U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 36522028

Date: JAN. 29, 2025

Appeal of Vermont Service Center Decision

Form I-485, Application to Register Permanent Residence or Adjust Status of U Nonimmigrant

The Applicant seeks to become a lawful permanent resident (LPR) under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m), based on her "U-2" nonimmigrant status. The Director of the Vermont Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status of U Nonimmigrant concluding that the record did not establish that she was physically present in the United States for a continuous period of at least three years prior to applying for adjustment of status. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3. On appeal, the Applicant asserts that she is eligible for the benefit sought.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

U.S. Citizenship and Immigration Services (USCIS) may in its discretion adjust the status of an individual admitted into the United States as a U nonimmigrant to that of an LPR, if among other requirements, he or she has been physically present in the United States for a continuous period of at least three years since the date of admission as a U nonimmigrant. Section 245(m)(1) of the Act; 8 C.F.R. § 245.24(b)(3).

Continuous physical presence is defined as the period of time that an applicant 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 [U adjustment] application." 8 C.F.R. § 245.24(a)(1). A U adjustment applicant will be deemed to have not maintained continuous physical presence if he or she has departed the United States for any period in excess of 90 days or for any periods exceeding 180 days in the aggregate. Section 245(m)(2) of the Act; 8 C.F.R. § 245.24(a)(1). Such departures may be excused if the law enforcement agency that supported the applicant's U petition certifies that the applicant's absence was necessary to assist in the criminal investigation or prosecution of the qualifying criminal activity upon which the

U nonimmigrant status was based or unless an official involved in the investigation or prosecution certifies that the absence was otherwise justified. *Id.*

To establish eligibility for U nonimmigrant status, a petitioner must establish that they are admissible to the United States or that any applicable ground of inadmissibility has been waived. 8 C.F.R. § 214.1(a)(3)(i) ("Every nonimmigrant alien who applies for admission to . . . the United States, must establish that . . . she is admissible to the United States, or that any ground of inadmissibility has been waived . . . ."). To meet this burden, a petitioner must file a Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application), in conjunction with the U petition, requesting waiver of any grounds of inadmissibility. 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv). The waiver application must be accompanied by a "statement signed by [the Petitioner] under penalty of perjury that specifies the applicable ground of inadmissibility, the factual basis for [the] inadmissibility, and [the Petitioner's] reasons for claiming that [she] should be granted advance permission to enter the United States." Form I-192, Instructions for Application for Advance Permission to Enter as a Nonimmigrant (Apr. 2013 ed.), at 4; *see also* 8 C.F.R. §§ 103.2(a)(1) ("Every form, benefit request, or document must be submitted . . . and executed in accordance with the form instructions . . . . The form's instructions are hereby incorporated into the regulations requiring its submission.") and 214.14(d)(1) (stating that each applicant for U nonimmigrant status must submit a U petition "in accordance with . . . the instructions to" the petition). USCIS has the authority to waive certain grounds of inadmissibility as a matter of discretion. Section 212(d)(14) of the Act, 8 U.S.C. § 1182(d)(14).

II. ANALYSIS

The Applicant was granted U-2 nonimmigrant status from May 2, 2018, through May 1, 2022. In November 2018, the Applicant departed the United States and did not return until July 2019. The Applicant was absent from the United States for a period exceeding 90 days. The Applicant filed the U adjustment application in March 2022. The Director determined that the Applicant did not satisfy the continuous physical presence requirement on the basis that the record did not demonstrate that she was physically present in the United States for a continuous period of at least three years before the filing of her application. Specifically, the Director found that the Applicant was absent from the United States for a period of 243 consecutive days.

On appeal, the Applicant explains that she traveled to Honduras and to facilitate her return, she scheduled a U-2 nonimmigrant visa appointment on December 5, 2018, with the U.S. Department of State (DOS). DOS denied her U-2 nonimmigrant visa citing inadmissibility under section 212(a)(9)(b)(i)(II) of the Act. The Applicant does not contest her inadmissibility under section 212(a)(9)(b)(i)(II) of the Act. She states that DOS instructed her to contact USCIS to amend the waiver application to specify that section 212(a)(9)(b)(i)(II) of the Act was waived. USCIS, as a matter of discretion, amended the waiver application and DOS issued her a U-2 nonimmigrant visa in July 2019. The record indicates that the waiver application, filed in conjunction with her U petition in August 2014, was amended to include section 212(a)(9)(b)(i)(II) of the Act.[1]

[1] The record reflects that the Applicant departed the United States since she entered in U-2 nonimmigrant status in July 2019 and was admitted in U-2 nonimmigrant status in May 2021.

