

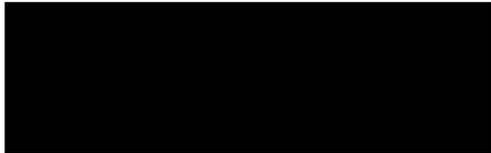


U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

LB



FILE:



Office: TEXAS SERVICE CENTER

Date:

NOV 17 2009

SRC 07 138 55136

IN RE:

Applicant:



APPLICATION: Application for Waiver of Inadmissibility pursuant to Section 245A(d)(2)(B)(i)
of the Immigration and Nationality Act, as amended, 8 U.S.C.
§ 1255a(d)(2)(B)(i)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. 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. If your appeal was sustained or remanded for further action, you will be contacted.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Texas Service Center, and came before the Administrative Appeals Office (AAO) on appeal. The AAO affirmed the director's decision and dismissed the appeal. The AAO will withdraw its previous decision and reopen the appeal *sua sponte*.

The record reflects that the applicant was granted temporary resident status under section 245A of the Immigration and Nationality Act (Act) on October 20, 1987. On April 12, 1989, the applicant filed an application for adjustment from temporary to permanent resident status (Form I-698). During the adjudication of the adjustment application, it was determined that the applicant was inadmissible to the United States based on his Human Immunodeficiency Virus (HIV) positive status. The applicant filed a Form I-690 application to request a waiver of this ground of inadmissibility, and the director denied the application. The director then terminated the applicant's temporary residence, as he was inadmissible to the United States based on his HIV positive status. On September 15, 2009, the AAO dismissed the appeal of the denial of the Form I-690 and the appeal of the applicant's termination of temporary resident status.

The Attorney General [now Secretary, Department of Homeland Security] shall provide for termination of temporary resident status granted to an alien if it appears to the Attorney General [Secretary] that the alien was in fact not eligible for such status. Section 245A(b)(2)(A) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(b)(2)(A).

The director correctly terminated the applicant's temporary residence because he was found to be inadmissible to the United States pursuant to section 212(a)(1)(A)(i) of the Act, 8 U.S.C. § 1182(a)(1)(A)(i), as an alien who is determined to have been infected with HIV, a communicable disease of public health significance. Section 212(a)(1)(A)(i), 8 U.S.C. § 1182(a)(1)(A)(i), of the Act provides that any alien who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome is inadmissible.¹

Aliens infected with HIV upon meeting certain conditions, could have such inadmissibility waived. If the applicant met these conditions, the Attorney General [Secretary], could waive such inadmissibility in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i).

On September 15, 2009, United States Citizenship & Immigration Services (USCIS) issued a memorandum directing its offices to hold in abeyance any waiver application and associated benefit request, which would be denied under current law if the only ground of inadmissibility is

¹ HIV had been determined by the Public Health Service to be a communicable disease of public health significance. 42 C.F.R. § 34.2(b)(4). In a final rule published November 2, 2009, the United States Department of Health and Human Services (HHS) Centers for Disease Control (CDC) removed HIV infection from the definition of communicable diseases of public health significance (Federal Register vol. 74, no. 210, pp. 56547-56562)(effective January 4, 2010).

that the applicant has been diagnosed with HIV infection. USCIS Memorandum from Lori Scialabba, Donald Neufeld and Pearl Chang, *Public Law 110-293, 42 CFR 34.2(b) and Inadmissibility Due to Human Immunodeficiency Virus (HIV) Infection* (September 15, 2009).

In this case the sole ground of inadmissibility identified by the director in denying the Form I-690 waiver application was the applicant's HIV infection.² In accordance with the noted policy, the AAO *sua sponte* reopens the matter, withdraws its September 15, 2009 decision dismissing the appeal of the denial of the waiver application, and withholds adjudication until reexamination of USCIS policy in light of the HHS final rule removing HIV infection from the definition of communicable diseases of public health significance.³

In proceedings for application for waiver of grounds of inadmissibility under section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), the burden of establishing that the application merits approval remains entirely with the applicant. *See* 8 C.F.R. § 245a.2(d)(5). Adjudication of the appeal will be held in abeyance until further notice

ORDER: The appeal is reopened, the AAO decision of September 15, 2009 dismissing the appeal of the waiver application is withdrawn, and adjudication of the appeal is held in abeyance until further notice.

² The AAO notes that the applicant may also be inadmissible as a public charge pursuant to section 212(a)(4)(A) of the Act, 8 U.S.C. § 1182(a)(4)(A).

³ The AAO may *sua sponte* reopen and reconsider any adverse decision. *See* 8 C.F.R. 245a.2(q).