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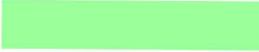
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



Date: Office: VERMONT SERVICE CENTER FILE: 
OCT 06 2014

IN RE: APPLICANT: 

APPLICATION: Application to Adjust Status (Form I-485) for an Alien in U Nonimmigrant Status Pursuant to Section 245(m) of the Immigration and Nationality Act, 8 U.S.C. § 1255(m)

ON BEHALF OF APPLICANT:

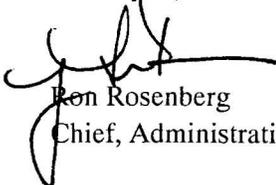
SELF-REPRESENTED

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 of the 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 The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed and the application will remain denied.

The applicant, who was granted U-2 nonimmigrant status, seeks to adjust her status under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The director denied the application because the applicant did not hold U-2 nonimmigrant status at the time of filing the Form I-485 and she did not have the required continuous physical presence in the United States.

Applicable Law

Section 245(m) of the Act states, in pertinent part:

- (1) 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.

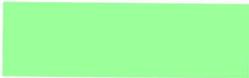
- (2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days unless the absence is in order to assist in the investigation or prosecution or unless an official involved in the investigation or prosecution certifies that the absence was otherwise justified.

* * *

The regulation at 8 C.F.R. § 245.24 provides, in pertinent part:

(a) *Definitions.* As used in this section, the term:

- (1) *Continuous Physical Presence* means the period of time that the alien has been physically present in the United States and must be a continuous period of at least 3 years since the date of admission as a U nonimmigrant continuing through the date of the conclusion of adjudication of



the application for adjustment of status. If the alien has departed from the United States for any single period in excess of 90 days or for any periods in the aggregate exceeding 180 days, the applicant must include a certification from the agency that signed the Form I-918, Supplement B, in support of the alien's U nonimmigrant status that the absences were necessary to assist in the criminal investigation or prosecution or were otherwise justified.

* * *

(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:

* * *

(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 . . . ;

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

* * *

(d) *Application Procedures for U nonimmigrants.* Each U nonimmigrant who is requesting adjustment of status must submit:

* * *

(5) A photocopy of all pages of all of the applicant's passports valid during the required period . . . and documentation showing the following:

(i) The date of any departure from the United States during the period that the applicant was in U nonimmigrant status;

(ii) The date, manner, and place of each return to the United States during the period that the applicant was in U nonimmigrant status; and

(iii) If the applicant has been absent from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days or more, a certification from the investigating or prosecuting agency that the absences were necessary to assist in the investigation or prosecution of the criminal activity or were otherwise justified[.]

* * *

(7) Evidence that the applicant was lawfully admitted in U nonimmigrant status and continues to hold such status at the time of application;

* * *

(9) Evidence, including an affidavit from the applicant, that he or she has continuous physical presence for at least 3 years as defined in paragraph (a)(1) of this section. Applicants should submit evidence described in 8 CFR 245.22. A signed statement from the applicant attesting to continuous physical presence alone will not be sufficient to establish this eligibility requirement[.]

* * *

Facts and Procedural History

The applicant originally entered the United States in L-2 nonimmigrant status in April 2007 and was initially granted interim relief on November 26, 2007 as a derivative of her spouse's request for U nonimmigrant status that was filed pending publication of the U nonimmigrant visa interim rule. On January 15, 2008, the applicant's spouse filed a Form I-918 Supplement A, Petition for Qualifying Family Member of U-1 Recipient (Form I-918 Supplement A) that the director approved, granting U-2 nonimmigrant status to the applicant from November 26, 2007 until November 26, 2011.

The applicant never obtained her U-2 visa from a U.S. consulate overseas. She instead renewed her L-2 visa at the U.S. Embassy in London in 2008 and 2010 and used this L-2 visa for her admissions to the United States when returning from foreign travel.

