



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

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

MATTER OF E-L-G-

DATE: FEB. 9, 2016

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 on his U-3 nonimmigrant status. *See* Immigration and Nationality Act (the Act) § 245(m), 8 U.S.C. § 1255(m). 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) of the Act allows U.S. Citizenship and Immigration Services (USCIS) to adjust the status of a U nonimmigrant to that of a lawful permanent resident as a matter of discretion, provided, in part, the U nonimmigrant “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 . . . section 101(a)(15)(U) [of the Act].” Section 245(m)(1)(A) of the Act. The term “continuous physical presence” is defined at 8 C.F.R. § 245.24(a)(1) as:

[T]he 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.

II. PERTINENT FACTS AND PROCEDURAL HISTORY

The Applicant is a citizen of Mexico who claims to have entered the United States in December 2006 without being inspected, admitted or paroled by an immigration officer. The Applicant was granted derivative U-3 nonimmigrant status from October 31, 2011 through March 3, 2015, and filed a Form I-485, Application to Adjust Status or Register Permanent Residence, with USCIS on October 27, 2014, seeking to become a lawful permanent resident on the basis of his U nonimmigrant status. The Director denied the Form I-485 because the Applicant held U

nonimmigrant status for less than three years as of the filing date of the Form I-485. Specifically, the Director noted that an eligibility criterion for lawful permanent residency under section 245(m) of the Act is three years of continuous physical presence in the United States. The Director concluded that when read together, the regulations at 8 C.F.R. §§ 103.2(b)(1)(requiring an applicant to establish eligibility at the time of filing a benefit request) and 245.24(d)(9)(requiring the submission of an affidavit and other evidence of continuous physical presence in the United States for three years in support of the Form I-485), do not allow for the filing of a Form I-485 under section 245(m) of the Act before the three-year anniversary date of an applicant's admission as a U nonimmigrant. The Applicant has appealed the denial of his Form I-485.

III. ANALYSIS

On appeal, the Applicant states that he has been continuously physically present in the United States since his entry in 2006, having never left the United States since that time. He also submits evidence in the form of school records to demonstrate his physical presence in the United States.

We acknowledge the Applicant's statement that he has never left the United States since entering in 2006; however, the required three years of continuous physical presence is measured "since the date of admission as a nonimmigrant under . . . section 101(a)(15)(U) [of the Act]. Section 245(m)(1)(A) of the Act. The period of time from December 2006 until October 30, 2011(the day before the Applicant's admission as a U nonimmigrant) does not count towards fulfilling the physical presence requirement described at section 245(m)(1)(A) of the Act.

The three-year period of continuous physical presence must have accrued as of the filing date of the Form I-485 to comport with long-standing USCIS and legacy Immigration and Naturalization Service (INS) regulations, providing that eligibility for an immigration benefit must be established as of the filing date of a benefit request. 8 C.F.R. §§ 103.2(b)(1),(12). Caselaw provides further support for this long-standing regulatory requirement. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008) (to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed); and *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971)(immigrant must meet eligibility requirements at the time of filing).

Furthermore, the regulation at 8 C.F.R. § 245.24(d)(9) states that a U adjustment applicant must submit in support of a Form I-485 "evidence, including an affidavit from the applicant, that he or she has continuous physical presence for at least 3 years" An individual who has not held U nonimmigrant status for three years as of the filing date of the Form I-485 would be unable to submit this required piece of evidence at the time of filing.

When USCIS received the Applicant's Form I-485 on October 27, 2014, he had not held U nonimmigrant status for three years, having been accorded such status from October 31, 2011 through March 3, 2015. The Applicant, therefore, could not have demonstrated the three years of continuous physical presence in the United States required by section 245(m) of the Act as of the filing date of the Form I-485, and it consequently must remain denied.

IV. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of E-L-G-*, ID# 15555 (AAO Feb. 9, 2016)