



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

OCT 06 2014

IN RE: APPLICANT: [REDACTED]

APPLICATION: Application to Adjust Status (Form I-485) for an Alien in U Nonimmigrant Status Pursuant to Section 245(m) of the Immigration and Nationality Act, 8 U.S.C. § 1255(m)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the 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 The director's decision will be withdrawn and the application remanded for entry of a new decision.

The applicant, who was granted U-3 nonimmigrant status, seeks to adjust his status under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The director denied the application because the applicant did not hold U-3 nonimmigrant status at the time of filing the Form I-485.

Applicable Law

Section 245(m) of the Act states, in pertinent part:

(1) The Secretary of Homeland Security may adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 101(a)(15)(U) to that of an alien lawfully admitted for permanent residence if the alien is not described in section 212(a)(3)(E), unless the Secretary determines based on affirmative evidence that the alien unreasonably refused to provide assistance in a criminal investigation or prosecution, if --

(A) the alien 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 clause (i) or (ii) of section 101(a)(15)(U); and

(B) in the opinion of the Secretary of Homeland Security, the alien's continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days unless the absence is in order to assist in the investigation or prosecution or unless an official involved in the investigation or prosecution certifies that the absence was otherwise justified.

* * *

The regulation at 8 C.F.R. § 245.24 provides, in pertinent part:

(a) *Definitions.* As used in this section, the term:

(1) *Continuous Physical Presence* means the 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.

* * *

(b) *Eligibility of U Nonimmigrants.* Except as described in paragraph (c) of this section, an alien may be granted adjustment of status to that of an alien lawfully admitted for permanent residence, provided the alien:

* * *

(2) (i) Was lawfully admitted to the United States as either a U-1, U-2, U-3, U-4 or U-5 nonimmigrant, as defined in 8 CFR § 214.1(a)(2), and

(ii) Continues to hold such status at the time of application . . . [.]

* * *

(d) *Application Procedures for U nonimmigrants.* Each U nonimmigrant who is requesting adjustment of status must submit:

* * *

(5) A photocopy of all pages of all of the applicant's passports valid during the required period . . . and documentation showing the following:

- (i) The date of any departure from the United States during the period that the applicant was in U nonimmigrant status;
- (ii) The date, manner, and place of each return to the United States during the period that the applicant was in U nonimmigrant status; and
- (iii) If the applicant has been absent from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days or more, a certification from the investigating or prosecuting agency that the absences were necessary to assist in the investigation or prosecution of the criminal activity or were otherwise justified[.]

* * *

(7) Evidence that the applicant was lawfully admitted in U nonimmigrant status and continues to hold such status at the time of application;

* * *

(9) Evidence, including an affidavit from the applicant, that he or she has continuous physical presence for at least 3 years as defined in paragraph (a)(1) of this section. Applicants should submit evidence described in 8 CFR 245.22. A signed statement from the applicant attesting to continuous physical presence alone will not be sufficient to establish this eligibility requirement[.]

* * *

Facts and Procedural History

The applicant originally entered the United States in L-2 nonimmigrant status in April 2007 and he was initially granted interim relief on November 26, 2007 as a derivative of his father's request for U nonimmigrant status that was filed pending publication of the U nonimmigrant visa interim rule. On January 15, 2008, the applicant's father filed a Form I-918 Supplement A, Petition for Qualifying Family Member of U-1 Recipient (Form I-918 Supplement A) that the director approved, granting U-3 nonimmigrant status to the applicant from November 26, 2007 until November 26, 2011.

The applicant never obtained his U-3 visa from a U.S. consulate overseas. He instead renewed his L-2 visa at the U.S. Embassy in London in 2008 and used this L-2 visa for his admissions to the United States when returning from foreign travel.

The applicant filed the instant Form I-485 on October 17, 2011. The director issued one Notice of Intent to Deny (NOID) and two Requests for Evidence (RFE) concerning, in pertinent part, the applicant's continuous physical presence in the United States. The applicant responded to both RFEs with additional evidence, which the director determined failed to establish the applicant's eligibility to adjust his status. According to the director, because the applicant's last entry into the United States was in L-2 status and he never obtained his U-3 visa, the applicant did not hold U-3 status at the time he filed his Form I-485.

The applicant has timely appealed the director's decision and submits a joint brief with his parents. The applicant states that he "was never informed of what the requirements or restrictions were" regarding his U nonimmigrant status and that it was an innocent mistake on his part to have never applied for a U-3 visa while at the U.S. Embassy in London.¹

Analysis

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Based on the evidence in the record, we withdraw the director's determination that the applicant did not hold U nonimmigrant status when he filed his Form I-485.

The Applicant's Entry into the United States as an L-2 Nonimmigrant is Not Disqualifying

Section 245(m)(1) of the Act provides for the adjustment the status "of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 101(a)(15)(U)" While the applicant used his L-2 visa to gain admission to the United States upon completion his foreign travel, he was "otherwise provided [U] nonimmigrant status" through the approval of the Form I-918 U petition and issuance of a Notice of Action (Form I-797) to evidence the validity period of his U-3 status.

¹ The Notice of Action (Form I-797) issued to the applicant as evidence of his U nonimmigrant status contained a section called "Departing from the United States," which notified him to obtain his U visa prior to returning from foreign travel.

An applicant is eligible to adjust status under section 245(m) of the Act if he or she, in part, “[c]ontinues to hold such status at the time of application.” 8 C.F.R. § 245.24(b)(2)(ii). A ground of ineligibility to adjustment is the revocation of U status; however, U.S. Citizenship and Immigration Services (USCIS) has not revoked the applicant’s U-3 status under the procedures specified at 8 C.F.R. 214.14(h). *See* 8 C.F.R. § 245.45(c)(an individual is ineligible for adjustment of status if U status has been revoked). Although the Form I-797 notified the applicant that he must obtain a U nonimmigrant visa for re-entry to the United States unless he is visa exempt or obtains a waiver, his repeated entries into the United States in L status does not render him ineligible to adjust status, as his U status has not been revoked. Consequently, we withdraw the director’s decision.

The Applicant Has Not Established His Continuous Physical Presence in the United States

Although we are withdrawing the director’s decision, we cannot conclude, based on the record as currently constructed, that the applicant is eligible to adjust status under section 245(m) of the Act.

An applicant for adjustment of status must demonstrate three years of continuous physical presence “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.” *See* 8 C.F.R. § 245.24(a)(1)(defining *continuous physical presence*).

The record demonstrates that the applicant has taken several trips outside of the United States (primarily to the United Kingdom) since being granted U status. Most importantly, government databases indicate that the applicant departed from the United States in January 2014 and has not made a lawful reentry into the United States. Thus, the applicant has accrued at least 270 days of absences from the United States since being granted U nonimmigrant status. An applicant’s absences of at least 180 days in the aggregate are not disqualifying if the applicant submits a certification from the certifying official that such absences were necessary to assist in the criminal investigation or prosecution or were otherwise justified. *See* Section 245(m)(2) of the Act. The record does not contain such certification.

Accordingly, we are returning the matter to the director for reconsideration of the applicant’s eligibility to adjust status under section 245(m) of the Act, including clarification of whether the applicant meets the continuous physical presence requirement at section 245(m)(1)(A) of the Act, as well as the discretionary determination at section 245(m)(1)(B) of the Act.

Conclusion

In these proceedings, it is the applicant’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 245.24(b), (d); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The director’s decision is withdrawn and the matter remanded for entry of a new decision, which if adverse to the applicant, shall be certified to the AAO for review.