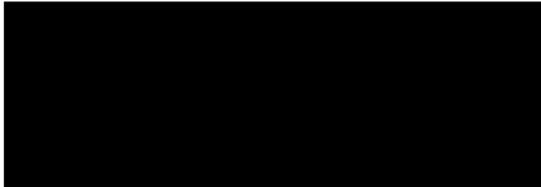


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



A6

Date: **SEP 18 2012**

Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

Applicant: 

APPLICATION: Application to Adjust Status (Form I-485) for an Alien in U Nonimmigrant Status Pursuant to Section 245(m)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1255(m)(1)

ON BEHALF OF APPLICANT:

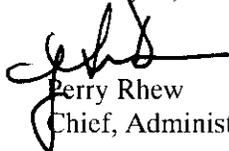


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center (the director), denied the Application to Adjust Status (Form I-485), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The application will remain denied.

The applicant, who was granted U-1 nonimmigrant status, seeks to adjust her status under section 245(m)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m)(1).

Applicable Law

Section 245(m)(1) of the Act states:

The Secretary of Homeland Security may adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 101(a)(15)(U) to that of an alien lawfully admitted for permanent residence if the alien is not described in section 212(a)(3)(E), unless the Secretary determines based on affirmative evidence that the alien unreasonably refused to provide assistance in a criminal investigation or prosecution, if

--

(A) the alien has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under clause (i) or (ii) of section 101(a)(15)(U); and

(B) in the opinion of the Secretary of Homeland Security, the alien's continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

The regulation at 8 C.F.R. § 245.24(b) provides:

Eligibility of U Nonimmigrants. Except as described in paragraph (c) of this section, an alien may be granted adjustment of status to that of an alien lawfully admitted for permanent residence, provided the alien:

(1) Applies for such adjustment;

(2)(i) Was lawfully admitted to the United States as either a U-1, U-2, U-3, U-4 or U-5 nonimmigrant, as defined in 8 C.F.R. § 214.1(a)(2), and

(ii) Continues to hold such status at the time of application; or accrued at least 4 years in U interim relief status and files a complete adjustment application within 120 days of the date of approval of the Form I-918, Petition for U Nonimmigrant Status[.]

Facts and Procedural History

The applicant was initially granted interim relief on June 16, 2006 based upon a request for U nonimmigrant status that she filed pending publication of the U nonimmigrant visa interim rule. On

February 1, 2010, the director granted U-1 nonimmigrant status to the applicant based upon an approved Petition for U Nonimmigrant Status (Form I-918 U petition). According to the Approval Notice for the Form I-918 U petition (Form I-797A), the applicant's U-1 status was valid from June 16, 2006, the date she was granted interim relief, until January 19, 2011. The applicant filed the instant Form I-485 on March 14, 2011 after the expiration date of her U-1 nonimmigrant status. The director denied the applicant's adjustment of status application because the applicant no longer held U-1 nonimmigrant status at the time she filed her Form I-485.

On appeal, counsel submits a brief, stating that extenuating circumstances beyond the applicant's control caused the Form I-485 to be filed after the applicant's U-1 nonimmigrant status had expired. According to counsel, the failure to timely file the Form I-485 was due to: (1) the prospective parole of the perpetrator of the qualifying criminal activity; (2) the applicant's financial circumstances inhibiting the ability to file; and (3) the applicant's concern over the status of her son's derivative application which had not been adjudicated as the expiration of the applicant's U-1 nonimmigrant status approached. Counsel also states that the applicant was prejudiced by the director because he failed to issue a notice of intent to deny (NOID) or a request for further evidence (RFE) prior to denying the instant Form I-485.

Analysis

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Based on the evidence in the record, we find no error in the director's decision to deny the applicant's adjustment of status application.

An applicant is eligible to adjust status under section 245(m)(1) of the Act if he or she, in part, "[c]ontinues to hold such status at the time of application." 8 C.F.R. § 245.24(b)(2)(ii). The record reflects, and counsel concedes, that the Form I-485 was filed after the applicant's U-1 nonimmigrant status had expired; however, counsel requests that U.S. Citizenship and Immigration Services (USCIS) favorably exercise its discretion to adjust the applicant's status to that of a lawful permanent resident because the failure to timely file the Form I-485 was due to extenuating circumstances. Although the regulation at 8 C.F.R. § 245.24(f) provides USCIS with discretionary authority to approve or deny an adjustment of status application, an applicant must first demonstrate her eligibility under the applicable statutory and regulatory criteria before USCIS will exercise its discretionary authority. Here, because the applicant was no longer in U nonimmigrant status when she filed her Form I-485, the regulation at 8 C.F.R. § 245.24(b)(2)(ii) bars the approval of her Form I-485. Consequently, USCIS does not reach the issue of whether the applicant's Form I-485 should be granted as a matter of discretion.

Regarding counsel's claim that the applicant was prejudiced by the director's failure to issue a NOID or RFE, the regulations at 8 C.F.R. § 245.24 governing adjustment of aliens in U status require no such notice prior to the denial of the Form I-485. As the applicant is ineligible to adjust her status according to 8 C.F.R. § 245.(b)(2)(ii) and USCIS may not waive that requirement, the applicant suffered no resultant prejudice by not being issued a NOID or RFE prior to the denial of the application.

Conclusion

In these proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 245.24(b),(d). Here, that burden has not been met as to the applicant's eligibility to adjust status under section 245(m)(1) of the Act and the appeal shall be dismissed.

This decision is without prejudice to the filing of a new Form I-485 if the applicant is granted an extension of her U-1 nonimmigrant status upon the proper filing of a Form I-539, Application to Extend Nonimmigrant Status.¹

ORDER: The appeal is dismissed. The application remains denied.

¹ *Extension of Status for T and U Nonimmigrants; Revisions to Adjudicator's Field Manual (AFM) Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11-28), USCIS PM-602-0032.1, April 19, 2011.* The record reflects that the applicant has filed a second Form I-485; however, until the applicant is granted an extension of her U-1 nonimmigrant status no purpose would be served in the additional filing of such applications.