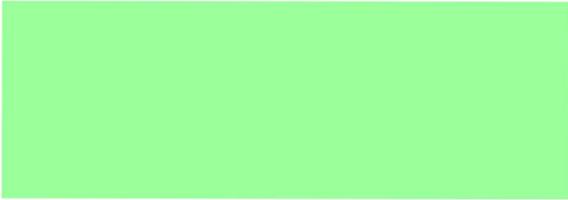




U.S. Citizenship
and Immigration
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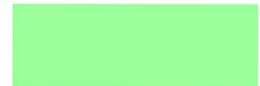
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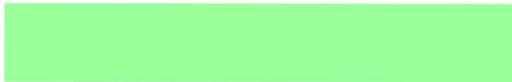
Office: VERMONT SERVICE CENTER

FILE:



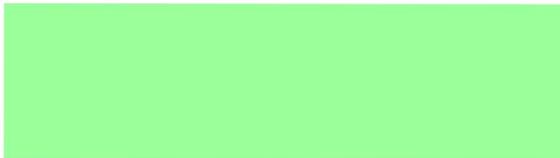
IN RE:

Petitioner:



PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U).

ON BEHALF OF PETITIONER:



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 U nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

The director denied the petition because as a lawful permanent resident of the United States, the petitioner is ineligible for U nonimmigrant status.

Analysis

Section 101(a)(15) of the Act defines the term “immigrant” as “every alien except an alien who is within one of the following classes of nonimmigrant aliens.” Section 101(a)(15)(U) of the Act is one such nonimmigrant classification that is not included in the definition of “immigrant” at section 101(a)(15) of the Act.

The regulation at 8 C.F.R. § 214.14(c)(4) prescribes the evidentiary standards and burden of proof in these proceedings:

The burden shall be on the petitioner to demonstrate eligibility for U-1 nonimmigrant status. The petitioner may submit any credible evidence relating to his or her Form I-918 for consideration by [U.S. Citizenship and Immigration Services (USCIS)]. USCIS shall conduct a de novo review of all evidence submitted in connection with Form I-918 and may investigate any aspect of the petition. Evidence previously submitted for this or other immigration benefit or relief may be used by USCIS in evaluating the eligibility of a petitioner for U-1 nonimmigrant status. However, USCIS will not be bound by its previous factual determinations. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including Form I-918, Supplement B, “U Nonimmigrant Status Certification.”

Facts and Procedural History

The petitioner is a native and citizen of Mexico who adjusted his status to that of a lawful permanent resident on December 1, 1990. On February 7, 2012, a Notice to Appear (NTA) was issued to the petitioner, placing him in removal proceedings. On October 1, 2013, an immigration judge sustained the allegations in the NTA and determined that the petitioner was “without status at this time.”

The petitioner filed the instant Petition for U Nonimmigrant Status (Form I-918 U petition) on November 8, 2013. On April 22, 2014, the director found that although the petitioner established his eligibility for U nonimmigrant status, the petitioner was not admissible as a nonimmigrant while remaining a lawful permanent resident, and denied the Form I-918 U petition accordingly. In her denial decision, the director cited *Matter of A*, 6 I&N Dec. 651 (BIA 1955), and determined that the

petitioner could not be granted U nonimmigrant status because he still held lawful permanent resident status and could not simultaneously be an immigrant and a nonimmigrant. The petitioner timely appealed the denial of the Form I-918 U petition.

Analysis

We conduct *de novo* appellate review. On appeal, the petitioner states that he is no longer a lawful permanent resident of the United States because an immigration judge sustained the petitioner's grounds of removability in the NTA and found that he "is without status at this time." Pursuant to section 214(p)(5) of the Act, an alien seeking U nonimmigrant status may apply for any other immigration benefit or status for which he or she may be eligible. However, USCIS will only grant one immigrant or nonimmigrant status at a time. *See* 72 Fed. Reg. 179, 53014-53042, 53018 (Sept. 17, 2007).

