U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 14 2010

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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. 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 termination of the applicant's temporary resident status by the Director, Southern Service Center, came before the Administrative Appeals Office (AAO) on appeal. The AAO affirmed the director's decision and dismissed the appeal. The AAO subsequently withdrew its previous decision and reopened the appeal *sua sponte.* The director's decision terminating the Form I-687 application for temporary residence will be remanded.

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).

At the time of adjudication, 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 at the time of the director's adjudication included infection with the etiologic agent for acquired immune deficiency syndrome, is inadmissible. 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). Thus, the applicant is no longer inadmissible due to his HIV infection.

In this case the sole ground of inadmissibility identified by the director in terminating the applicant's temporary resident status was his HIV infection. The director's termination of the applicant's temporary resident status may not be reversed, however, as 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). The applicant states that the public charge provisions do not apply in this case, as the applicant has worked 40 qualifying quarters of coverage as defined under Title II of the Social Security Act, 42 U.S.C. 401 *et seq,* citing 8 C.F.R. § 213a.2(a)(2)(ii)(C). The cited

regulation applies to situations in which an intending immigrant seeks an immigrant visa, admission as an immigrant, or adjustment of status as an immediate relative, family-based immigrant under section 203(a) of the Act, or employment-based immigrant under section 203(b) of the Act, and does not apply to the application for temporary residence under review. *See*, 8 C.F.R. § 213a.2(a)(2)(i). Thus, whether the applicant has worked 40 quarters under Title II of the Security Act is not relevant.

As stated, an applicant for temporary resident status must establish that he is admissible to the United States as an immigrant. Section 245A(a)(4)(A) of the Act, 8 U.S.C. § 1255a(a)(4)(A). Section 212(a)(4) of the Act states in pertinent part that any alien who: "...is likely at any time to become a public charge is inadmissible." The factors to be taken into account in determining whether an alien is inadmissible under section 212(a)(4) of the Act include the alien's age, health, family status, assets, resources, financial status, education and skill, as well as whether any affidavit of support under section 213A of the Act has been submitted on the alien's behalf. Section 212(a)(4)(B) of the Act.

Further, 8 C.F.R. § 245a.2(d)(4) requires applicants for temporary residence under section 245A of the Act to submit proof of financial responsibility in order to determine whether an applicant is likely to become a public charge. Generally, the evidence of employment submitted by an applicant pursuant to 8 C.F.R. § 245a.2(d)(3)(i) will serve to demonstrate the applicant's financial responsibility during the documented period(s) of employment. If the applicant's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the applicant may be required to provide proof that he or she has not received public cash assistance. Pursuant to 8 C.F.R. § 245a.2(d)(4), the burden of proof to demonstrate the inapplicability of the ground of inadmissibility arising under section 212(a)(4) of the Act lies with the applicant who may provide:

> (i) Evidence of a history of employment (i.e., employment letter, W - 2 Forms, income tax returns, etc.);
>
> (ii) Evidence that he/she is self-supporting (i.e., bank statements, stocks, other assets, etc.); or
>
> (iii) Form I - 134, Affidavit of Support, completed by a spouse in behalf of the applicant and/or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the affidavit of support shall be extended to other family members where family circumstances warrant.

The AAO notes that an applicant for adjustment of status under section 245A of the Act who is determined to be likely to become a public charge may still be admissible under the terms of the Special Rule. 8 C.F.R. § 245a.3(g)(4). Under the Special Rule, an alien who has a consistent employment history and shows the ability to support himself or herself even though his or her

income may be below the poverty level is not inadmissible as a public charge. 8 C.F.R. § 245a.3(g)(4)(iii). The alien's employment history should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. **8 C.F.R. § 245a.3(g)(4)(iii).**

As the record does not establish that the applicant is not likely to become a public charge, the case will be remanded in order for the director to make the determination of whether the applicant is inadmissible to the United States on the grounds that he is likely to become a public charge. The director may request such information from the applicant as is required to make such determination.

If the applicant is determined to be likely to become a public charge, the director must determine whether the applicant is eligible for a waiver of such inadmissibility. The Attorney General [now Secretary, Department of Homeland Security] may 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). 8 C.F.R. § 245a.2(k)(2). The applicant filed a Form I-690 application to request a waiver of the ground of inadmissibility based on the applicant's HIV positive status, and the director denied the application. The AAO initially denied the appeal and then reopened the Form I-690 application. The Form I-690 application will be remanded concurrently with this decision in order for the director to determine whether the applicant, if inadmissible on public charge grounds, is eligible for a waiver of such inadmissibility.

Should the director determine that the applicant is likely to become a public charge, that such grounds may not be waived, and that the termination of the applicant's temporary resident status was correct, the director shall certify such decision to the AAO for review. Should the director find that the applicant is either not likely to become a public charge or that he is likely to become a public charge and that the grounds of inadmissibility may be waived, the director should reinstate the applicant's temporary residence under Form I-687.

The record reflects that the Form I-698 Application to Adjust Status from Temporary to Permanent Residence was denied by the director because the applicant was inadmissible due to his HIV positive infection. The denial of the Form I-698 is not before the AAO for review. The AAO notes that if the director has the occasion to reopen the Form I-698 because HIV positive status is no longer a ground of inadmissibility, that the director must then consider whether the applicant is likely to become a public charge. This ground of inadmissibility may only be waived for an applicant for adjustment of status from temporary to permanent resident who is or was an aged, blind, or disabled individual as defined in section 1614(a)(1) of the Social Security Act. 8 C.F.R. § 245a.3(g)(3)(ii).

The director's decision terminating the applicant's temporary resident status is withdrawn. The case is remanded to the director to determine whether the applicant is likely to become a public

charge, and if so, to determine whether such grounds of inadmissibility may be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

ORDER: The director's decision is withdrawn. The appeal is remanded for further action consistent with the above discussion and the entry of a new decision, which, if adverse to the applicant, shall be certified to the AAO for review.