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

(b)(6)

U.S. Citizenship and Immigration Services

Date: FEB 12 2014 Office: VERMONT SERVICE CENTER

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:

SELF-REPRESENTED

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 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-5 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 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;

(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 CFR § 214.14(h).

Facts and Procedural History

The applicant was initially granted interim relief on October 18, 2007 based upon a request for U nonimmigrant status that her sister filed on her behalf pending publication of the U nonimmigrant visa interim rule. On November 12, 2008, the director granted U-5 nonimmigrant status to the applicant based upon an approved Petition for Qualifying Family Member of U-1 Recipient (Form I-918 Supplement A) that her sister filed on her behalf. The applicant's U-5 status was valid from October 18, 2007, the date she was granted interim relief, until October 17, 2011. The applicant properly filed the instant Form I-485 on June 1, 2012,[1] after the expiration of her U-5 nonimmigrant status. The director denied the application on October 31, 2012 because the applicant no longer held U-5 nonimmigrant status at the time she filed her Form I-485.

On appeal, the applicant submits a copy of her Form I-797C, Notice of Action, as evidence that she was granted an extension of her U visa.

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.

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 that the applicant's Form I-485 was filed after her U-5 nonimmigrant status had expired on

[1] The applicant initially submitted her Form I-485 on December 27, 2011; however, it was rejected because she submitted an incorrect filing fee.

October 17, 2011. Although the regulation at 8 C.F.R. § 245.24(f) provides U.S. Citizenship and Immigration Services (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. The Form I-797C submitted on appeal confirms that the applicant's U nonimmigrant status was extended from June 5, 2012 until a decision was made on her Form I-485. However, the record shows that the applicant filed her Form I-485 on June 1, 2012, prior to the extension of her U nonimmigrant status. Therefore, the applicant was not in U nonimmigrant status when she filed her Form I-485, and 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

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); *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 appeal shall be dismissed.

This decision is without prejudice to the filing of a new Form I-485 should the applicant's U-5 nonimmigrant status get extended through the approval of a Form I-539, Application to Extend Nonimmigrant Status.[2]

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

[2] *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.