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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-S-M-

DATE: FEB. 23, 2016

CERTIFICATION 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 her U-1 nonimmigrant status. *See* Immigration and Nationality Act (the Act) § 245(m), 8 U.S.C. § 1255(m). The Director, Vermont Service Center, initially denied the application. The matter is now before us on certification. Upon *de novo* review, we will withdraw the initial decision and remand the matter to the Director for further proceedings consistent with this decision and for the entry of a new decision.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The Applicant is a native and citizen of Mexico who was placed into removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, for having entered the Unites States without inspection. At the conclusion of those proceedings, the immigration judge granted her the privilege of voluntary departure until [redacted] 2007, as authorized under section 240B of the Act, 8 U.S.C. § 1229c, with an alternate order of removal to Mexico should she fail to depart as required. The Applicant reserved her right to appeal and her attorney indicated that she would advise the Applicant of the consequences of failing to voluntarily depart the United States as required, including the penalties described at section 240B(d)(1) of the Act, which include a 10-year bar from eligibility for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255.

The Applicant properly filed an appeal with the Board of Immigration Appeals (the Board), which the Board dismissed. In its decision, the Board extended the Applicant's voluntary departure period until [redacted] 2008 and also included written notice of the penalties for failure to depart under 240B(d)(1) of the Act.

The Applicant, however, did not depart the United States as required in the time specified, and has remained in the United States without interruption. The Applicant subsequently filed a Form I-918, Petition for U Nonimmigrant Status, in February 2009, seeking U-1 nonimmigrant status as a victim of qualifying criminal activity.[1] The Applicant's request was granted and, in April 2013, she applied

[1] "U-1" classification affords nonimmigrant status to victims of certain crimes who assist authorities investigating or prosecuting the criminal activity. Section 101(a)(15)(U) of the Act, 8 U.S.C. § 1101(a)(15)(U).

for adjustment of status by filing a Form I-485, Application to Register Permanent Residence or Adjust Status, based on her U-1 nonimmigrant status.

The Director denied the Applicant's Form I-485, determining that, pursuant to section 240B(d)(1) of the Act, the Applicant is ineligible for lawful permanent residency until [redacted] 2018 (ten years from the final date of her voluntary departure) because she failed to timely depart the United States as required.

The Director has certified the matter to us as a novel legal issue because the civil penalties at section 240B(d)(1) of the Act pre-date the codification of the adjustment of status provisions for U nonimmigrants found at subsection 245(m) of the Act, raising the question of whether they should apply in light of the later provisions. The Director notified the Applicant of the certification and provided thirty days to submit a written brief or other written statement, but we received no brief or further evidence from the Applicant. 8 C.F.R. § 103.4(a)(2).

II. APPLICABLE LAW

A. Statute

1. Adjustment of Status for U Nonimmigrants

Section 245 of the Act provides generally for the adjustment of status of nonimmigrants to lawful permanent residents. The requirements for U nonimmigrants are included specifically at subsection 245(m). U.S. Citizenship and Immigration Services (USCIS) has exclusive jurisdiction over a Form I-485 filed pursuant to this subsection. 8 C.F.R. § 245.24(k).

2. Civil Penalties for Failure to Voluntary Depart

Individuals in removal proceedings who are granted voluntary departure in lieu of an order of removal are subject to certain penalties if they fail to timely depart the United States. These penalties, which include a 10-year period of ineligibility for relief under section 245 of the Act, are outlined at section 240B of the Act, which states, in pertinent part, as follows:

> (d) Civil Penalty for Failure To Depart
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> (1) IN GENERAL- Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien--
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> (A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and
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> (B) shall be ineligible, for a period of 10 years, to receive any further

> relief under this section and sections 240A, 245, 248, and 249.
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> (2) APPLICATION OF VAWA PROTECTIONS[2] - The restrictions on relief under paragraph (1) shall not apply to relief under section 240A or 245 on the basis of a petition filed by a *VAWA self-petitioner*,[3] or a petition filed under section 240A(b)(2), or under section 244(a)(3) (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.
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> (3) NOTICE OF PENALTIES- The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

(Emphasis added). The civil penalties under section 240B(d) of the Act were initially created in the Immigration and Nationality Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 104 Stat. 4978 (1990) and contained an exception for "exceptional circumstances" for the alien's failure to timely depart voluntarily.[4] These civil penalties were substantially modified through passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C of Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009 (1996), which eliminated the earlier "exceptional circumstances" exception.

