U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30815238

Date: MAR. 12, 2024

Motion on Administrative Appeals Office Decision

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

The Applicant seeks to become a lawful permanent resident based on their "U" nonimmigrant status. See Immigration and Nationality Act (the Act) section 245(m), 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 Director of the Vermont Service Center denied the Applicant's Form I-485, Application for Adjustment of Status of a U Nonimmigrant (U adjustment application). The Director also dismissed the Applicant's subsequent combined motion to reopen and reconsider the adverse decision. We then dismissed the Applicant's appeal. The matter is now before us on combined motion to reopen and reconsider. 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). Upon review, we will dismiss the motions.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Because the scope of a motion is limited to the prior decision, we will only review the latest decision in these proceedings. 8 C.F.R. § 103.5(a)(1)(i), (ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

The Applicant was granted U nonimmigrant status on June 06, 2017, with a validity period through June 05, 2021. In March 2020, the Applicant filed his U adjustment application. The Director denied this application, concluding that the Applicant had not established that at the time of filing he had been physically present in the United States for a continuous period of at least three years since his date of admission in U nonimmigrant status, as required under section 245(m)(1) of the Act. In our previous decision, incorporated here by reference, we concluded that the Applicant had not overcome the Director's sole ground for denial.

On motion, the Applicant submits, in relevant part, a personal affidavit and correspondence with counsel who previously represented him in the preparation of his U adjustment application. He also

submits copies of the approval notice for his Form I-918, Petition for U Nonimmigrant Status, and the receipt notice for his U adjustment application, both of which are in the record below.[1] The Applicant asserts that these new facts establish eligibility.

As an initial matter the Applicant does not dispute that his U adjustment application was filed on March 18, 2020, and that at the time of filing he had not been physically present for the requisite continuous period of three years since his date of admission in U nonimmigrant status. In his affidavit on motion, the Applicant explains that he relied upon prior counsel's advice in filing the U adjustment application in March 2020 and was unaware that he had mailed his U adjustment application early. He contends that due to the untimely filing of his U adjustment application and the Director's subsequent denial of it, he has suffered extreme hardship as his employment was terminated in early 2023. While we are sympathetic to the challenges faced by the Applicant, he does not explain on motion how or why these difficulties establish that he had been continuously physically present in the United States for the requisite three-year period at the time he filed his U adjustment application.

The Applicant also asserts on motion that because of the errors of previous counsel, he may rely upon the doctrine of equitable estoppel because he "trusted his attorneys and blindly followed their advice" and "relied on the advice of a professional experienced lawyer in the field of immigration." He further requests that the doctrine of equitable estoppel be applied against USCIS as he was led "to believe that everything was done in accordance with the regulations" when USCIS accepted his U adjustment application and issued a receipt notice to him, only to later deny the application because it was untimely filed. We acknowledge these arguments. However, we have no authority to apply the doctrine of equitable estoppel. *See Matter of Hernandez-Puente,* 20 I&N Dec. 335, 338-39 (BIA 1991). Although federal courts may apply the doctrine against USCIS, we may not. *Id.*

The Applicant has not offered new evidence on motion to reopen sufficient to establish his eligibility for adjustment of status under section of 254(m) of the Act.

A motion to reconsider must establish that our prior decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). Because the scope of a motion is limited to the prior decision, we will only review the latest decision in these proceedings. 8 C.F.R. § 103.5(a)(1)(i), (ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

On motion, the Applicant contests the correctness of our prior decision. He acknowledges that he had not been physically present in the United States for a continuous period of three years at the time he filed his U adjustment application. As a U adjustment applicant, the Applicant must have been in valid U status for at least three years since the date of admission as a U nonimmigrant. *See section* 245(m)(1)(A) of the Act (stating that an individual must have "been physically present in the United States for a continuous period of at least 3 years since the date of admission as a [U] nonimmigrant"); 8 C.F.R. § 245.24(a)(1) (stating that continuous physical presence "means the period of time that the

[1] The Applicant also includes documents from Wikipedia and the National Consumer Law Center regarding the application of estoppel and equitable tolling, *Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022), and the immigration court order terminating his removal proceedings.

[individual] 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"), 245.24(d)(9) (stating that a U adjustment application must include, in part, "an affidavit from the applicant, that he or she has continuous physical presence for at least 3 years"). Here he argues that the requisite physical presence requirement prior to the filing of his U adjustment application is "a mere procedural requirement" that should not take precedence over his eligibility for the classification sought. The Applicant contends that as he has resided in the United States for a continuous period of at least 13 years, he has fully complied with this requirement. Accordingly, he argues that we should remand the matter for further consideration. However, the Applicant does not point to any legal authority that would allow us to waive a requirement of the Act as implemented by regulation, and we lack the authority to do so. *See United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as this regulation is extant it has the force of law.").

The Applicant further contends that we should consider the residence period at the time of adjudication, as USCIS currently is doing in the context of adjusting status for those granted asylum. The physical presence requirement for asylees wishing to adjust status is found at 8 C.F.R. § 209.2(a)(ii) and is separate and distinct from the continuous physical presence requirement for nonimmigrants in U status under section 245(m)(1) of the Act. The Applicant cites to no legal authority that would allow us to apply the requirements under 8 C.F.R. § 209.2(a)(ii) to nonimmigrants in U status. Accordingly, he has not shown that our previous decision was based on an incorrect application of law or policy at the time we issued our decision.

Although the Applicant has submitted additional evidence in support of the motion to reopen, the Applicant has not established eligibility. On motion to reconsider, the Applicant has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the combined motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.