The applicant filed the instant Form I-485 on October 17, 2011. The director issued one Notice of Intent to Deny (NOID) and two Requests for Evidence (RFE) concerning, in pertinent part, the applicant's continuous physical presence in the United States. The applicant responded to both RFEs with additional evidence, which the director determined failed to establish the applicant's eligibility to adjust her status. According to the director, because the applicant's last entry into the United States was in L-2 status and she never obtained her U-2 visa, the applicant did not hold U-2 status at the time she filed her Form I-485. The director additionally found that the applicant's list of her overseas trips demonstrated that she had been outside of the United States for more than 180 days and she had not submitted a certification from the certifying official that her absences from the United States were necessary to assist in the investigation or prosecution of the certified criminal activity or were otherwise justified.

The applicant has timely appealed the director's decision and submits a joint brief with her spouse and son, as well as letters from friends and business associates attesting to her and her spouse's standing within the community. The applicant states that she "was never informed of what the requirements or restrictions were" regarding her U nonimmigrant status and that it was an innocent mistake on her part to have never applied for a U-2 visa while at the U.S. Embassy in London.¹ Regarding her continuous physical presence, the applicant states that she was only out of the United States for 130 days because the dates of her exits from and reentries into the United States should be counted as being physically present in the United States.

Analysis

We conduct 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 withdraw the director's determination that the applicant did not hold U nonimmigrant status when she filed her Form I-485, but affirm the director's finding that the applicant does not have the required physical presence in the United States to adjust status. Additionally,

¹ The Notice of Action (Form I-797) issued to the applicant as evidence of her U nonimmigrant status contained a section called "Departing from the United States," which notified her to obtain her U visa prior to returning from foreign travel.

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beyond the director's decision, we note for the record a factor relating to the exercise of discretion in this case.

The Applicant's Entry into the United States as an L-2 Nonimmigrant is Not Disqualifying

Section 245(m) of the Act provides for the adjustment the status "of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 101(a)(15)(U)" While the applicant used her L-2 visa to gain admission to the United States upon completion her foreign travel, she was "otherwise provided [U] nonimmigrant status" through the approval of the Form I-918 U petition and issuance of a Notice of Action (Form I-797) to evidence the validity period of her U-2 status.

An applicant is eligible to adjust status under section 245(m) 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). A ground of ineligibility to adjustment is the revocation of U status; however, U.S. Citizenship and Immigration Services (USCIS) has not revoked the applicant's U-2 status under the procedures specified at 8 C.F.R. 214.14(h). See 8 C.F.R. § 245.45(c)(an individual is ineligible for adjustment of status if U status has been revoked). Although the Form I-797 notified the applicant that she must obtain a U nonimmigrant visa for re-entry to the United States unless she is visa exempt or obtains a waiver, her repeated entries into the United States in L status does not render her ineligible to adjust status, as her U status has not been revoked. Consequently, this portion of the director's decision is withdrawn.

The Applicant Has Not Established Her Continuous Physical Presence in the United States

An applicant for adjustment of status must demonstrate three years of continuous physical presence "since the date of admission as a U nonimmigrant continuing through the date of the conclusion of adjudication of the application for adjustment of status." See 8 C.F.R. § 245.24(a)(1)(defining *continuous physical presence*).

The record demonstrates and the applicant admits to having taken numerous trips outside of the United States (primarily to the United Kingdom). In response to the NOID and the two RFEs, the applicant listed her periods of travel outside of the United States since she was granted U-2 status in November 2007, the dates of which ranged from March 2008 until February 2013.²

In calculating the applicant's continuous physical presence, we did not count as absences from the United States the day that the applicant left from and returned to the United States for each listed trip. The calculation amounts to 211 days of absence from the United States from date the applicant was admitted

² The applicant's list of absences from the United States is generally consistent with government databases. The applicant's list of absences, however, does not include those absences that occurred after the applicant responded to the RFE in February 2013 but prior to the director's adjudication of the Form I-485 in September 2013. According to government databases, the applicant also traveled outside of the United States from April 8, 2013 until April 18, 2013; June 22, 2013 until July 2, 2013; and from July 22, 2013 until August 11, 2013.

as a U-2 nonimmigrant continuing through August 2013. Although the applicant states on appeal that he was absent only 130 days, she has not explained how she made her calculations.

