

(b)(6)



U.S. Citizenship
and Immigration
Services

[Redacted]

Date: **DEC 04 2013** Office: VERMONT SERVICE CENTER FILE: [Redacted]

IN RE: Applicant: [Redacted]

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
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 Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion to reopen will be granted. The appeal will remain dismissed and the petition 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).

On motion, counsel submits a brief and additional evidence of the applicant's prior attorney's alleged ineffective assistance.

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; in pertinent part:

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 CFR 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[.]

Regarding the duration of U nonimmigrant status, section 214(p)(6), 8 U.S.C. § 1184(p)(6) states, in pertinent part:

The authorized period of status of an alien as a nonimmigrant under section 101(a)(15)(U) shall be for a period of not more than 4 years, but shall be extended upon certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating or prosecuting criminal activity . . . that the alien's presence in the United States is required to assist in the investigation or prosecution of such criminal activity. The Secretary of Homeland Security may extend, beyond the 4-year period authorized under this section, the authorized period of status of an alien as a nonimmigrant under section 101(a)(15)(U) if the Secretary determines that an extension of such period is warranted due to exceptional circumstances. Such alien's nonimmigrant status shall be extended beyond the 4-year period authorized under this section if the alien is eligible for relief under section 245(m) and is unable to obtain such relief because regulations have not been issued to implement such section and shall be extended during the pendency of an application for adjustment of status under section 245(m).

Facts and Procedural History

As the facts and procedural history have already been explained in the previous decisions, we will not repeat them in their entirety here, and the previous AAO decision dated September 18, 2012, is incorporated here by reference. The applicant was initially granted interim relief on January 17, 2006 based upon her *prima facie* eligibility for U nonimmigrant status prior to the publication of the U nonimmigrant visa interim rule. On March 23, 2010, the director granted U-2 nonimmigrant status to the applicant, valid from January 17, 2006 until March 8, 2011, based upon the approved Petition for a Qualifying Family Member of a U Nonimmigrant (Form I-918 Supplement A) filed on her behalf by her spouse. The applicant filed the instant Form I-485 on March 21, 2011, 13 days after the expiration date of her U-2 nonimmigrant status. The director denied the applicant's adjustment of status application because she did not continue to hold U-2 nonimmigrant status at the time she filed her Form I-485.

On appeal, prior counsel stated that the applicant was denied effective assistance of counsel when her first attorney failed to inform her of the applicable deadlines for pursuing an adjustment of status application and asserted that the applicant never received any notices from U.S. Citizenship and Immigration Services (USCIS) which would have enabled her to timely pursue an adjustment of status application on her own. The AAO dismissed the appeal because the applicant did not demonstrate that her failure to file her Form I-485 prior to the expiration of her U-2 nonimmigrant status was due to ineffective assistance of her first counsel, and the regulation at 8 C.F.R. § 245.24(b)(2)(ii) barred the approval of her application.

On motion, counsel submits a brief, stating that the applicant's Form I-485 should be reopened because her prior attorney committed clear prejudicial error by filing the applicant's Form I-485 past the

expiration of the applicant's U nonimmigrant status and then filing a baseless appeal. Counsel submits evidence showing that prior counsel was ineffective under the standards and requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Accordingly, the motion to reopen is granted on this basis.

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 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-2 nonimmigrant status had expired; however, counsel requests that USCIS reopen the applicant's Form I-485 application because the failure to timely file the Form I-485 was not the applicant's fault, but rather her prior attorney's fault, and grant the application in the exercise of discretion. Counsel also asserts that the applicant filed a Form I-539, Application to Extend Nonimmigrant Status, but USCIS records do not reflect that a Form I-539 is pending or that any such application has been approved. 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 favorably exercise its discretion. Here, even though the applicant's prior counsel provided ineffective assistance, because the applicant was no longer in U-2 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.

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); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). 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 application shall remain denied.

This decision is without prejudice to the filing of a new Form I-485 if the applicant is granted an extension of her U-2 nonimmigrant status through her filing of a Form I-539, Application to Extend Nonimmigrant Status.¹

ORDER: The motion is granted. The appeal remains dismissed and the application remains denied.

¹ *See 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.*