



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: Office: VERMONT SERVICE CENTER FILE: [REDACTED]

OCT 15 2013

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, Vermont Service Center (the director), denied the Application to Register Permanent Residence or Adjust Status (Form I-485) and the Administrative Appeals Office (AAO) summarily dismissed the subsequent appeal. The matter is again before the AAO on a motion to reopen and reconsider. The motion to reconsider will be granted. The appeal will remain dismissed and the underlying petition 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). The director denied the Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), because the applicant failed to submit a Report of Medical Examination and Vaccination Record (Form I-693), as required by the regulation at 8 C.F.R. § 245.5. The applicant, through counsel, timely filed an appeal to the AAO. The appeal was summarily dismissed because the applicant did not identify specifically any erroneous conclusion of law or statement of fact for the appeal. The applicant, through counsel, timely filed the instant motion with the AAO.

The applicant has met the requirements for a motion to reconsider, but not a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2)-(3). On motion, counsel provides no new evidence, but submits a legal brief asserting that U nonimmigrants are not required to submit a medical examination report. Accordingly, the motion to reconsider is granted.

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. § 245.5 provides:

Pursuant to section 232(b) of the Act, an applicant for adjustment of status shall be required to have a medical examination by a designated civil surgeon, whose report setting forth the findings

of the mental and physical condition of the applicant, including compliance with section 212(a)(1)(A)(ii) of the Act, shall be incorporated into the record. A medical examination shall not be required of an applicant for adjustment of status who entered the United States as a nonimmigrant spouse, fiancée, or fiancé of a United States citizen or the child of such an alien as defined in section 101(a)(15)(K) of the Act and § 214.2(k) of this chapter if the applicant was medically examined prior to, and as a condition of, the issuance of the nonimmigrant visa; provided that the medical examination must have occurred not more than 1 year prior the date of application for adjustment of status.

Regarding the application procedure for adjustment of aliens in U nonimmigrant status, the regulation at 8 C.F.R. § 245.24(d) states, in pertinent part, the following:

Each U nonimmigrant who is requesting adjustment of status must submit:

- (1) Form I-485, Application to Register Permanent Residence or Adjust Status, in accordance with the form instructions;

* * *

- (10) *Evidence establishing that approval is warranted.* Any other information required by the instructions to Form I-485

The Instructions for Form I-485, Application to Register Permanent Residence or Adjust Status, state, in pertinent part:

Evidence. You must submit all required initial evidence along with all the supporting documentation with your application at the time of filing.

* * *

Initial Evidence. You must file your application with the following evidence:

* * *

7. **Medical examination.** When required, submit a medical examination report on Form I-693, Report of Medical Examination and Vaccination Record.

Individuals applying for adjustment of status:

A. General: When filing your Form I-485, include your medical examination report with the application, unless you are a refugee.

* * *

D. Persons not required to have a medical examination: The medical report is not required if you are applying for creation of a record for admission as a lawful

permanent resident under section 249 of the INA as someone who has continuously resided in the United States since January 1, 1972 (registry applicant).

Facts and Procedural History

The applicant was initially granted interim relief on March 14, 2007 based upon a request for U nonimmigrant status pending publication of the U nonimmigrant visa interim rule. The director later approved the applicant's Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), granting the applicant U-1 status from March 14, 2007, the date she was granted interim relief, until March 13, 2011. The applicant filed the instant Form I-485 on March 9, 2011. On August 17, 2011, the director issued a Request for Evidence (RFE) of among other things, a completed Form I-693 medical report. In response to the RFE, the applicant, through counsel, claimed that she could not afford the cost of the medical exam. On January 6, 2012, the director denied the applicant's adjustment of status application. The AAO summarily dismissed the applicant's subsequent appeal.

On motion, the applicant, through counsel, contends that the medical report required by 8 C.F.R. § 245.5 does not apply to the applicant as a U-1 nonimmigrant. In addition, counsel asserts the adjustment "application was filed with all the necessary documents to establish her eligibility for adjustment of status under the U visa provisions of the INA."

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 claims a medical examination is not required of U nonimmigrants because it is "not in the Victims of Trafficking and Violence Act of 2000 nor in the INA" and "medical grounds of inadmissibility are not required by statute." Counsel contends that 8 C.F.R. § 245.5 "is older and was partially amended by 8 C.F.R. § 245.24(d) with relation to the U based adjustment of status filings because it specifies the limited inadmissibility issues that do actually apply to U based adjustment of status filings." She states the "only ground of inadmissibility applicable to U nonimmigrants applying for adjustment of status under section 245(m) of the Act . . . relates to participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing." Counsel contends U.S. Citizenship and Immigration Services (USCIS) is "requiring a medical examination despite § 245(m)(1) of the Act not requiring it." Therefore, counsel contends that requiring a medical exam of U nonimmigrants is *ultra vires*.

Contrary to counsel's claim on motion, the U adjustment regulation did not negate the medical report requirement for all adjustment applicants, which is not *ultra vires*. Section 245(m)(1) of the Act provides USCIS with discretionary authority to approve or deny an adjustment of status application for U

nonimmigrants. The applicant bears the burden of showing that discretion should be exercised in her favor. 8 C.F.R. § 245.24(d)(10). While U adjustment applicants are not required to demonstrate their admissibility, USCIS may consider all factors when making its discretionary decision on the application. *Id.* The regulation at 8 C.F.R. § 245.5 clearly states that all applicants for adjustment of status are required to have a medical examination, and there is no exception for U nonimmigrants. The only exception is for an applicant who entered the United States as a nonimmigrant spouse, fiancée, or fiancé of a United States citizen or the child of such an alien, if the applicant was medically examined not more than one year prior to the date of application for adjustment of status. Here, the applicant failed to follow the regulation at 8 C.F.R. § 245.24(d) which establishes the application procedure for adjustment of aliens in U nonimmigrant status. All U nonimmigrants applying for adjustment of status must submit a Form I-485, in accordance with the form instructions. 8 C.F.R. § 245.24(d)(1). The Form I-485 instructions, which were last updated on June 20, 2013, state that all initial evidence must be included with the application, including a Form I-693 medical report, unless the applicant is a refugee or a registry applicant.

The applicant was requested on August 17, 2011, to submit a medical examination report, and she failed to comply. It has been over two years since the initial request, and the record still does not contain a completed medical examination report. The regulation at 8 C.F.R. § 245.24(d)(10) specifically acknowledges that U adjustment applicants are not required to establish their admissibility, yet grants USCIS the ability to require a medical report pursuant to its discretionary authority to approve or deny U adjustment applications under section 245(m)(1) of the Act. The applicant's Form I-485 cannot be approved without a medical examination report as required by the regulations at 8 C.F.R. §§ 245.24(d)(1), 245.5; therefore, she has failed to establish that she is eligible for adjustment of status.

Conclusion

In these proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. 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.

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