



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

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

In Re: 20329347

Date: FEB. 25, 2022

Appeal of Vermont Service Center Decision

Form I-485, Application for Adjustment of Status of U Nonimmigrant

The Applicant seeks to become a lawful permanent resident (LPR) based on his “U” nonimmigrant status under section 245(m) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m). The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application), concluding that the Applicant was ineligible to adjust status under section 245(m) of the Act at the time he filed his U adjustment application. The matter is now before us on appeal. On appeal, the Applicant submits a brief and additional evidence and reasserts his eligibility.

The Administrative Appeals Office reviews 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 remand the matter to the Director for the issuance of a new decision.

I. LAW

U.S. Citizenship and Immigration Services (USCIS) may adjust the status of a U nonimmigrant to that of an LPR if he meets all other eligibility requirements and, “in the opinion” of USCIS, 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 his eligibility pursuant to section 291 of the Act, 8 U.S.C. § 1361, and must do so by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

An individual subject to an order of voluntary departure is ineligible for adjustment of status for 10 years if he “voluntarily fails to depart the United States within the time period specified” in the order. Section 240B(d)(1)(B) of the Act, 8 U.S.C. § 1229c(d). An individual has not “voluntarily” failed to depart the United States under section 240B(d)(1) of the Act when, through no fault of his own, he was unaware of the voluntary departure order or was physically unable to depart within the time granted. *Matter of Zmijewska*, 24 I&N Dec. 87, 94 (BIA 2007).

II. ANALYSIS

The Applicant, a native and citizen of Mexico, entered the United States without inspection, admission, or parole in 1994. In [] 2012, an Immigration Judge in Illinois granted the Applicant voluntary departure in lieu of removal. He was given notice to depart by [] 2013, and failed to depart within the voluntary departure period. On [] 2013, two days after the expiration of his voluntary departure period, he filed a motion to reopen proceedings with the Immigration Judge, which was denied in [] 2014. In [] 2014, he filed an appeal of the Immigration Judge's decision with the Board of Immigration Appeals (Board) and in [] 2015, the Board granted his appeal and remanded his case for further proceedings and entry of a new decision. In [] 2016, another Immigration Judge in Illinois terminated the Applicant's removal proceedings.

USCIS granted the Applicant U-1 nonimmigrant status from October 2015 to September 2019, as a victim of a qualifying crime who was helpful in the investigation of the crime. The Applicant timely filed the instant U adjustment application in March 2019. The Director denied the U adjustment application, determining that the Applicant was ineligible to adjust status because he did not comply with his order of voluntary departure and was still within the ten-year period that barred him from adjusting status based on his failure to voluntarily depart, as provided in section 240B(d) of the Act.

In denying the U adjustment application, the Director noted that the Immigration Judge's [] 2012 decision gave the Applicant proper notice of the civil penalties for voluntarily failing to depart within the allotted timeframe. The Director further noted that no statutory exceptions to the civil penalties for failing to voluntarily depart applied to the Applicant and that the evidence in the record did not indicate he had complied with the Immigration Judge's order permitting him to voluntarily depart by [] 2013. The Director acknowledged the Applicant's filing of a motion to reopen proceedings with the Immigration Judge, but noted that it was filed two days after the voluntary departure period ended. As such, the Director determined that the Applicant's failure to depart was voluntary and that the civil penalties for failing to depart attached to him and took effect upon the expiration of the voluntary departure period in [] 2013, leaving him ineligible to adjust his status under section 245 of the Act for a period of ten years.

On appeal, the Applicant does not dispute that he voluntarily failed to depart prior to the end of his voluntary departure period. Instead, he asserts, through counsel, that upon the Board's granting of his motion to reopen and the subsequent termination of proceedings by the Immigration Judge, the "voluntary departure order no longer legally existed—for any purpose." The Applicant cites *Orichitch v. Gonzales*, 421 F.3d 595 (7th Cir. 2005), as further support for his argument that the motion to reopen nullified the voluntary departure order. In *Orichitch*, the U.S. Court of Appeals for the Seventh Circuit determined that section 240B(d) did not continue to operate upon the Board's grant of a motion to reopen, stating that the "motion to reopen . . . permanently disposed of the existing [s]ection 240B(d) issue. More precisely, the grant of the motion to reopen disposed of the [s]ection 240B(d) issue by disposing of the order that otherwise triggered the operative effect of that section—the . . . voluntary departure order." *Id.* at 598. As highlighted by the Applicant on appeal, he resides in and his proceedings before the Immigration Judge took place in the state of Illinois, within the Seventh

Circuit.¹ Accordingly, *Orichitch* is binding precedent in this case and, pursuant to that decision, the Board's grant of the Applicant's motion to reopen and the subsequent termination of his removal proceedings disposed of his voluntary departure order and rendered section 240B(d) inoperative in this case. The Applicant remains eligible for adjustment of status under section 245(m) of the Act.

III. CONCLUSION

The Applicant has overcome the Director's sole ground for denying his U adjustment application. Therefore, we will remand the matter to the Director for consideration of whether the Applicant has met the remaining eligibility requirements to adjust his status to that of an LPR under section 245(m) of the Act.

ORDER: The decision of the Director is withdrawn. The matter is remanded to the Director for the entry of a new decision consistent with the foregoing analysis.

¹ Three other U.S. Circuit Courts of Appeal that have held, contrary to *Orichitch*, that the reopening of removal proceedings does not nullify the consequences of a prior failure to comply with an order of voluntary departure. See *Singh v. Gonzales*, 468 F.3d 135, 139 (2d. Cir. 2006); *DaCosta v. Gonzales*, 449 F.3d 45, 50 (1st Cir. 2006); *Odogwu v. Gonzales*, 217 Fed. Appx. 194, 198 (4th Cir. 2007).