounds that INS regulations narrowly limited the reasons for an exception to the bar for applying while out of status.
20__: BIA affirmed.
2019: Appeal to 9th Circuit.

Appeals to Statute & Precedent:

- **8 U.S.C. § 1255(c)(2):** Adjustment of status is denied to "an alien . . . who is in unlawful immigration 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." (emphasis added)
- **8 C.F.R. § 1245.1(d)(2):** INS regulations define parenthetical phrase ^^^, limiting "no fault of his own" to inaction of individual or organization *designated by regulation to act* on behalf of the noncitizen, *so long as the inaction is acknowledged* by the individual or organization. "Technical reasons" means USCIS messed up.
- ***Evangelista v. Johnson*, 2015 WL 12683978, at *4-5 (D. Mass. Oct. 30, 2015):** "no fault of his own" encompasses attorney negligence
- ***Wong v. Napolitano*, 2010 WL 916274, at *12-15 (D. Or. Mar. 10, 2010):** "no fault of his own" encompasses attorney negligence
- ***Alimoradi v. U.S. Citizenship & Immigration Services*, 2009 WL 8633619, at *5-6 (C.D. Cal. Feb. 10, 2009):** "no fault of his own" encompasses attorney negligence
- ***Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003):** by analogy—failure to appear at court and removed *in absentia* because of negligent advice of attorney counts as "exceptional circumstances" per the relevant statute.

Discussion:

- "The IJ relied not on the plain meaning of the statutory phrase 'other than through no fault of his own or for technical reasons,' but on the definition of that phrase provided in a regulation promulgated by USCIS's predecessor agency." (*Peters v. Barr*, No. 16-73509, 8 (9th Cir. 2020))
    - It wasn't a "technical reason," because the IJ found that the attorney probably hadn't sent the revised I-129 for the USCIS to mess up.
    - It wasn't "through no fault of [her] own," because attorney negligence doesn't fit in the regulation's definition (attorney was not "designated by regulation" to assist her, and in any case the attorney did not acknowledge any inaction). ("Instead, he maintained till his death during the pendency of these proceedings that he had in fact filed the corrected petition." !!!)
- **"The pairing of 'fault' with the phrase 'of his own' makes evident that Congress intended the parenthetical exception to apply when an applicant is not *personally* to blame for her failure to maintain lawful status.** The policy choice strikes us as eminently sensible given the complexity of the laws governing maintenance of lawful immigration status and the ease with which an individual who is diligently trying to maintain such status can inadvertently fail to do so." *Peters v. Barr*, No. 16-73509, 11 (9th Cir. 2020).
- "An applicant cannot be regarded as personally responsible for failing to maintain lawful status when that failure occurs due to a mistake on her lawyer's part." *Peters v. Barr*, No. 16-73509, 12 (9th Cir. 2020).
- "Our decision in *Monjaraz-Munoz* addresses a different section of the [INA], but it is nonetheless instructive because the purpose served by the 'exceptional circumstances' provision is similar to the purpose underlying the 'other than through no fault of his own provision.' Both reflect Congress's desire to avoid penalizing non-citizens who have diligently attempted to follow the rules but fail in that effort due to circumstances for which they cannot fairly be deemed responsible. In both contexts, when

reasonable reliance on an attorney's erroneous advice results in an applicant's failure to take action that the law requires, non-compliance is excused because the applicant is not to blame." *Peters v. Barr*, No. 16-73509, 14 (9th Cir. 2020).

- Re. the regulation in question: "…we agree that the regulation is invalid to the extent it excludes reasonable reliance on the assistance of counsel from the circumstances covered by the statutory phrase 'other than through no fault of his own.'" *Peters v. Barr*, No. 16-73509, 14 (9th Cir. 2020).
- "[Peters] remains eligible for adjustment of status because her failure to maintain lawful status continuously since entering the United States occurred through no fault of her own." *Peters v. Barr*, No. 16-73509, 16 (9th Cir. 2020).