



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 01 2015

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application to Adjust Status for an Alien in T Nonimmigrant Status Pursuant to Section 245(l)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1255(l)(1)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center (the director), denied the Application to Register Permanent Residence or Adjust Status (Form I-485), and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application will remain denied.

The applicant, who was granted T-1 nonimmigrant status, seeks to adjust his status under section 245(l)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(l)(1).

Applicable Law

Section 245(l)(1) of the Act provides that the Secretary of Homeland Security may adjust the status of an alien admitted into the United States as a T-1 nonimmigrant if such alien has been, in pertinent part, physically present in the United States for a continuous period of at least 3 years since the date of admission as a T-1 nonimmigrant.

Under section 245(l)(3) of the Act, a T-1 nonimmigrant “shall be considered to have failed to maintain continuous physical presence in the United States” if the T-1 nonimmigrant has departed from the United States for any single period in excess of 90 days or periods of 180 days in the aggregate, unless such absences were necessary to assist in the investigation or prosecution of the trafficking crime of which the T-1 nonimmigrant was a victim, or the official who was involved in the investigation or prosecution of the trafficking crime certifies that the absence was otherwise justified. The regulation at 8 C.F.R. § 245.23(a)(3) mirrors the statutory provision regarding the requirement of continuous physical presence as an eligibility ground for lawful permanent residency for T-1 nonimmigrants.

Facts and Procedural History

On March 31, 2010, the director approved the applicant’s Application for T Nonimmigrant Status (Form I-914 T). The applicant filed the instant Form I-485 on August 27, 2013. The director denied the application on July 22, 2014 because after being lawfully admitted as a T-1 nonimmigrant, the applicant failed to maintain continuous presence in the United States, having departed and remained outside the United States for a single period in excess of 90 days and an aggregate period exceeding 180 days.

On appeal, the applicant explains that although he remained outside the United States for approximately nine months during a single trip to India, he had to travel due to the sudden and tragic deaths of his wife and children and thought United States Citizenship and Immigration Services (USCIS) would forgive these exigent circumstances.

Analysis

The AAO conducts appellate review on a *de novo* basis. Based on the evidence in the record, we find no error in the director’s decision to deny the applicant’s adjustment of status application.

The applicant concedes that after being accorded T-1 nonimmigrant status on March 31, 2010, he took two trips outside the United States, the first from May 23, 2011 to February 25, 2012 (278 days) and the

second from November 23, 2012 to January 20, 2013 (58 days). The applicant requests that USCIS exercise favorable discretion to adjust his status to that of a lawful permanent resident because his first trip to India was in response to learning that his wife and children were killed in a bus accident, and his second trip to care for his elderly mother who was in poor health. The applicant adds that had it not been for the sudden nature of his family members' deaths, he would have waited to travel until he was approved for advance parole and would have been able to return sooner to the United States.¹

An applicant's single absence in excess of 90 days or absences of at least 180 days in the aggregate are not disqualifying if the applicant submits a certification from the official involved in investigating or prosecuting the trafficking crime that such absences were necessary to assist in the investigation or prosecution of such crime or were otherwise justified. See Section 245(l)(3) of the Act. The applicant fails to submit such certification here. Consequently, the applicant does not satisfy section 245(l)(1) of the Act, which requires a three-year period of continuous physical presence in the United States while in T-1 nonimmigrant status, and he is ineligible to adjust status on this basis alone.

We acknowledge the tragic circumstances under which the applicant traveled to India in May 2011. However, 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 his eligibility under the applicable statutory and regulatory criteria before USCIS will exercise its discretionary authority. Here, because the applicant departed the United States after being accorded lawful T-1 nonimmigrant status and was outside the United States for a single period in excess of 90 days and an aggregate period exceeding 180 days, the regulation at 8 C.F.R. § 245.23(b)(3) bars the approval of his 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.

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; 8 C.F.R. § 245.23(e). Here, that burden has not been met as to the applicant's eligibility to adjust his status under section 245(l)(1) of the Act and the appeal shall be dismissed.

ORDER: The appeal is dismissed. The application remains denied.

¹ The applicant asserts that his "parole application was denied for reasons unknown to counsel while he was in India," which resulted in him "being forced" to stay outside the United States "until his second parole application was approved 5 months later." USCIS administrative records contain no evidence of an earlier parole application. The record shows that the applicant first applied for advance parole on November 17, 2011 (), nearly six months after departing the United States. The application was approved on January 25, 2012 and the applicant remained in India an additional month before returning to the United States on February 25, 2012.