



U.S. Citizenship
and Immigration
Services

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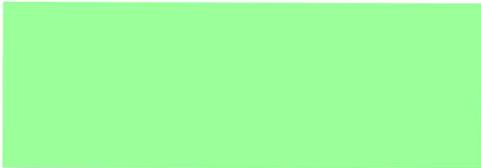


Date: **NOV 18 2013** Office: VERMONT SERVICE CENTER FILE:

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 (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, Vermont Service Center (the director), denied the Application to Register Permanent Residence or Adjust Status (Form I-485), and affirmed his decision upon granting a subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and 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 provides, in pertinent part:

(b) *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;

(3) Has continuous physical presence for 3 years as defined in paragraph (a)(1) of this section;

(4) Is not inadmissible under section 212(a)(3)(E) of the Act;

(5) Has not unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the alien was granted U nonimmigrant status, as determined by the Attorney General, based on affirmative evidence; and

(6) Establishes to the satisfaction of the Secretary that the alien's presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest.

(c) *Exception.* An alien is not eligible for adjustment of status under paragraph (b) of this section if the alien's U nonimmigrant status has been revoked pursuant to 8 C.F.R. § 214.14(h).

Facts and Procedural History

The applicant was initially granted interim relief on January 11, 2008 based upon a request for U nonimmigrant status pending publication of the U nonimmigrant visa interim rule. On July 14, 2010, the director approved the applicant's Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition). The applicant's U-1 status was valid from January 11, 2008, when she was granted interim relief, until January 10, 2012. The applicant filed the instant Form I-485 on January 30, 2012, after the expiration to her U-1 nonimmigrant status. The director denied the application on July 30, 2012 because the applicant no longer held U-1 nonimmigrant status at the time she filed her Form I-485, she did not establish that she had three years of continuous physical presence in the United States since the date of admission as a U nonimmigrant or that she had not unreasonably refused to assist law enforcement, and the director did not find a favorable exercise of discretion was warranted. The applicant filed a motion to reopen. The director reopened the proceedings but affirmed the denial of the application.

On appeal, counsel states that the applicant is not responsible for filing her application late. According to counsel, the failure to timely file the Form I-485 was due to confusion at his law practice. He also states that even though the regulation requires the U visa applicant to be in status at the time of filing a Form I-485, "the regulation can be equitab[ly] tolled." The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Counsel's claims fail to establish the applicant's eligibility and the appeal will be dismissed for the following reasons.

Analysis

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) reopen the applicant's application because the failure to timely file the Form I-485 was not the

applicant's fault. 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. In addition, counsel cites no legal basis for his claim that the regulation can be equitably tolled. As of the date of this decision, the AAO has received no brief or additional evidence as counsel indicated he would submit on the Form I-290B, Notice of Appeal.

The director also denied the application because the applicant did not establish that she had three years of continuous physical presence in the United States since the date of admission as a U nonimmigrant or that she had not unreasonably refused to assist law enforcement, and the director did not find a favorable exercise of discretion was warranted. To establish three years of continuous physical presence in the United States since admission in U nonimmigrant status, an applicant must submit evidence such as, but not limited to, state or federal government documents, school and employment records, income tax returns, and monthly rent receipts or utility bills. 8 C.F.R. §§ 245.22, 245.24(b)(3), (d)(9). In her affidavit, the applicant states she has not traveled outside of the United States since she received U-1 nonimmigrant status. The record includes notices for immigration applications filed by the applicant in 2008, 2009, 2010, and 2011; income tax returns for 2006, 2007, 2008, and 2009 for the applicant, and 2011 for the applicant and her husband; school records for the applicant's daughter for 2006, 2008, and 2011; and copies of passports for the applicant and her family. The submitted documents establish the three years of continuous physical presence in the United States since the applicant's admission in U nonimmigrant status, and this portion of the director's decision will be withdrawn.

However, there is no evidence that the applicant has not unreasonably refused to assist law enforcement. Applicants must submit evidence that demonstrates whether or not they received requests for assistance from an official or law enforcement agency that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity after the applicants were granted U nonimmigrant status and the applicants' response to such requests. 8 C.F.R. §§ 245.24(d)(8), 245.24(e). Applicants may satisfy this evidentiary requirement by submitting a newly executed Form I-918 Supplement B, U Nonimmigrant Status Certification (Form I-918 Supplement B). *Id.* If the applicant does not submit such a document, the applicant may submit an affidavit describing the applicant's efforts, if any, to obtain a newly executed Form I-918 Supplement B, or other evidence describing whether or not the alien received any request to provide assistance in a criminal investigation or prosecution and the alien's response to any such request. 8 C.F.R. § 245.24(e)(2). On appeal, counsel does not address this ground for denial and submits no additional evidence.

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

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NON-PRECEDENT DECISION

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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.*