



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

WAC 94 129 51143

Office: PHOENIX

Date:

MAY 14 2008

IN RE:

Applicant:

[Redacted]

APPLICATION:

Application for Adjustment from Temporary to Permanent Resident Status 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. All documents have been returned to the National Benefits Center. 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 adjustment from temporary resident status to permanent resident status was denied by the Field Office Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application based on the determination that the applicant failed to demonstrate that he satisfied the basic citizenship skills requirement.

On appeal, counsel asserts that the applicant has a physical or mental impairment, or a combination of the two, that prevents him from learning the English language and states that additional evidence will be submitted to support this claim.

Any alien who has been lawfully admitted for temporary resident status may apply for adjustment of status if the alien (A) can demonstrate that he or she meets the requirements of section 312 of the Immigration and Nationality Act (Act) (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or, (B) can demonstrate he or she is satisfactorily pursuing a course of study recognized by the Attorney General to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States. See 8 C.F.R. § 245a.3(b)(4).

An applicant may demonstrate that the section 312 requirements have been met by speaking and understanding English during the course of the permanent residence interview, or by passing a standardized section 312 test given in the English language by the Legalization Assistance Board with the Educational Testing Service or the California State Department of Education with the Comprehensive Adult Student Assessment System. See 8 C.F.R. § 245a.3(b)(4)(iii).

Under section 245A(b)(1)(D)(ii) of the Act, the Attorney General may waive all or part of the above requirements for aliens who are at least 65 years of age or developmentally disabled.

The pertinent regulation regarding aliens to be granted an exception to the basic citizenship skills requirement and those circumstances under which the Attorney General could consider a waiver of such requirement is contained at 8 C.F.R. § 245a.3(b)(4)(ii), which states the following:

The requirements of paragraph (b)(4)(i) of this section must be met by each applicant. However, these requirements shall be waived without formal application for persons who, as of the date the application or the date of eligibility for permanent residence under this part, which date is later, are:

- (A) Under 16 years of age; or
- (B) 65 years of age or older; or
- (C) Over 50 years of age who have resided in the United States at least 20 years and submit evidence establishing the 20-year qualification requirement; or
- (D) Developmentally disabled as defined at § 245a.1(v) of this chapter. Such persons must submit medical evidence concerning their developmental disability; or
- (E) Physically unable to comply. The physical disability must be of a nature which renders the applicant unable to acquire the four language skills of speaking, understanding, reading, and writing English in accordance with the criteria and precedence established in OI 312.1(a)(2)(iii) (Interpretations). Such persons must submit medical evidence concerning their physical disability.

The record shows that the applicant was born on June 7, 1969, and that his Form I-698 application was filed on April 7, 1994. Therefore, the applicant does not fall within the criteria described at 8 C.F.R. §§ 245a.3(b)(4)(ii)(A),

(B), or (C) based on his age at the time he filed his application. However, counsel for the applicant claims that the applicant fits the criteria described in 8 C.F.R. § 245a.3(b)(4)(ii)(D) or (E) on the basis of the applicant's claimed mental and/or physical disability. It must now be determined whether the applicant is qualified for a discretionary waiver under 8 C. F. R. § 245a.1(v) on the basis of a developmental disability.

The term developmentally disabled means the same as the term developmental disability defined in section 102(5) of the Developmental Disabilities Assistance and Bill of Rights Act of 1987, Pub. L. 100 - 146. As a convenience to the public, that definition is printed here in its entirety:

The term developmental disability means a severe, chronic disability of a person which:

- (1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (2) Is manifested before the person attains age twenty-two;
- (3) Is likely to continue indefinitely;
- (4) Results in substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and
- (5) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

8 C. F. R. § 245a.1(v).

In the present matter, in support of counsel's assertion that the applicant is developmentally disabled, the applicant submits a psychological report issued by clinical psychologist [REDACTED], whose findings were based on an evaluation of the applicant which was conducted on November 5, 2007. The applicant was given an intelligence test the results of which established that the applicant's intelligence is at the border of mental retardation. Nevertheless, [REDACTED] found that the applicant "is without severe problems in coping with life associated with [m]ental [r]etardation" While [REDACTED] also determined that at the applicant's intelligence level "most people need special help to cope with life" and also "have reduced ability to adapt to the demands of normal life," he did not establish the applicant's specific ability to adapt. [REDACTED] also noted that while most mental retardation begins prior to age 18, he did not rule out the possibility that the applicant's head injury caused by a serious rollover car accident "could also be a factor in his learning limitations." It is noted, however, that the applicant has not provided documentation establishing the date of the car accident. Regardless, [REDACTED] did not make a clear determination as to when the applicant's diminished mental capacity was first onset. It therefore cannot be concluded that the mental impairment manifested itself prior to the applicant's attaining age twenty-two. *Id.* (Citing the five elements of developmental disability.) It is further noted that in No. 18 of the Form I-698, which was filed in April 1994, the applicant indicated that he intended to demonstrate a knowledge of United States history and government and a minimal understanding of ordinary English by satisfactorily pursuing a course of study recognized by the Attorney General. The applicant did not mark the box that indicated that he may be exempted from the statutory requirement because of age or physical inability to comply. Rather, the applicant first made the claim that he may be exempt from this statutory requirement after having failed two prior examinations that were conducted during his interviews, scheduled on October 17, 2006 and September 10, 2007, respectively. In No. 19(B) of the same application, the applicant was also asked to disclose any grounds for inadmissibility (previously excludability),

which included mental retardation as one of the grounds. It is noted that the applicant marked the box that indicated that none of the grounds applied to him. The applicant then signed this application under penalty of perjury, thereby suggesting that the information provided therein was truthful and accurate. Lastly, the record contains pay stubs showing that the applicant was employed at Superstition Springs Golf Club from December 1986 through March 1987, and possibly beyond that date. Thus, based on a combination of the factors discussed above, the AAO cannot conclude that the applicant has established that he is developmentally disabled.