The petitioner has been a lawful permanent resident of the United States since December 1, 1990. On February [REDACTED], an NTA was issued for the petitioner, and he remains in removal proceedings before the Immigration Court in [REDACTED] California. Although the immigration judge found the petitioner was "without status" in October [REDACTED] the record does not contain a final administrative order of removal. Lawful permanent resident status terminates upon entry of a final administrative order of removal, and since the petitioner is still in removal proceedings and an order of removal has not been finalized, he remains an immigrant. 8 C.F.R. § 1.2 (*definition of lawfully admitted for permanent residence*). *See also Etuk v. Slattery*, 936 F.2d 1433, 1447 (2d Cir. 1991) (citing *Matter of Gunaydin*, 18 I&N Dec. 326 (BIA 1982)). In addition, lawful permanent residency may be lost through abandonment, rescission, or relinquishment. *See Matter of Gunaydin*, 18 I&N Dec. at 327. However, none of those circumstances exist in this case.

On appeal, the petitioner claims that, in the alternative, if he is a lawful permanent resident, his lawful permanent resident status is a waivable ground of inadmissibility and the director "should have considered whether to favorably exercise discretion and waive the ground." Section 212(d)(14) of the Act provides USCIS with the authority to waive certain grounds of inadmissibility listed at section 212(a) of the Act as a matter of discretion; however, status as a lawful permanent resident is not a ground of inadmissibility under section 212(a) of the Act and cannot be waived by USCIS.¹ The petitioner also claims that the director erred "in failing to consider the dual intent character of the U-1 category." As noted above, USCIS will only grant one immigrant or nonimmigrant status at a time. The statute and regulations do not permit a lawful permanent resident to adjust status to that of a U nonimmigrant, and we lack authority to waive the requirements of the statute, as implemented by the regulations. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (as long as regulations remain in force, they are binding on government officials). The Act allows an alien to change from one nonimmigrant classification to another and permits lawful permanent residents to adjust to A, E and G nonimmigrant classification, but the Act contains no provision for the adjustment of a lawful

¹ Insofar as the director suggested that lawful permanent resident status is a ground of inadmissibility, that portion of the director's decision is withdrawn.

permanent resident to U nonimmigrant status. *See* sections 247, 248 of the Act, 8 U.S.C. §§ 1257, 1258.

The petitioner also asserts that the “doctrine of *res judicata*” should be applied in this case because the immigration judge already determined that the petitioner “is without status” and the director should not relitigate the petitioner’s current immigration status. The petitioner’s contention that *res judicata* precludes the director from determining the petitioner’s current immigration status is erroneous. It is the petitioner’s burden to establish the statutory requirement in the instant case, and he has not established that his lawful permanent resident status was terminated. The record shows that an immigration judge determined that the petitioner “is without status,” but the immigration judge did not terminate the petitioner’s lawful permanent resident status. *See Matter of Gunaydin, supra*. Therefore, the director is not precluded from determining that the petitioner is still a lawful permanent resident.

Eligibility for a benefit request must be established at the time of petition filing, particularly for individuals seeking U nonimmigrant classification, who are subject to an annual cap on U-1 nonimmigrant status and are placed on a waiting list, by filing date of petition, if they cannot be granted such status due solely to the cap. *See* 8 C.F.R. §§ 103.2(b)(1), 214.14(d); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In addition, section 101(a)(15) of the Act defines the term “immigrant” as “every alien except an alien who is within one of the following classes of nonimmigrant aliens.” Section 101(a)(15)(U) of the Act is one such nonimmigrant classification that is not included in the definition of “immigrant” at section 101(a)(15) of the Act.

Accordingly, the petitioner is ineligible for U nonimmigrant status because he was a lawful permanent resident when he applied for such status in November, [REDACTED]

Conclusion

The petitioner was a lawful permanent resident of the United States at the time he filed his Form I-918 U petition and he is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act. The appeal must be dismissed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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