U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23481940

Date: JAN. 3, 2023

Motion on Administrative Appeals Office Decision

Form I-485, Application to Adjust Status

The Applicant seeks to become a lawful permanent resident (LPR) based on her "T" nonimmigrant status under Immigration and Nationality Act (the Act) section 245(*l*), 8 U.S.C. § 1255(*l*). The Director of the Vermont Service Center denied the application and we dismissed the Applicant's appeal. The matter is now before us on a motion to reconsider. 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). Upon review, we will dismiss the motion.

U.S. Citizenship and Immigration Services (USCIS) may in its discretion adjust the status of an individual admitted into the United States as a T-1 nonimmigrant to that of a lawful permanent resident if, as relevant here, they have been physically present in the United States for a continuous period of at least three years since "the date of admission as a [T-1] nonimmigrant." Section 245(*l*)(1)(A) of the Act; 8 C.F.R. 245.23(a)(3). Continuous physical presence is not maintained under section 245(*l*)(1)(A) of the Act if a T adjustment applicant departed from the United States for any period in excess of 90 days or for any periods exceeding 180 days in the aggregate, unless the absence was necessary to assist in the investigation or prosecution of the acts of trafficking, or an official involved in the investigation or prosecution certifies that the absence was otherwise justified. Section 245(*l*)(3) of the Act.

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

As we discussed in our prior decision, incorporated here by reference, the Applicant received T-1 nonimmigrant status, valid from August 2013 until August 2017. She departed the United States on January 22, 2014 and returned 126 days later on May 29, 2014. The Director denied the Applicant's T adjustment application because she did not establish that she was physically present for a continuous period of at least three years since her admission as a T nonimmigrant, as section 245(*l*)(1)(A) of the Act requires, due to her absence from the United States for a single period over 90 days after her admission as a T-1 nonimmigrant in August 2013. The Director further noted that the Applicant did

not demonstrate that she had been readmitted as a T-1 nonimmigrant upon reentry to the United States. In our decision on appeal, we noted that although the Applicant had not left the United States after her May 2014 reentry, she had not accrued three years of physical presence in T-1 nonimmigrant status since that time. We explained that the class of admission was left blank on the May 2014 stamp in her passport and that a corresponding Form I-94 Admission Record listed her class of admission as "DT," indicating that she received significant public benefit parole under section 212(d)(5) of the Act, which was not an admission in T-1 nonimmigrant status.

On motion, the Applicant argues that we did not properly consider the absence of a class of admission notation on the May 2014 stamp in her passport. She states that if the immigration officer had entered a class of admission on the stamp, although it is possible that they would have entered "DT," they also could have entered "T-1" or otherwise indicated that she was being admitted in T-1 status. Further, she states that the absence of a class of admission on the stamp "could also be indicative of administrative or clerical error, which could have also contributed to 'DT' being incorrectly noted on the I-94." However, the evidence does not show that the officer noted that the Applicant was being readmitted in T-1 nonimmigrant status or made a clerical error, and we cannot speculate about what the officer intended without evidence to support such a finding. The evidence available in the record shows that, although the class of admission was left blank on the stamp, the corresponding Form I-94 listed the class of admission as "DT," indicating the Applicant was paroled into the United States under significant public benefit parole pursuant to section 212(d)(5) of the Act.

The Applicant also contends that if she had applied for and received advance parole, it "would have essentially been the same as" the significant public benefit parole she received because the two types of parole come from the same parole authority at section 212(d)(5) of the Act and no applicable distinction exists. She states she qualified for parole "in either form" as a trafficking survivor who departed for urgent family reasons, and should not be deemed to have lost her T-1 nonimmigrant status by departing without advance parole. The issue on motion is not whether the Applicant lost T-1 nonimmigrant status, but whether she accrued three years of continuous physical presence since her last admission as a T-1 nonimmigrant. As stated, her departure of over 90 days broke her period of physical presence and she did not start a new period of continuous physical presence in T-1 nonimmigrant status upon her return. Per the guidance in the USCIS Policy Manual, a T nonimmigrant who travels outside the United States must file an application for advance parole "before departing the United States in order to return to the United States in T nonimmigrant status." 3 *USCIS Policy Manual* 12.B, https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-12. By contrast, a "T nonimmigrant who departs the United States and returns through means other than an advance parole document issued before departure or admission at a designated port of entry with a T nonimmigrant visa does not resume T nonimmigrant status . . . ." *Id.* As we previously explained, although a T adjustment applicant may accrue continuous physical presence beginning from any admission to the United States as a T-1 nonimmigrant, including admissions made after departures that broke a prior period of continuous presence, the Applicant's May 2014 reentry through significant public benefit parole was not a T-1 nonimmigrant admission. *See* section 101(a)(13)(A), (B) of the Act (defining the terms "'admission" and "'admitted" and stating that an applicant who is paroled under section 212(d)(5) of the Act "shall not be considered to have been admitted."). Consequently, she did not commence a new period of continuous physical presence upon reentry as a parolee.

We acknowledge the Applicant's statements regarding her experiences as a trafficking survivor and her reasons for departing the United States. However, her absence of over 90 days broke her period of physical presence in T-1 nonimmigrant status and her reentry under significant public benefit parole did not begin a new period of continuous physical presence. The Applicant has not established three years of continuous physical presence in the United States after her admission as a T-1 nonimmigrant, as section 245(*l*)(1)(A) of the Act requires, and we lack the authority to waive the requirement of the statute. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (holding that government officials are bound to adhere to the governing statute and regulations). Accordingly, she is not eligible to adjust status to that of a lawful permanent resident.

ORDER: The motion to reconsider is dismissed.