



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

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

MATTER OF S-K-K-

DATE: NOV. 23, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Applicant, formerly a T-1 nonimmigrant, seeks to adjust his status. *See* Immigration and Nationality Act (the Act) § 245(l)(1); 8 U.S.C. § 1255(l)(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(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.

The regulation at 8 C.F.R. § 245.23(a), requires that an applicant establish, among other things, that he or she:

- (2) (i) [w]as lawfully admitted to the United States as a T-1 nonimmigrant . . . ; and
- (ii) [c]ontinues to hold such status at the time of application, or accrued 4 years in T-1 nonimmigrant status and files a complete application before April 13, 2009;

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.

II. FACTS AND PROCEDURAL HISTORY

On February 18, 2009, the Director approved the Applicant's Form I-914, Application for T Nonimmigrant Status, giving him T-1 nonimmigrant status from May 19, 2009, until May 18, 2013. The Applicant filed the instant Form I-485, Application to Register Permanent Residence or Adjust Status, on July 29, 2014. The Director denied the application on March 13, 2015, because the Applicant's T-1 nonimmigrant status expired on May 18, 2013, and he therefore was not a T-1 nonimmigrant at the time he filed the Form I-485. In addition, the Director determined that the Applicant's Form I-485 was unapprovable 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 an aggregate period exceeding 180 days.

On appeal, the Applicant does not dispute the finding that he no longer held T-1 nonimmigrant status at filing. Regarding his continuous presence, the Applicant explains that he took three trips outside the United States due to issues relating to his family in India, and he asked that U.S. Citizenship and Immigration Services (USCIS) forgive these exigent circumstances.

III. ANALYSIS

A. Lack of T Nonimmigrant Status

We conduct appellate review on a *de novo* basis. Based on the evidence in the record, including evidence submitted on appeal, the Applicant has not overcome the Director's determination that the Applicant was not a T nonimmigrant at the time he filed his Form I-485 application. On February 18, 2009, USCIS approved the Applicant's Form I-914 and provided him T-1 nonimmigrant status with a validity period of May 19, 2009, to May 18, 2013. The Applicant filed the Form I-485 on July 29, 2014, after his status expired. At Part 1 of the Form I-485, he indicated that he had a T-1 visa but was "out of status." Because the Applicant was not a T nonimmigrant at the time he filed the instant application, it cannot be approved. 8 C.F.R. § 245.23(a)(2).

B. Failure to Maintain Continuous Presence in the United States.

The Applicant also has not overcome the Director's determination that, as an additional matter, the Applicant departed the United States for an aggregate period of time exceeding 180 days.

The Applicant concedes that after being accorded T-1 nonimmigrant status on May 19, 2009, he took the following three trips outside the United States: September 27, 2010 to December 25, 2010 (89 days); December 13, 2011 to April 21, 2012 (130 days); and March 26, 2013 to April 8, 2013 (13 days), for an aggregate total of 232 days.¹ The Applicant requests that USCIS exercise favorable

¹ There are slight discrepancies between the dates provided by the Applicant in several statements as well as in the dates that appear to be reflected in his passport. For purposes of this decision, we have relied on the dates provided by the Applicant as the discrepancies are nominal and do not affect the outcome because he was outside the United States for an aggregate period exceeding 180 days.

discretion to adjust his status to that of a lawful permanent resident because the time he spent in India involved caring for his ailing mother, wife, and newborn child, as well as legal issues.

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 does not 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 circumstances surrounding the Applicant's travels. However, although the regulation at 8 C.F.R. § 245.23(e)(3) 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, the application is not approvable because the Applicant was not a T-1 nonimmigrant when he filed the application. 8 C.F.R. § 245.23(a)(2). Moreover, because the Applicant was outside the United States for an aggregate period exceeding 180 days, the regulation at 8 C.F.R. § 245.23(a)(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.

IV. CONCLUSION

In these proceedings, the Applicant bears the burden of proving his eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Cite as *Matter of S-K-K-*, ID# 14693 (AAO Nov. 23, 2015)