In 2005, nine years after the IIRIRA amendments, Congress revisited the voluntary departure statute by enacting a new exception to the civil penalties under section 240B(d) for certain victims of domestic violence or related abuse. Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, §§ 811-812, 119 Stat. 2960, 3057 (2006). These provisions are currently found in subsection (2) of section 240B(d) as set forth above.

B. Caselaw

In *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007), the Board contrasted the term "exceptional circumstances" used in IMMACT 90 with the phrase "voluntarily fails to depart" that first appeared through the passage of IIRIRA. The Board's discussion of the differences between these two concepts provides a framework for determining whether an individual's failure to depart the United States was voluntary:

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[2] The acronym "VAWA" means "The Violence Against Women Act," which allows an abused spouse, child or parent of a U.S. citizen, or an abused spouse or child of a lawful permanent resident, to self-petition for immigrant classification rather than remain with or rely upon the abuser to secure that benefit. *See* sections 204(a)(1)(A),(B) of the Act, 8 U.S.C. §§ 1154(a)(1)(A), (B).

[3] The term "VAWA self-petitioner" has a specific meaning when used throughout the Act, and is not limited to only persons seeking immigrant classification as abused spouses, children or parents under section 204 of the Act. *See* section 101(a)(51) of the Act, 8 U.S.C. § 1101(a)(51).

[4] Under IMMACT 90, the term "exceptional circumstances" was defined as "the serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances that were beyond the control of the alien." Former section 242B(f)(2)of the Act, 8 U.S.C. § 1252b(f)(2) (1996).

> [T]he term "voluntarily" ordinarily refers to conduct that is "brought about of one's own accord or by free choice. . . ." Congress has used the phrase "voluntarily fails" in a number of provisions. . . . In each instance, the phrase "voluntarily fails" refers to a failure to complete an act or requirement within the actor's control. . . . Under the terms of section 240B(d) of the Act, a respondent who, through no fault of her own, remains unaware of the grant of voluntary departure until after the period for voluntary departure has expired cannot be said to have "voluntarily" failed to depart within the period of voluntary departure.
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> We emphasize that the "voluntariness" exception is not a substitute for the repealed "exceptional circumstances" exception. It is a much narrower exception limited to situations in which an alien, through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart. It would not include situations in which departure within the period granted would involve exceptional hardships to the alien or close family members. Nor would lack of funds for departure be considered an involuntary failure to depart. . . .

24 I&N Dec. at 93.

III. ANALYSIS

The issues we must resolve are whether U nonimmigrants are also included under the VAWA exception at section 240B(d)(2) of the Act and, if not, whether the Applicant has demonstrated that she "voluntarily failed to depart" the United States by [redacted] 2008.

The Director correctly notes that the civil penalties for not complying with the terms of a voluntary departure order that first appeared in IMMACT 90 pre-date the creation of the U crime victim adjustment provisions at subsection 245(m) of the Act. Congress created these provisions a decade later in the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, 114 Stat. 1464 (2000).[5] In addition, the purpose of the U and VAWA provisions is similar, in that both offer immigration benefits for the victims of certain crimes and domestic abuse, respectively.

Although the U nonimmigrant classification did not exist in 1990 when the civil penalties were originally enacted, or in 1996 when the penalties were amended, the ability of U nonimmigrants to adjust status under subsection 245(m) of the Act had existed for more than five years by the time Congress passed VAWA 2005. Although Congress created an exception from the civil penalties under section 240B(d)(2) of the Act in this legislation for VAWA self-petitioners, it did not do so for U nonimmigrants. Moreover, Congress similarly did not do so later when it enacted the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. No. 113-4, 127 Stat. 54

[5] The VTVPA included among its many provisions the Violence Against Women Act of 2000 (VAWA 2000) which created the U nonimmigrant visa category and the related adjustment of status provisions within the Battered Immigrant Protection Act (BIWPA). See VAWA 2000, Title V, BIWPA at § 1513.

