



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF J-E-D-L-P-T

DATE: NOV. 5, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

APPLICATION: FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE  
OR ADJUST STATUS

The Applicant seeks to become a lawful permanent resident based upon his classification as a U-3 nonimmigrant. *See* Immigration and Nationality Act (the Act) § 245(m)(1); 8 U.S.C. § 1255(m)(1). The Director, Vermont Service Center, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

**I. 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

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(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 [Secretary], 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.

\* \* \*

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

\* \* \*

(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[.]

## II. FACTS AND PROCEDURAL HISTORY

The Applicant was initially granted U-3 nonimmigrant status on March 25, 2011, based upon an approved Form I-918 Supplement A, Petition for Qualifying Family Member of U-1 Recipient. The Applicant's U-3 status was valid from March 25, 2011, through August 2, 2014. The Applicant initially attempted to submit his Form I-485, Application to Register Permanent Residence or Adjust Status, on or about July 8, 2014; however, it was rejected because the application did not include the correct fee. *See* 8 C.F.R. § 103.2(a)(7)(i);(iii) (benefit requests that are not submitted with the correct fee will be rejected and rejected benefit requests do not retain a filing date). The Applicant's

Form I-485 was considered properly filed on September 26, 2014, after the expiration of his U-3 nonimmigrant status. The Director denied the application on May 26, 2015, because the Applicant no longer held U-3 nonimmigrant status at the time he filed his Form I-485.

On appeal, the Applicant submits a brief and additional evidence.

### III. ANALYSIS

We conduct appellate review on a *de novo* basis. Based on the evidence in the record, including the Applicant's appellate submission, the Applicant has not overcome the Director's decision to deny his Form I-485.

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 not properly filed until September 26, 2014, after his U-3 nonimmigrant status had expired on August 2, 2014.

On appeal, the Applicant contends that the denial of the application is an abuse of discretion because U.S. Citizenship and Immigration Services (USCIS) reached a conclusion without issuing a request for evidence (RFE) or a notice of intent to deny (NOID), or by conducting an interview, and because the Applicant believed he was in status and did not need to file an extension. However, neither the statute nor the regulations compel USCIS to issue an RFE or NOID if evidence is insufficient, as whether to request evidence remains wholly within the Director's discretion. *See* 8 C.F.R. 103.2(b)(8)(ii). Moreover, as the Applicant is precluded by regulation from adjustment because he was not in U-3 status at the time of filing, no additional evidence could have cured his ineligibility. The Applicant must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1), (12). A visa petition may not be approved at a future date after the Applicant becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

Alternately, the Applicant asks us to grant his Form I-485 because he believed he did not have to file an extension of status since he received a Form I-797C, Notice of Action, that he read as saying his U visa status was extended. The Form I-797C, however, specifically informed him that if his status had expired, he needed to file an Application to Extend/Change Nonimmigrant Status.<sup>1</sup>

Regardless of the Applicant's mistaken belief about the filing of an extension, as a benefit request that is rejected will not retain a filing date, the Applicant's Form I-485 cannot be considered filed until September 26, 2014. *See* 8 C.F.R. § 103.2(a)(7)(iii). Although the regulation at 8 C.F.R. § 245.24(f) provides USCIS with discretionary authority to approve or deny a Form I-485, an

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<sup>1</sup> The Form I-797C reads as follows: "If you were still in U . . . status on the date your . . . [Form I-485] was received, that status is extended until a decision is reached on your Form I-485. If your status was no longer valid by the date your Form I-485 was received, you will need to file the Application to Extend/Change Status (Form I-539) with this office to request an extension of your nonimmigrant status."

applicant must first demonstrate eligibility under the applicable statutory and regulatory criteria before USCIS will exercise its discretionary authority. The record shows that the Applicant was not in U nonimmigrant status when he filed his Form I-485, and the regulation at 8 C.F.R. § 245.24(b)(2)(ii) bars the approval of his Form I-485. For adjustment under section 245(m)(1) of the Act, the applicant must continue to hold U status at the time of the application. 8 C.F.R. § 245.24(b)(2)(ii). Consequently, USCIS does not reach the issue of whether the Applicant's Form I-485 should be granted as a matter of discretion or whether his failure to maintain status was in error, as he has not met the regulatory requirements for adjustment of status under section 245(m)(1) of the Act.

#### IV. 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 after the approval of an extension should the Applicant file a Form I-539.<sup>2</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of J-E-D-L-P-T-*, ID# 15414 (AAO Nov. 5, 2015)

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<sup>2</sup> 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.