An applicant's absences of at least 180 days in the aggregate are not disqualifying if the applicant submits a certification from the certifying official that such absences were necessary to assist in the criminal investigation or prosecution or were otherwise justified. See Section 245(m)(2) of the Act. The applicant fails to submit such certification here. Consequently, the applicant does not satisfy section 245(m)(1)(A) of the Act, which requires a three-year period of continuous physical presence in the United States while in U nonimmigrant status, and she is ineligible to adjust status on this basis alone.

Evidence in the Record Relating to Discretion

Under section 245(m)(1)(B) of the Act, adjustment of status is a discretionary determination, and an applicant has the burden of showing that discretion should be exercised in her favor. 8 C.F.R. § 245.24(d)(11).

On appeal, the applicant submits numerous letters from business associates in support of her, her spouse and her son's adjustment applications. These individuals describe the applicant and her spouse's business operations in the United States, and speak to their property ownership, employment of local residents and their general value to the local business community. The applicant also asserts for the record, in a joint statement with her spouse and son, that they have contributed to the U.S. economy by investing "a considerable sum of money in a business as well as purchasing a house," generating revenue from their business and paying taxes. The record further demonstrates that the applicant and her spouse own a business in the United Kingdom (U.K.).

When she submitted her Form I-485 in 2011, the applicant also submitted a Request for Fee Waiver (Form I-912). On this fee waiver, the applicant was listed as a dependent of her son and under the Financial Hardship section, her son wrote: "I live with my parents and they are self-employed[;] our income is below the poverty guide line." As required, the applicant signed the Form I-912, certifying that the information contained therein was accurate.

In October 2013, the applicant filed a second Form I-912 in conjunction with an application for an advance parole document (Form I-131). On this second Form I-912, the applicant again claimed to live below the Federal Poverty Guidelines (FPG). She claimed only one asset, a 2000 Chevy worth \$3,000. She also stated that her monthly income was \$3,882 but that her monthly expenses amounted to \$7,680, with \$5,000 of that monthly expense going towards her mortgage. Again, the applicant signed the Form I-912, verifying the accuracy of her statements.

As provided for in the Form I-912 *Instructions*, USCIS created the fee waiver request for those individuals *unable* to pay the fees related to their benefit requests due to financial hardship or because they actually live below the FPG. While the applicant and her spouse's tax returns from 2010 show wages, salaries and tips of \$8,176, a close review of the return demonstrates that the applicant claimed approximately \$175,000 in net sales for her and her spouse's U.S. business and well as other income.

Thus, the applicant did not actually live below the FPG or have a financial hardship that made her unable to pay the Form I-485 filing fees in 2011. The applicant's claim to living below the FPG when submitting the Form I-912 along with the Form I-131 in 2013 was also an apparent misrepresentation, as she failed to disclose as assets her U.S. and U.K. businesses and her home.

USCIS created the fee waiver process to recognize that some individuals are unable to pay the fees associated with their benefit requests due to their poor economic status. The fee waiver process was not intended to waive fees for individuals who may be able to show a limited personal income on their tax returns resulting from the number and amount of deductions and business-related losses they are able to claim but are otherwise financially able to pay the costs associated with processing their immigration benefit request(s). The applicant's international travel history as well as her own statements and the statements from associates regarding her status as a local and international business owner and contributor to the U.S. economy are belied by her claims of living below the FPG and, therefore, entitling her to a waiver of the fees to process her adjustment of status application.³ While the applicant is otherwise ineligible for adjustment of status based upon her failure to establish continuous physical presence in the United States, her misrepresentation of her ability to pay the fees associated with her adjustment application would be a negative factor in the exercise of discretion were she able to demonstrate her eligibility to adjust. As noted on the *Instructions* to the Form I-912, an individual's knowing and willful falsification or concealment of a material fact may result in the denial of an immigration benefit.

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). The applicant has established that she held U status at the time she filed her Form I-485, but has failed to demonstrate her continuous physical presence in the United States while in U status. Accordingly, the applicant has not met her burden as to her eligibility to adjust status under section 245(m) of the Act and the appeal shall be dismissed.

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

³ In a letter that the applicant's spouse submitted on behalf of his family's adjustment applications, he claims to have spent "\$100,000 in immigration costs" over the years, further demonstrating the applicant's ability to pay the \$1,070 fee associated with her Form I-485.