



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

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

In Re: 24785740

Date: FEB. 8, 2023

Motion on Administrative Appeals Office Decision

Form I-485, Application for Adjustment of 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 his “U” nonimmigrant status. The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application), and we dismissed the Applicant’s subsequent appeal. The matter is now before us on a motion to reopen. Upon review, we will dismiss the motion.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

U.S. Citizenship and Immigration Services (USCIS) may adjust the status of a U nonimmigrant to that of an LPR provided that he is: not inadmissible under section 212(a)(3)(E) of the Act; has been continuously physically present in the United States for at least three years since the date of admission as a U nonimmigrant; and establishes that his continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. Section 245(m) of the Act. The applicant bears the burden of establishing her eligibility, including that a favorable exercise of discretion is warranted, and must do so by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 245.24(b)(6); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

In addition, an applicant for adjustment of status under 245(m) must comply with the general eligibility and documentary requirements to adjust status at 8 C.F.R. § 245.5, which requires that the applicant “have a medical examination by a designated civil surgeon, whose report setting forth the findings of the mental and physical condition of the applicant, including compliance with section 212(a)(1)(A)(ii) of the Act, shall be incorporated into the record.”

The Applicant is a citizen of Brazil who last entered the United States without inspection in August 2002. The Director granted his petition for U nonimmigrant status in October 2014. He timely filed the instant U adjustment application in October 2018. In January 2021, the Director, in a request for evidence (RFE), provided the Applicant with the opportunity to submit the medical examination report. The Applicant responded to the RFE but did not submit a medical examination report. The

Director denied the Applicant's U adjustment application because he did not submit "the proper documentation as required by regulation."

On appeal, the Applicant asserted that his prior counsel was advised by USCIS field office personnel to bring the medical examination report to his adjustment interview to assure it would not be expired due to a backup in processing adjustment of status cases. We dismissed the appeal, finding that the record did not indicate that the Applicant had a pending interview on his adjustment application, the Applicant failed to submit the medical examination report in response to the Director's request, and the Applicant also did not submit the medical examination report on appeal.

On motion, the Applicant makes a claim of ineffective assistance against his prior counsel as his counsel advised him not to submit a medical examination report in response to a request for evidence. He asserts that he meets the requirements under *Matter of Lozada*, 19 I&N Dec 637 (BIA 1988).¹ While we acknowledge the claims by the Applicant of ineffective assistance, he does not submit new evidence on motion to establish his eligibility for adjustment of status. The Applicant submitted a personal statement, a letter from Applicant's current counsel to his prior counsel outlining the allegations of ineffective assistance, a letter in response from prior counsel, and a letter from the State Bar of California acknowledging receipt of the Applicant's complaint against his prior counsel. The Applicant did not submit the required medical examination report. Accordingly, he remains ineligible for adjustment of status under section 245(m) of the Act.

ORDER: The motion to reopen is dismissed.

¹ In *Lozada* the Board of Immigration Appeals established a framework for asserting claims of ineffective assistance of counsel to include a written affidavit from the noncitizen, evidence former counsel was informed of the allegation and given opportunity to respond, and evidence that a complaint was filed with the appropriate disciplinary authorities or an explanation why no complaint was filed.