In Re: 32089333

Appeal of Nebraska Service Center Decision

Form I-485, Application to Register Permanent Residence or Adjust Status

The Applicant seeks to become a lawful permanent resident (LPR) based on their “U” nonimmigrant status. See section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The U classification affords nonimmigrant status to crime victims, who assist authorities investigating or prosecuting the criminal activity, and their qualifying family members. The U nonimmigrant may later apply for lawful permanent residency.

The Director of the Nebraska Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application), determining the Applicant was ineligible to adjust status at the time of filing because he did not demonstrate he was physically present in the United States for a continuous period of at least three years in U nonimmigrant status. The matter is now before us on appeal. 8 C.F.R. § 103.3.


I. LAW

U.S. Citizenship and Immigration Services (USCIS) may in its discretion adjust the status of an individual admitted into the United States as a U nonimmigrant to that of a lawful permanent resident if, among other requirements, they have been physically present in the United States for a continuous period of at least three years since the date of admission as a U nonimmigrant and establishes that their continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. Section 245(m)(1) of the Act; 8 C.F.R. § 245.24(b)(3), (6).

Continuous physical presence is defined as the period of time that an applicant has been physically present in the United States and “must be a continuous period of at least 3 years since the date of admission as a U nonimmigrant continuing through the date of the conclusion of adjudication of the [U adjustment] application.” 8 C.F.R. § 245.24(a)(1). U adjustment applicants will be deemed to have not maintained continuous physical presence if they departed the United States for any period in
excess of 90 days or for any periods exceeding 180 days in the aggregate. Section 245(m)(2) of the Act; 8 C.F.R. § 245.24(a)(1). Such departures may be excused if the law enforcement agency that supported the applicant’s U petition certifies that the applicant’s absence was necessary to assist in the criminal investigation or prosecution or was otherwise justified. Id.

II. ANALYSIS

The Applicant was granted U nonimmigrant status from February 2020 to February 2024. The Applicant departed the United States in January 2021, and in January 2022, U.S. Customs and Border Protection (CBP) admitted him in U nonimmigrant status until January 2026. The Applicant filed his U adjustment application in December 2022. In October 2023, the Director denied the U adjustment application, determining the Applicant did not have the requisite three years of continuous physical presence in U nonimmigrant status at the time of filing his U adjustment application, because he had spent an excess of 90 continuous days outside of the United States after his admission in U nonimmigrant status, breaking his continuous presence, and he did not submit a certification from the agency that signed his original Supplement B that his absence was in some way tied to the investigation or prosecution of his qualifying criminal activity or otherwise justified.1

Applicants for immigration benefits must establish their eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). For U adjustment applicants, the applicant must show the accrual of at least three years of continuous physical presence in the United States in U status at the time of filing. See section 245(m)(1)(A) of the Act and 8 C.F.R. § 245.24(b)(3) (stating the requirement of three years of continuous physical presence); see also 8 C.F.R. § 245.24(d)(5), (9) (requiring applicants to submit evidence of their three-year period of continuous physical presence with their application to establish eligibility for U adjustment).

After the grant of U nonimmigrant status in February 2020, the Applicant departed the United States for a period in excess of 90 days, creating a break in his continued physical presence. The Director’s decision focused on the Applicant’s break in continuous presence as the reason for his ineligibility at the time of filing. However, at the time of filing his U adjustment application in December 2022, even if the Applicant had not departed the United States, he would not have yet acquired and been able to demonstrate three years of continuous physical presence following his February 2020 admission in U nonimmigrant status as required to establish his eligibility. 8 C.F.R. §§ 103.2(b)(1), 245.24(a)(1), (d)(5), (9). In other words, even if the Applicant had provided the required certification under section 245(m)(2) of the Act and 8 C.F.R. § 245.24(a)(1), he still would not have yet acquired three years of continuous presence at the time of filing.

On appeal, the Applicant explains why he left the United States, how his intent was to depart for a month, that he met with an Immigration Officer in Fresno, California, who told him he did not need to apply for advanced parole to return to the United States, that he was unable to reenter and by the

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1 The Applicant included in the record below an updated Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), dated December 2022. The record supports that the same law enforcement agency that certified the original Supplement B, in support of the Applicant’s U nonimmigrant status, also certified the updated Supplement B. However, the updated Supplement B did not address the Applicant’s departure from the United States and whether it was necessary to assist in the criminal investigation or prosecution or was otherwise justified as required under section 245(m)(2) of the Act, 8 C.F.R. § 245.24(a)(1).
time he was able to obtain a visa through the consulate, a long time had passed. We note that the Applicant raised these circumstances to the Director as well and while we similarly are sympathetic, we again note that the Applicant would not have been eligible for U adjustment at the time of filing, even if he had not departed. Further, USCIS lacks authority to disregard or circumvent the statutory eligibility requirements of section 245(m) of the Act and as implemented by the regulations at 8 C.F.R. § 245.24. See, e.g., United States v. Nixon, 418 U.S. 683, 695-96 (1974) (holding that government officials are bound by governing statutes and regulations in force); United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954) (stating that immigration regulations carry the force and effect of law).

Moreover, U adjustment applicants may restart their period of continuous physical presence after it has been interrupted upon subsequent admission as a U nonimmigrant. Section 245(m)(1)(A), 8 C.F.R. § 245.24(a)(1). However, U adjustment applicants must acquire at least three years of continuous physical presence in U status as of the date their adjustment applications are filed and they must continue that presence through the adjudication of their applications. 8 C.F.R. §§ 103.2(b)(1), 245.24(a)(1), (d)(5), (9). Here, the Applicant restarted his period of physical presence upon his subsequent admission in U status in January 2022 and would not acquire three years of continuous physical presence until January 2025.

III. CONCLUSION

The Applicant has not established that at the time of filing he had been continuously physically present in the United States for at least three years from an admission as a U nonimmigrant. The Applicant is consequently ineligible for adjustment of status under section 245(m) of the Act.

ORDER: The appeal is dismissed.