



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

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

MATTER OF A-D-A-L-

DATE: SEPT. 30, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Applicant, a U-3 nonimmigrant, seeks to adjust her status. *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 [Secretary] 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 April 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 April 9, 2010, through April 8, 2014. The Applicant initially submitted her Form I-485, Application to Register Permanent Residence or Adjust Status, on April 1, 2014; however, it was rejected because she submitted an incorrect filing fee. *See* 8 C.F.R. § 103.2(a)(7)(i) and (iii) (benefit requests submitted with incorrect fees are rejected and do not retain a filing date). The Applicant properly filed the instant Form I-485 on April 15, 2014, after the

(b)(6)

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expiration of her U-3 nonimmigrant status. The Director denied the application on November 7, 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 including a copy of her Form I-797C, Notice of Action, as evidence that she was granted an extension of her U visa.

III. ANALYSIS

We conduct appellate review on a *de novo* basis. Based on the evidence in the record, the Applicant has not overcome 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-3 nonimmigrant status had expired on April 8, 2014.

On appeal, the Applicant contends that the denial of the application violates the Applicant's constitutional rights of due process, equal protection, and fairness because the Applicant never received a request for evidence (RFE) of her physical presence and because U.S. Citizenship and Immigration Services (USCIS) "misled" the Applicant by granting her extension of status and processing the form fees. However, the fees for forms are processed regardless of whether an application or petition is granted, and the approval of an extension of status is not dependent on or related to whether a separate application or petition is granted. In addition, USCIS *has discretion* under the regulation at 8 C.F.R. 103.2(b)(8)(ii) to issue an RFE when evidence is insufficient to show eligibility. 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. Furthermore, the Applicant was already on notice that evidence of continuous physical presence was required, and what type of evidence was required, through the statute and regulations. *See* the Act § 245(m)(1); 8 C.F.R. § 245.24(b) and (d). Finally, the Applicant's constitutional arguments are not appropriately before us, as like the Board of Immigration Appeals, this office lacks jurisdiction to rule on the constitutionality of the Act and the regulations we administer. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992).

The Applicant also asks us to exercise discretion in order to grant her Form I-485 because she is only [redacted] years old and her mother's application was granted. She notes that she originally attempted to file the Form I-485 prior to the expiration of her U-3 nonimmigrant status. 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 Form I-797C submitted on appeal confirms that the Applicant's U nonimmigrant status was extended from April 24, 2014, until a decision was made on her Form I-485. However, the record shows that the Applicant filed her Form I-485 on April 15, 2014, 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.

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 another Form I-539, Application to Extend Nonimmigrant Status.¹

ORDER: The appeal is dismissed.

Cite as *Matter of A-D-A-L-*, ID#14182 (AAO Sept. 30, 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.