U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-H-V-

DATE: OCT. 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 her 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 --
>
> > (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 February 9, 2010, 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 February 9, 2010, through February 8, 2014. The Applicant initially attempted to submit her Form I-485, Application to Register Permanent Residence or Adjust Status, on or about February 7, 2014; however, it was rejected because the application was not properly executed. *See* 8 C.F.R. § 103.2(a)(7)(i);(iii) (benefit requests that are not properly executed

may be rejected and rejected benefit requests do not retain a filing date). The Applicant's Form I-485 was considered properly filed on June 10, 2014, after the expiration of her U-3 nonimmigrant status. The Director denied the application on December 17, 2014, because the Applicant no longer held U-3 nonimmigrant status at the time she filed her 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 her 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 not properly filed until June 10, 2014, after her U-3 nonimmigrant status had expired on February 8, 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) rejected the Applicant's Form I-485 rather than sending her a request for evidence (RFE) for the missing information and that USCIS should have exercised discretion to grant the late filed application since the initial, rejected filing was timely. However, neither the statute nor the regulations compel USCIS to issue an RFE if evidence is insufficient, as whether to request evidence remains wholly within the Director's discretion. USCIS has discretion under the regulation at 8 C.F.R. 103.2(b)(8)(ii) to issue a RFE when evidence is insufficient to show eligibility. Moreover, the Applicant's initial application was not rejected because further evidence was required to establish eligibility. Rather, it was rejected because the application itself was not properly executed. Specifically, the Form I-797, Notice of Action, indicated that the application was "incomplete and/or there appear[ed] to be missing pages."

Alternately, the Applicant asks us to exercise discretion in order to grant her Form I-485 because the Form I-485 was originally filed prior to the expiration of the Applicant's U-3 nonimmigrant status, the rest of her family has successfully adjusted status, and she would experience hardship if her application remains denied. The Applicant additionally asserts that the instructions for the Form I-485 indicate that a person may file for adjustment of status even if they failed to maintain their nonimmigrant status as long as the failure to maintain status was for "technical reasons."

Per the regulations, as a benefit request that is rejected will not retain a filing date, the Applicant's Form I-485 cannot be considered filed until June 10, 2014. 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 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 record shows that 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. Similarly,

although an applicant who has failed to maintain nonimmigrant status for technical reasons may apply for adjustment of status in some cases under section 245(a) of the Act, the applicant must still meet the applicable statutory and regulatory requirements before they will be granted adjustment of status. Moreover, 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 her failure to maintain status was for technical reasons, as she 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, Application to Extend Nonimmigrant Status.[1]

ORDER: The appeal is dismissed.

Cite as *Matter of C-H-V-*, ID# 13098 (AAO Oct. 5, 2015)

[1] *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.