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

L1

[REDACTED]

FILE:

Office: Texas Service Center

Date: JUL 14 2006

IN RE:

Applicant:

[REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

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.

Mari Johnson

2 Robert P. Wiemann, Chief
Administrative Appeals Office.

DISCUSSION: The termination of temporary resident status by the Director, Southern Regional Processing Facility, is before the Administrative Appeals Office on appeal. The matter will be remanded for further consideration and action.

The director terminated the applicant's status because the applicant was deemed to be inadmissible under former section 212(a)(28) of the Immigration and Nationality Act (the Act) for having been a member of a proscribed organization.

On appeal, prior counsel stated that the director denied the application on the basis of inadmissibility without providing any evidence to support such finding. Prior counsel also denied that the applicant was inadmissible on such basis. Current counsel states that the applicant has since been granted the status of a *permanent* resident in this legalization proceeding, which raises questions regarding the relevance of the termination of temporary resident status. It is this procedural matter that must be addressed first.

The applicant was granted temporary resident status on October 28, 1989. Counsel indicates that after that date, and before the applicant's temporary resident status was terminated on April 10, 1990, the applicant applied for adjustment of status from temporary to permanent resident. That adjustment application is not in the record. Nor is there a Form I-181, Creation of Record of Lawful Permanent Residence, which is the official record of approval of adjustment application. No file copy of an approval notice that would have been sent to the applicant is in the record. However, counsel points out that the applicant was issued Form I-94, evidently on June 30, 1995 by the Dallas District Office of the legacy Immigration and Naturalization Service (INS), stamped "Temporary Evidence of Lawful Admission for Permanent Residence," with validity until June 30, 1996. Such document is in the record. The file also contains a memorandum dated October 25, 1995 from INS's Texas Service Center to its Dallas District Office. The 1995 memorandum discusses rescission of a Form I-698 adjustment application and adjudication of a Form I-130 relative petition. The record of proceeding does not contain a Form I-698 adjustment application, a decision of rescission of permanent residence, a Form I-130 relative petition, or a decision on a Form I-130 relative petition. What must be determined is whether INS, subsequent to the termination of temporary resident status, nevertheless approved the application for adjustment from temporary resident to permanent resident status.

It is noted that an alien who has been lawfully admitted for temporary resident status, *such status not having been terminated*, is eligible for adjustment to permanent resident status in the legalization program. 8 C.F.R. § 245a.3(b). The applicant's status could not have been properly adjusted to that of permanent resident unless INS withdrew the termination action. Because of the missing material from the record, it is not clear what action was taken. The missing Form I-698 adjustment application, any decision relating to the Form I-698 adjustment application, and any related notice of withdrawal of the termination, must be entered into the record of proceeding. Furthermore, the District Director, Dallas, and the Director, Texas Service Center, shall each enter explanatory memoranda into the record as to what transpired, and whether the applicant was granted permanent residence. If it is determined that the applicant is a lawful permanent resident, no further action need be taken on this termination of temporary resident status, and the matter may be declared moot.

Concerning the issue of inadmissibility, according to 8 C.F.R. § 245a.2(u)(1), the temporary resident status of an alien may be terminated at any time upon the occurrence of any of the following:

- (i) It is determined that the alien was ineligible for temporary residence under section 245A of this Act;
- (ii) The alien commits an act which renders him or her inadmissible as an immigrant, unless a waiver is secured pursuant to § 245a.2(k)(2).

Former section 212(a)(28) of the Act, 8 U.S.C. § 1182(a)(28) (1990) was subsequently amended and is now codified as section 212(a)(3) of the Act, 8 U.S.C. § 1182(a)(3) (2001). That section includes within its purview any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, has been or is engaged in or is likely to engage after entry in espionage, sabotage, or subversive or terrorist activities. Such activities include any act which the actor knows or reasonably should know, affords material support to any individual, organization or government in conducting a terrorist activity, including the providing of any type of material support or the soliciting of funds for any terrorist organization.

Section 245A(a)(4)(A) of the Act requires an alien to establish that he is admissible as an immigrant to the United States. Pursuant to section 245A(d)(2)(B)(ii)(III) of the Act, a finding of inadmissibility under section 212(a)(3) of the Act may not be waived.

The director's decision will be withdrawn. In issuing his decision, the director failed to inform the applicant of the derogatory information that formed the basis of his decision. The regulation at 8 C.F.R. § 103.2(b)(16)(i) (2001), formerly 8 C.F.R. § 103.2(b)(3)(i) (1989), states:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section.

Under section 245A of the Act, the director's determination of the applicant's eligibility is not a discretionary determination, but rather a determination of statutory eligibility. Accordingly, the applicant's eligibility shall be determined based on information contained in the record of proceeding which is disclosed to the applicant. 8 C.F.R. § 103.2(b)(16)(ii). The only exception to this requirement is that a director may base a determination of statutory ineligibility in whole or in part on classified information that is not contained in the record, but only in accordance with 8 C.F.R. § 103.2(b)(16)(iv).

Pursuant to 8 C.F.R. § 103.2(b)(16)(iv), if the application is to be denied based on classified information, the regional director should determine whether the applicant may be given notice of the general nature of the information and an opportunity to rebut, provided that the regional director believes he can do so consistently with safeguarding both the information and its source.¹ If the regional director authorizes the use of such classified information, his authorization shall be made part of the record.

There is no indication that the director complied with the requirement of 8 C.F.R. § 103.2(b)(16)(iv), since the record contains no determination from the regional director, nor any indication that the applicant had an

¹ Although the regulation at 8 C.F.R. § 103.2(b)(16)(iv) refers to the "regional commissioner" as the decision maker in these matters, the position is now referred to as the "regional director." See 8 C.F.R. § 103.1(g)(2).

opportunity to review and rebut such a determination. It is necessary, therefore, to remand the case so that the director can comply with 8 C.F.R. § 103.2(b)(16)(iv). *Matter of Tahsir*, 16 I&N Dec. 56 (BIA 1976).

If, after this remand, the regional director authorizes the issuance of the notice of intent to deny, based on the disclosure of the general nature of the classified information, the Director, Texas Service Center shall afford the applicant an opportunity to rebut the information and present information in his own behalf. After reviewing the submitted evidence, that director shall render a new decision based on the record, including any classified information, and determine whether the applicant is inadmissible pursuant to section 212(a)(3) of the Act. The director's decision shall also state whether the classified information is material to his decision, pursuant to 8 C.F.R. § 103.2(b)(16)(iv).

Upon review, the decision of the director will be withdrawn and the matter will be remanded for further action in accordance with this decision.

ORDER: The decision of the director is withdrawn. The matter is remanded for further action consistent with the foregoing discussion and entry of a new decision which, if adverse to the applicant, is to be certified to the Administrative Appeals Office for review.