As the applicant has failed to establish that he is developmentally disabled as a result of a physical or mental disability or impairment, he is not eligible for a discretionary waiver under 8 C. F. R. § 245a.3(b)(4)(ii).

The applicant, who is neither 65 years old nor developmentally disabled, does not qualify for of the exception in section 245A(b)(1)(D)(ii) of the Act. Nor does he satisfy the "basic citizenship skills" requirement of section 245A(b)(1)(D)(i) of the Act because he does not meet the requirements of section 312(a) of the Act. An applicant can demonstrate that he meets the requirements of section 312(a) by "[s]peaking and understanding English during the course of the interview for permanent resident status" and answering questions based on the subject matter of approved citizenship training materials, or "[b]y passing a standardized section 312 test . . . by the Legalization Assistance Board with the Educational Testing Service (ETS) or the California State Department of Education with the Comprehensive Adult Student Assessment System (CASAS)." 8 C.F.R. §§ 245a.3(b)(4)(iii)(A)(1) and (2).

Pursuant to 8 C.F.R. § 245a.3(b)(4)(iii)(B), the applicant was interviewed twice in connection with his Form I-687 application, on October 17, 2006 and again on September 10, 2007. On both occasions, the applicant failed to demonstrate a minimal understanding of English and minimal knowledge of United States history and government.

The remaining question, therefore, is whether the applicant satisfies the alternative "basic citizenship skills" requirement by satisfactorily pursuing a course of study recognized by the Attorney General. 8 C.F.R. § 245a.3(b)(4)(i)(B).

Pursuant to 8 C.F.R. § 245a.1(s), "satisfactorily pursuing" means:

(1) An applicant for permanent resident status has attended a recognized program for at least 40 hours of a minimum 60-hour course as appropriate for his or her ability level, and is demonstrating progress according to the performance standards of the English/citizenship course prescribed by the recognized program in which he or she is enrolled (as long as enrollment occurred on or after May 1, 1987, course standards include attainment of particular functional skills related to communicative ability, subject matter knowledge, and English language competency, and attainment of these skills is measured either by successful completion of learning objectives appropriate to the applicant's ability level, or attainment of a determined score on a test or tests, or both of these); or,

(2) An applicant presents a high school diploma or general educational development diploma (GED) from a school in the United States. A GED gained in a language other than English is acceptable only if a GED English proficiency test has been passed. (The curriculum for both the high school diploma and the GED must have included at least 40 hours of instruction in English and U.S. history and government); or,

(3) An applicant has attended for a period of one academic year (or the equivalent thereof according to the standards of the learning institution), a state recognized, accredited learning institution in the United States and that institution certifies such attendance (as long as the curriculum included at least 40 hours of instruction in English and U.S. history and government); or,

(4) An applicant has attended courses conducted by employers, social, community, or private groups certified (retroactively, if necessary, as long as enrollment occurred on or after May 1, 1987, and the curriculum included at least 40 hours of instruction in English and U.S. history and government) by the district director or the Director of the Outreach Program under Sec. 245a.3(b)(5)(i)(D) of this chapter; or,

(5) An applicant attests to having completed at least 40 hours of individual study in English and U.S. history and government and passes the proficiency test for legalization, called the IRCA Test for Permanent Residency, indicating that the applicant is able to read and understand minimal functional English within the context of the history and government of the United States. Such test may be given by INS, as well as, State Departments of Education (SDEs) (and their accredited educational agencies) and Qualified Designated Entities in good-standing (QDEs) upon agreement with and authorization by INS.

To satisfy the English language and basic citizenship skills requirements under the "satisfactorily pursuing" standard as defined at sec. 245a.1(s) of this chapter the applicant must submit evidence of such satisfactory pursuit in the form of a "Certificate of Satisfactory Pursuit" (Form I - 699) issued by the designated school or program official attesting to the applicant's satisfactory pursuit of the course of study as defined at sec. 245a.1(s) (1) and (4) of this chapter; or a high school diploma or general educational development diploma (GED) under sec. 245a.1(s)(2) of this chapter; or certification on letterhead stationery from a state recognized, accredited learning institution under sec. 245a.1(s)(3) of this chapter; or evidence of having passed the IRCA Test for Permanent Residency under sec. 245a.1(s)(5) of this chapter. 8 C.F.R. § 245a.3(b)(4)(iv). Evidence of satisfactory pursuit may be submitted with the application, or, at the latest, at the time of the interview. See 8 C.F.R. § 245a.3(b)(4)(iv).

The applicant has not submitted Form I-699, Certificate of Satisfactory Pursuit, or a high school or GED diploma, or proof of attendance for one academic year at a state recognized learning institution, or evidence of having passed the IRCA Test for Permanent Residency. As such, the applicant has not demonstrated that he "satisfactorily pursued" a course of study recognized by the Attorney General. Therefore, the applicant has not shown that he meets the section 312 requirements or that he satisfactorily pursued an approved course.

The applicant has not shown that he meets the requirements concerning the English language and history and government of the United States or that he is otherwise exempt from such requirements due to a physical or mental disability. Therefore, the applicant is ineligible for permanent residence in the legalization program.

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