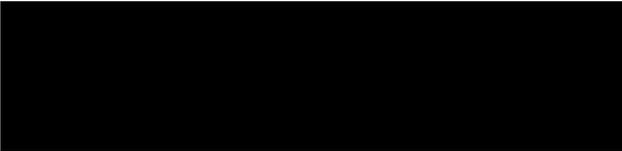


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Services

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FILE:



Office: California Service Center

Date: OCT 28 2005

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: Self-represented

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, Western Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The director noted that the applicant had been absent from the United States for over 45 days, and had failed to establish that an emergent reason had delayed her return. The director therefore concluded that the applicant had not resided continuously in the United States, and denied the application.

On appeal, the applicant provides the dates of her departure and return to the United States. She explains that she went to Mexico because her father was ill.

An applicant for temporary residence must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2).

An alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

On her Application for Status as a Temporary Resident (Form I-687) the applicant claimed that she established a residence in the United States in 1981, and that she continuously resided in the United States since then. However, the applicant also indicated that she went to Mexico in August 1986, and returned in October 1986. The officer of the Immigration and Naturalization Service who interviewed the applicant wrote on the application that the return date was October 11, 1986. This corresponds to the stamp in the applicant's passport which shows that she was admitted to the United States as a visitor on that date.

Subsequently, the director sent a notice to the applicant that asked her to submit a detailed explanation of the reason for her absence, and the exact dates of departure and return. In response, the applicant stated that she left the United States on August 28, 1986 and returned on October 11, 1986. She said that her father was very sick and needed to see her. She also provided statements from doctors attesting to her father's hospitalization. This response was not entered into the record at the time, and the director denied the application, finding that the applicant's return to the United States after an absence of "approximately three months" was not delayed due to an emergent reason.

On appeal, the applicant furnished copies of her response and the doctor's letters. In her response, she stated that she was absent for 3 days in August (the 28th through the 31st), the full 30 days in September, and 11 days in October (the 1st through the 11th). She added this up and stated that it totaled 44 days. The applicant apparently did not count the date she left the United States, August 28, as a day of absence. This method of

computing the days of absence corresponds to that used in *Matter of C--*, 19 I&N Dec. 808, a precedent decision discussing absences and “emergent reasons”.

Regarding the claimed date of departure from the United States, it is noted that the applicant initially provided the information regarding her absence from the United States, although it was not to her advantage to do so. The director has not raised any issue of credibility regarding the applicant’s claim as to when she departed the United States. In the absence of evidence to the contrary, there is no reason to now conclude that the claim is less than credible.

It is concluded that the applicant was absent for 44 days. As such, the absence did not interrupt her continuous residence, and it is not necessary to determine if an emergent reason delayed her return to the United States.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she has resided in an unlawful status in the United States from prior to January 1, 1982 through the date of filing, *is admissible to the United States under the provisions of section 245A of the Act, 8 U.S.C. § 1255a*, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). The applicant is inadmissible under section 212(a)(6)(C) of the Act, which relates to an alien who obtained a visa, admission or another benefit by fraud or misrepresentation. After the applicant departed the United States on August 28, 1996 she obtained a nonimmigrant visitor visa and reentry to the United States by misrepresentation, as she had no intention to simply visit the United States, but rather intended to return to her unlawful residence.

Eligibility for temporary residence exists for an alien who would otherwise be eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant in order to return to an unrelinquished unlawful residence. 8 C.F.R. § 245a.2(b)(9). An alien described in paragraph (b)(9) of this section must receive a waiver of the inadmissibility charge as an alien who entered the United States by fraud. 8 C.F.R. § 245a.2(b)(10).

The Director, California Service Center shall accord the applicant the opportunity to apply for a waiver of the inadmissibility. Should that application be approved, and then this application for temporary residence, the applicant shall be advised as to how to apply for adjustment to permanent resident status.

ORDER: The appeal is sustained.