(2013), the most recent legislation with provisions impacting U nonimmigrants. These facts are significant because "[C]ongress is assumed to act with the knowledge of existing law and interpretations when it passes new legislation." *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 (1982)).

We recognize that a central purpose in creating the U nonimmigrant classification was to protect crime victims in keeping with the humanitarian interests of the United States.[6] In this regard, the U nonimmigrant category does serve a similar purpose to the VAWA provisions. Nevertheless, only three classes of individuals are specified at section 240B(d)(2) of the Act as protected from the civil penalties thereunder: VAWA self-petitioners; individuals who file petitions for special rule cancellation as battered spouses or children under section 240A(b)(2) of the Act, 8 U.S.C. § 1229b(b)(2); and individuals who filed for suspension of deportation as battered spouses under former section 244(a)(3) of the Act (pre-IIRIRA). Persons in valid U status are not enumerated under section 240B(d)(2). In addition, the statutory authorities relating to U nonimmigrants at sections 101(a)(15)(U) and 214(p) of the Act are not included in the definition of "VAWA self-petitioner" at section 101(a)(51) of the Act. When Congress includes language in one part of a statute, but omits in others, it is presumed to do so purposefully. *Russello v. United States*, 464 U.S. 16, 23 (1983) (citing *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972)). The plain language of the statute excludes U nonimmigrants from the exception to the penalties listed at section 240B(d)(1) of the Act, and so we conclude that the Applicant cannot avail herself of its protections.[7]

Although the Applicant does not fall within the VAWA protections at section 240B(d)(2) of the Act, the civil penalties under that provision would not apply to her if she can demonstrate that she did not "voluntarily fail to depart" the United States prior to the final 2008 deadline that the Board imposed. *Matter of Zmijewska, supra.*

The record does not reflect that the Applicant has had an opportunity to demonstrate whether or not her failure to depart was voluntary under the framework discussed in *Zmijewska*. Accordingly, we will remand the matter to the Director to develop the record on this issue, such as through the issuance of a request for evidence (RFE), and thereafter to determine whether she is subject to the civil penalties at section 240B(d)(1) of the Act.

IV. CONCLUSION

The exception for the civil penalties for failure to voluntarily depart the United States in section 240B(d)(2) of the Act is available to certain victims of domestic violence under the Violence Against Women Act, or "VAWA self-petitioners," as that term is defined under section 101(a)(51) of the Act. The exception does not apply to U nonimmigrant victims of specified criminal activity under section

[6] H.R. Rep. No. 106-939, at 72 (2000).

[7] We note that the Applicant also has not sought relief from removal as a battered spouse under section 240A(b)(2) of the Act or former section 244(a)(3) of the Act.

101(a)(15)(U) of the Act. A U nonimmigrant who failed to depart the United States during the period of voluntary departure is barred from adjusting status under section 245 of the Act, 8 U.S.C. § 1255, for a period of 10 years unless he or she can establish that the failure to depart was not voluntary. *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007), followed.

The Applicant bears the burden of establishing her eligibility for lawful permanent residency under subsection 245(m) of the Act. Section 291 of the Act, 8 U.S.C. § 1361. The Director was correct in finding that the Applicant is subject to the civil penalties at 240B(d)(1) of the Act, and therefore is ineligible to adjust her status under section 245(m). We withdraw the Director's decision, however, so that she may provide the Applicant with an opportunity to submit evidence demonstrating the voluntary or involuntary nature of her failure to depart the United States during the prescribed period.

ORDER: The initial decision of the Director, Vermont Service Center is withdrawn. The matter is remanded to the Director, Vermont Service Center for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of L-S-M-*, ID# 14367 (AAO Feb. 23, 2016)