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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: **JUN 10 2008**

XT0-88-516-04240

IN RE:

Applicant:

[REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has 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, Chief
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 (AAO) on appeal. The appeal will be dismissed.

The director terminated the applicant's temporary resident status because he found that the applicant's Form I-698 Application to Adjust Status from Temporary to Permanent Resident Status was not filed within 43 months after the approval of his application for temporary resident status.

On appeal, counsel for the applicant stated that the application for permanent residence was filed late due to the negligence of a notary claiming to be an attorney; the applicant should not be held liable for a late filing that occurred when he was a minor; and the applicant's temporary resident status should not be terminated because he never received the Notice of Intent to Terminate (NOIT). The applicant provided no evidence that he properly filed Form I-698 within the 43-month eligibility period.

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

The applicant was granted temporary resident status on December 5, 1988. The 43-month eligibility period for filing for adjustment expired on July 4, 1992. The record indicates the Form I-698 Application for Adjustment of Status from Temporary to Permanent Resident was submitted on May 18, 1993, after the expiration of the eligibility period. On March 22, 1999, the Immigration and Naturalization Service (INS), currently Citizenship and Immigration Services (CIS), issued a NOIT to the applicant's address of record indicating its intention to terminate the applicant's temporary resident status because the I-698 application was not filed within the 43 month eligibility period. The director provided the applicant with 30 days in which to respond to the NOIT. The applicant did not submit evidence that he properly filed Form I-698 within 43 months of establishing temporary residence. Therefore, the director found the applicant had not filed a timely application to adjust from temporary to permanent resident status and terminated the applicant's temporary resident status in the Notice of Termination (NOT) dated February 23, 1996, also issued to the applicant's address of record. The director also noted that the application to adjust to permanent resident status was denied on December 22, 1995. The record does not indicate that either the NOIT or the NOT was returned as undeliverable.

It is noted that the director erroneously stated in the NOIT and NOT that the application for temporary resident status was granted on December 5, 1989, rather than on December 5, 1988. The director's error is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The

AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

As indicated above, counsel asserted that the applicant's mother was misled by an individual whom she believed to be an attorney. For this reason, the applicant's mother mistakenly believed that the individual had timely filed Form I-698 on behalf of the applicant. It is noted that any appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved applicant setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the applicant in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Although counsel notes that the applicant was not assisted by an attorney but by an individual whom his mother believed to be an attorney, there is no remedy available for an applicant who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on his behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel). The applicant failed to fulfill the requirements listed above. Specifically, the applicant failed to provide an affidavit describing the agreement with the representative, evidence that the prior representative was informed of the allegations and given an opportunity to respond, and information regarding whether a complaint has been filed with disciplinary authorities. Therefore, the applicant is found not to have established a claim of ineffective assistance of counsel.

The applicant's statements made on appeal have been considered. The applicant has presented no evidence that he properly filed Form I-698 during the 43-month eligibility period. As the applicant has not overcome the basis for termination of status, the appeal must be dismissed.

It is noted that counsel raised the question of whether an application to adjust from temporary to permanent resident status may be denied solely on the basis of a late filing. Counsel referred to 8 C.F.R. § 245a.3(a)(2), which states that no application shall be denied for failure to timely apply before the end of 43 months from the date of actual approval of the temporary resident application. This paragraph merely provides that if the director's basis for denying the Form I-698 is that it was untimely filed, the case should not be denied on this basis prior to the expiration of the 43 month period. Again, since the applicant failed to submit the Form I-698 application prior to the expiration of the 43 month period, the decision to terminate the applicant's temporary resident status was proper.

It is also noted that counsel requested the opportunity for oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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