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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



AG

Date: Office: VERMONT SERVICE CENTER FILE: 

**SEP 18 2012**

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:

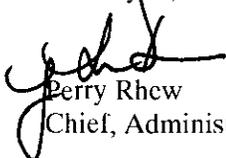


INSTRUCTIONS:

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-2 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

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(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 January 17, 2006 based upon a request for U nonimmigrant status filed on her behalf pending publication of the U nonimmigrant visa interim

rule. On March 23, 2010, the director granted U-2 nonimmigrant status to the applicant based upon an approved Petition for a Qualifying Family Member of a U Nonimmigrant (Form I-918 Supplement A) filed on her behalf by her spouse. According to the Approval Notice for the Form I-918 Supplement A (Form I-797A), the applicant's U-2 status was valid from January 17, 2006, the date she was granted interim relief, until March 8, 2011. The applicant filed the instant Form I-485 on March 18, 2011 after the expiration date of her U-2 nonimmigrant status. The director denied the applicant's adjustment of status application because the applicant no longer held U-2 nonimmigrant status at the time she filed her Form I-485.

On appeal, counsel submits a Notice of Appeal (Form I-290B), stating that extenuating circumstances beyond the applicant's control caused the Form I-485 to be filed after the applicant's U-2 nonimmigrant status had expired. According to counsel, the failure to timely file the Form I-485 was due to ineffective assistance of prior counsel, S-J-<sup>1</sup>.

#### *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.

Counsel's ineffective assistance of counsel claim is not supported by the documentary evidence requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In addition, according to the record, the applicant terminated S-J-'s services on September 6, 2010, the date on which the applicant's new counsel, J-S-L-,<sup>2</sup> requested that she receive any and all correspondence from U.S. Citizenship and Immigration Services (USCIS) regarding the applicant's Form I-918 Supplement A. The record reflects that the Form I-918 Supplement A approval notice was forwarded to J-S-L- and that the applicant was not prejudiced by any assistance S-J- may have failed to render to her. Thus, the applicant's ineffective assistance of counsel claim has no merit.

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-2 nonimmigrant status had expired. 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.

#### *Conclusion*

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<sup>1</sup> Name withheld to protect identity of individual.

<sup>2</sup> Name withheld to protect identity of individual.

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.<sup>3</sup>

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

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<sup>3</sup> *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.*