On appeal, the Applicant asserts that she should not be penalized for the lengthy processing time that forced her to stay in Honduras for more than 180 days. Additionally, she proffers that once her waiver application approved, it covered ". . . all INA 212(a) inadmissibility;" and that her waiver application ". . . was approved pursuant to the blanket INA 212(d)(14) which should not require a specific waiver of . . . 212(a)(9)(b)(i)(II)." However, the Applicant's arguments are unavailing, and she has not cited any legal authority to support her claims. A review of the waiver application indicates that when the Applicant was instructed to disclose the reasons why she believed she was inadmissible to the United States, the Applicant wrote: EWI one time. Consequently, the sole inadmissibility that was waived by the Director, as a matter of discretion, was section 212(a)(6)(A)(i) of the Act. The Applicant did not disclose that she was subject to an additional inadmissibility, and consequently did not request an additional waiver, although it was incumbent upon her to do so. The Applicant's waiver application was approved in May 2018, although she did not provide all the required information and did not specify all the applicable grounds of inadmissibility as required by the form instructions. Form instructions have the weight of regulations. *See* 8 C.F.R. § 103.2(a)(1) ("Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission."). As such, the Applicant's argument that section 212(d)(14) of the Act provides a blanket waiver is unavailing for the purposes of disclosing the actual grounds of inadmissibility for which she was seeking a waiver. Moreover, the approval of the waiver application specified that the ground of inadmissibility waived was section 212(a)(6)(A)(i) of the Act. It would serve no purpose to list the actual grounds of inadmissibility being waived, if section 212(d)(14) of the Act merely provided a blanket waiver, thereby depriving the Director their ability to exercise their discretion.

As detailed above, both the statute and relevant regulations require that absences in excess of 90 days or for any periods in the aggregate exceeding 180 days may be excused if necessary to assist in the investigation or prosecution of the qualifying criminal activity or if an official involved in the investigation or prosecution expressly certifies that the absence was otherwise justified. *See* section 245(m)(2) of the Act; *see also* 8 C.F.R. § 245.24(a)(1), (d)(5)(iii). Here, the Applicant was absent from the United States for more than 90 days and she has not submitted a certification from the law enforcement agency that supported the principal petitioner's U-1 petition certifying that her absence was necessary to assist in the criminal investigation or prosecution. Nor has an official involved in the investigation or prosecution certified that the Applicant's absence was otherwise justified.

While we acknowledge that the requisite period of continuous physical presence may commence after any admission in U status, U adjustment applicants must still have accrued the requisite three years of continuous physical presence prior to filing. *See* section 245(m)(1)(A) of the Act (requiring that the applicant "*has been* physically present in the United States for a continuous period of at least 3 years" (emphasis added)); *see also* 8 C.F.R. § 103.2(b) (stating that an applicant must establish eligibility "at the time of filing"); 8 C.F.R. § 245.24(b)(3) (stating that, to be eligible, an applicant must have "continuous physical presence for 3 years"); *see also* 8 C.F.R. § 245.24(d)(5), (9) (requiring applicants to submit evidence of their three-year period of continuous physical presence with their application in order to establish eligibility for U adjustment); Form I-485, Instructions for Application to Register Permanent Residence or Adjust Status, at 28, *https://www.uscis.gov/i-485* (explaining that "applicants

may file Form I-485 only after they have been physically present in the United States for a continuous period of at least three years since being admitted as a U nonimmigrant . . ..").

Here, although the Applicant commenced a new period of continuous physical presence beginning with her July 2019 admission as a U-2 nonimmigrant, she did not accrue the requisite three years of such presence prior to filing her U adjustment application in March 2022. The Applicant is consequently ineligible for adjustment of status under section 245(m) of the Act.

ORDER: The appeal is dismissed.