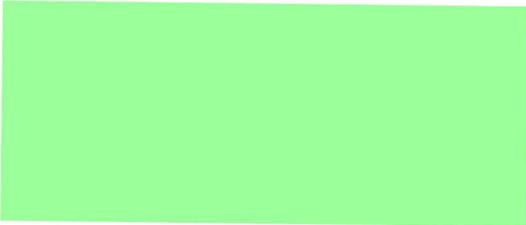




U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **APR 24 2014** 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 Administrative Appeals Office (AAO) dismissed the subsequent appeal, and the matter is again before the AAO on motion. The motion to reopen will be granted. The appeal will remain 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). On July 30, 2012, the director denied the Form I-485 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. The applicant filed a motion to reopen, and the director reopened the proceedings but affirmed the denial of the application. The applicant timely filed an appeal with the AAO. The AAO dismissed the appeal but determined that the applicant had established the three years of continuous physical presence in the United States since her admission in U nonimmigrant status and withdrew that portion of the director's decision. The applicant timely filed the instant motion with the AAO.

The applicant has met the requirements for a motion to reopen at 8 C.F.R. § 103.5(a). On motion, counsel claims that immigration statutes may be equitably tolled due to extraordinary circumstances, and in this case, the applicant did not timely file her adjustment of status application due to attorney error. In addition, counsel states the applicant has not unreasonably refused to cooperate with law enforcement. In support of his claims, counsel submits a brief, a statement from the applicant, and additional evidence. As additional documentary evidence has been submitted to support the applicant's new claim, the motion to reopen will be granted.

Analysis

Counsel asserts that the applicant did not file her adjustment of status application before her U-1 nonimmigrant status expired because of attorney error. He claims that “[a]ttorney error is an extraordinary circumstance beyond [the applicant’s] control,” and cites *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013), in support of his claim. In *Kuusk*, the Fourth Circuit Court of Appeals (Fourth Circuit) determined that the statutory filing deadline for a motion to reopen removal proceedings could be equitably tolled, only when (1) the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant or (2) extraordinary circumstances beyond plaintiff’s control made it impossible to file the claims on time. *Kuusk*, 732 F.3d at 305, citing *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). The Fourth Circuit held that “equitable tolling will be granted ‘only sparingly,’ not in ‘a garden variety claim of excusable neglect.’” *Id.* at 306, citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

Kuusk v. Holder involves a motion to reopen removal proceedings, not an application to adjust status while in U nonimmigrant status filed pursuant to section 245(m) of the Act. Counsel provides no legal

basis for his claim that section 245(m) of the Act constitutes a statute of limitations to which the principles of equitable tolling apply. Even if the AAO could apply equitable tolling principles to the instant application as discussed in *Kuusk v. Holder*, counsel does not sufficiently explain how “attorney error” is an extraordinary circumstance that rendered the applicant unable to file her adjustment application timely.

If the applicant is claiming that she was the victim of ineffective assistance of counsel, she has not complied with the procedural requirements as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), for making an ineffective assistance of counsel claim, including the requirement that she show prejudice as a result of the alleged ineffective assistance. See *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Lozada*, *supra*. Therefore, the applicant is not eligible to adjust status because she was no longer in U nonimmigrant status when she filed her Form I-485. See 8 C.F.R. § 245.24(b)(2)(ii).

Counsel also claims that the applicant has never refused to cooperate with law enforcement. In her affidavit, the applicant explains her efforts to obtain a newly executed Form I-918 Supplement B, U Nonimmigrant Status Certification (Form I-918 Supplement B), and states she has never unreasonably refused to assist law enforcement. The record includes a copy of a new Form I-918 Supplement B that appears to have been sent to the law enforcement agency on December 16, 2013. The applicant’s affidavit and additional evidence establish that she has not unreasonably refused to assist law enforcement after she was granted U nonimmigrant status, and this portion of the director’s decision will be withdrawn.

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) of the Act and the application must remain denied.

ORDER: The motion is granted. The AAO’s prior decision, dated November 18, 2013, is affirmed. The appeal remains dismissed and the application remains denied.