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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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NOV 23 2004

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Applicant:



APPLICATION:

Application for Status as a Temporary Resident pursuant to Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The termination of the applicant's temporary resident status by the Director, California Service Center is before the Administrative Appeals Office on appeal. The appeal will be sustained.

The director terminated the applicant's temporary resident status because the applicant apparently failed to file the application for adjustment of status from temporary to permanent residence within the 43-month application period.

In response to the Notice of Intent to Terminate, and on appeal, the applicant states that she did apply for adjustment in a timely fashion, and provides evidence of such.

The status of an alien lawfully admitted for temporary residence under section 245A(a)(1) of the Act may be terminated at any time if the alien fails to file for adjustment of status from temporary to permanent resident on Form I-698 within forty-three (43) months of the date he/she was granted status as a temporary resident. See 8 C.F.R. § 245a.2(u)(1)(iv).

According to a computer printout in the record, the applicant was granted temporary resident status on October 28, 1988. The 43-month eligibility period for filing for adjustment would have expired on May 28, 1992. The Application for Adjustment of Status from Temporary to Permanent Resident (Form I-698) that the director denied was received by the service center on January 16, 1997. The director then denied the untimely Form I-698 application, and simultaneously issued a Notice of Intent to Terminate. He later terminated the applicant's temporary resident status.

The applicant responded to the intent notice by furnishing a photocopy of a Form I-698 that had supposedly been completed and signed by her on August 23, 1990. It bore a "Received August 27, 1990" stamp of the service center. She also submitted a photocopy of a money order made out to "INS," dated August 23, 1990. The applicant stated that INS could not find her file, and that is why she applied again in 1977.

In the termination notice, the director pointed out that there was a seven-year gap between the purported first filing of Form I-698 and the one that was filed in 1997. Given the applicant's claim that she had apparently been told that her file could not be located, the director found it unusual that the service center had no record of receiving an inquiry from the applicant during the seven years. The director also pointed out that the applicant had two years from the time of the alleged 1990 filing until the 43-month period expired in which to inquire. The director concluded that the applicant's failure to inquire in writing meant that the claim to have filed the application in 1990 was questionable.

On appeal, counsel points out that the applicant was receiving yearly extensions of her work authorization based on the pending application, and therefore had no immediate need to inquire formally about her case. Counsel focuses on the "Received" stamp on the photocopy of the 1990 Form I-698, and maintains that this is concrete evidence of the filing.

It is noted that the director did not assert that the stamp was not authentic, and in fact did not address the stamp directly in his decision.

Other applicants have asserted, on appeal, that they filed timely adjustment applications, and have provided copies of such earlier applications. However, the majority of those copies did not bear the received stamp of the service center. Furthermore, in many of those records of proceeding, there was proof that the service center rejected the applications for improper fee or other reasons, and returned the applications to the applicants. Here, in this case, there is no evidence that the applicant failed to resubmit an application that had been rejected by the service center. In fact, there is no evidence of any action at all by the service center on the claimed first adjustment application subsequent to stamping it as received. It appears that the original application may have been lost, as speculated by counsel.

While not all of the facts may be known, the preponderance of evidence strongly suggests that the applicant submitted the required application in 1990. We cannot hold that the applicant's failure to have filed a written inquiry regarding that application is dispositive. Therefore, the applicant is deemed to have overcome the finding that she had not timely applied for permanent residence.

It must be noted that the printout in the record that shows that the applicant was granted temporary residence on October 29, 1988 also curiously shows that three subsequent requests for evidence were sent to the applicant, as if the application were still being adjudicated. The record contains a fourth request, dated November 4, 1988, asking the applicant to provide more evidence in support of her application for temporary residence. Further, a note dated March 17, 1989 seems to earmark the application for denial. Although the evidence that the application was granted on October 29, 1988 may be questionable, this issue need not be further addressed, as the applicant has already been found to have overcome the basis for termination.

ORDER: The appeal is sustained, and the termination of status is withdrawn. The director shall reopen and adjudicate the Form I-698 adjustment application.