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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: **APR 13 2015** Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

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:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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-3 nonimmigrant status, seeks to adjust his 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

On January 21, 2010, the director granted U-3 nonimmigrant status to the applicant based upon an approved Petition for Qualifying Family Member of a U-1 Recipient (Form I-918 Supplement A) that his mother filed on his behalf. The applicant's U-3 status was valid from January 21, 2010, until January 20, 2014. The applicant filed the instant Form I-485 on January 27, 2014, after the expiration of his U-3 nonimmigrant status. The director denied the application on July 30, 2014, because the applicant no longer held U-3 nonimmigrant status at the time he filed his Form I-485. The applicant timely appealed the denial of his Form I-485.

On appeal, the applicant explains that he initially filed his Form I-485 with the filing fee in October 2013, but it was returned by U.S. Citizenship and Immigration Services (USCIS) in November 2013.¹ He admits that his Form I-485 was untimely filed but claims that his U nonimmigrant status expired while he was waiting for a response from USCIS on how to resubmit his application.

Analysis

The AAO conducts appellate review on a *de novo* basis. 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, and the applicant concedes, that the Form I-485 was filed after his U-3 nonimmigrant status had expired on January 20, 2014; however, the applicant claims that he was waiting on a response from USCIS when his status expired. In addition, the applicant claims that his Form I-485 should be granted

¹ In his appeal letter, the applicant wrote November 2014, but this appears to be a misprint as the fee was returned in 2013, not 2014.

as a matter of discretion because a denial would cause hardship to him and his family. Although the applicant was waiting for a response from USCIS to his inquiry prior to filing his application, and 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 his 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 he filed his Form I-485 on January 27, 2014, the regulation at 8 C.F.R. § 245.24(b)(2)(ii) bars the approval of his Form I-485, and we lack the authority to waive the requirements of the statute, as implemented by the regulations. See *United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (as long as regulations remain in force, they are binding on government officials). Consequently, as the applicant failed to meet the required regulatory criteria, 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, 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)(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 his U-3 nonimmigrant status upon the proper filing of a Form I-539, Application to Extend Nonimmigrant Status.²

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

² *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.*