

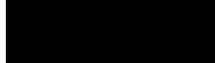
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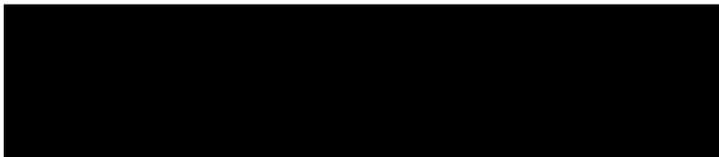


**U.S. Citizenship
and Immigration
Services**

LI



FILE:  Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2007
XAH-88-006-8090

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 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, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to Section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a, was denied by the Director, Western Service Center (now California Service Center), and is now before the Administrative Appeals Office (AAO) on appeal. This matter will be remanded for further action and consideration.

The director found the applicant, a child, to be excludable and inadmissible under Section 212(a)(1) of the Act, 8 U.S.C. § 1182(a)(1), for having a Class A medical condition of mental retardation. The director noted that the applicant failed to complete the Form I-690, Application for Waiver of Grounds of Excludability, to overcome his ineligibility. The director also noted that the applicant failed to have the Form I-693, Record of Medical Examination, completed per a follow-up examination with the civil surgeon that initially examined him. The director denied the applicant's Form I-687, Application for Status as a Temporary Resident, on this basis.

On appeal, the applicant's father requested a "humanitarian evaluation" of his child's application.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

On November 29, 1990, Section 212(a)(1) of the Act was amended by Section 601 of the Immigration and Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 4978. IMMACT made significant changes to the grounds of exclusion and waivers available in Section 212(a) of the Act. IMMACT 90 Wire #55, (CO 1803-C), reprinted in 68 No. 22 *Interpreter Releases* 717 (June 17, 1991). Pursuant to IMMACT, waivers under Section 212(g) for excludability under Section 212(a)(1) would no longer be required because Section 212(a)(1) (mental retardation) had been deleted from the Act as an exclusion ground. *Id.* This eligibility standard took effect on June 1, 1991. *Id.*

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. *Matter of George and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968). Thus, the August 16, 1991 decision to deny the applicant's Form I-687, Application for Status as a Temporary Resident, was in error and is withdrawn.

Although the applicant has overcome the sole basis for the director's denial of his application, the applicant's medical condition is evidence that he could be ineligible for adjustment to temporary resident status based on the public charge ground for inadmissibility. See Section 212(a)(4)(A) of the Act, 8 U.S.C. § 1182(a)(4)(A). On September 25, 1987, the applicant's father signed a Form I-134, Affidavit of Support, on behalf of the applicant to assure that the applicant would not become a public charge. The affidavit of support was binding on the applicant's father, the affiant, for a period of three (3) years. Since this time period has expired,

the affidavit of support from the applicant's father is no longer a valid document for the purpose of making a public charge determination.

In determining whether the applicant is inadmissible as a public charge, the director shall consider the applicant's age, health, family status, assets, resources, financial status, education and skills. Section 212(a)(4)(B) of the Act, 8 U.S.C. § 1182(a)(4)(B). Pursuant to Section 245A(d)(2)(B)(iii) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(iii), applicants for temporary resident status are subject to the special rule for the determination of public charge. Under the special rule, an applicant who has a consistent employment history which shows the ability to support himself, even though his income may be below the poverty level, may be admissible. 8 C.F.R. § 245a.2(k)(4). The length of time an applicant has received public cash assistance will constitute a significant factor in considering the applicability of the public charge provision. *Id.* An applicant for temporary residence who is determined likely to become a public charge and is unable to overcome this determination after the application of the special rule will be denied adjustment. 8 C.F.R. § 245a.2(d)(4). Pursuant to Section 245A(d)(2) of the Act, the public charge ground of inadmissibility may be waived for adjustment to temporary resident status based on humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

In conclusion, the director's decision, finding the applicant to be excludable and inadmissible under Section 212(a)(1) of the Act, 8 U.S.C. § 1182(a)(1), for having a Class A medical condition of mental retardation was in error and is withdrawn. The matter should be remanded to the director to address whether the applicant is subject to the inadmissibility ground of public charge pursuant to Section 212(a)(4)(A) of the Act, 8 U.S.C. § 1182(a)(4)(A).

ORDER: This matter is remanded for further action and consideration pursuant to the above.