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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: California Service Center

Date: JAN 12 2006

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.

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, California Service Center, and is before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because the applicant failed to establish that he continued to reside in the United States in an **unlawful** status since January 1, 1982. This was based on the applicant's admission to the United States as an H-2 temporary worker on February 7, 1986.

On appeal, counsel contends that the applicant's entries in 1986 and 1987 using his nonimmigrant H-2 visa were never lawful since such visa was procured through fraud. She also maintains that INS (the Immigration and Naturalization Service, now Citizenship and Immigration Services, or CIS) did not apply its policy consistently regarding this issue.

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).

Eligibility also 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 this paragraph must receive a waiver of inadmissibility for having entered the United States by fraud. 8 C.F.R. 245a.2(b)(10).

In his decision, the director did not determine whether the claim of entry in 1980 and continuous residence was valid, but rather focused on the fact that the applicant was apparently in valid, lawful nonimmigrant H-2 status from February 7, 1986 through the date this application was filed, March 10, 1988. Although the director stated the applicant was admitted to the United States on June 17, 1987, there is no actual proof of that in the record. The applicant was issued a second H-2 visa at the United States Consulate in Tijuana on that date, and he reentered the United States after the visa issuance, either on the same day or somewhat later. Regardless, he was issued the first H-2 visa on February 7, 1986, and was admitted to the United States that day, and was granted extensions of stay by INS through October 1, 1988.

The regulation at 8 C.F.R. § 245a.2(b)(9) allows an alien to be considered to have maintained continuous unlawful residence if he reentered the United States with a nonimmigrant visa *obtained by fraud* in order to return to an unlawful residence. On an application for waiver of inadmissibility filed by the applicant shortly after he applied for temporary residence, he stated that he obtained his H-2 visa by fraud. He further stated the following:

\_\_\_\_\_ the United States in 1980. I have been living here for about eight years in the State of California. I have been working in my company for about eight years: my job is very stable and rarely laid-off. I left the United States to obtain a visa; I had

no intention of remaining in Mexico. I had a job waiting for me here in the United States. I don't plan to return to Mexico in the near future.

Although the applicant stated that he acquired his H-2 visa by fraud, he did not explain in detail how the acquisition was fraudulent. The fact that he had a job waiting for him in the United States does not lead to a conclusion that his visa, issued in order that he could work at that job, was fraudulently obtained.

An alien who reentered the United States with a visitor visa in order to return to an unlawful residence was guilty of fraud, as he had no intention of visiting. However, the situation is somewhat different in the case of an alien such as the applicant who, as the result of a petition filed by his employer, obtained an H-2 working visa and reentered the United States and did work for that employer. Even when there is a record of prior unlawful residence in the United States, CIS cannot presume that an alien acquired a nonimmigrant visa and entry by fraud when there is evidence that the alien did engage in the employment for which the visa was issued. Were the Service to hold otherwise, any alien who had been in the United States unlawfully would never be able to regularize his status by departing and then acquiring a proper nonimmigrant visa.

The applicant in this case provided evidence to establish his employment as an H-2 horse groom from February 7, 1986 through the date of filing of the application. Therefore, we cannot conclude that the applicant's admissions to the United States in 1986 and 1987 were obtained through fraud, as he evidently properly engaged in employment pursuant to the terms of his visa subsequent to his H-2 admission. As a result of the applicant's lawful entries, the continuity of his claimed prior unlawful stay has been interrupted, making the applicant ineligible for temporary resident status. Also, because the applicant is not inadmissible for having entered by fraud, the director's denial of the accompanying application for waiver of inadmissibility because of the lack of inadmissibility shall not be disturbed.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has *unlawfully* resided in the United States for the requisite period. 8 C.F.R. 245a.2(d)(5). The applicant has failed to meet this burden.

**ORDER:** The appeal is dismissed. This decision constitutes a final notice of ineligibility.