

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

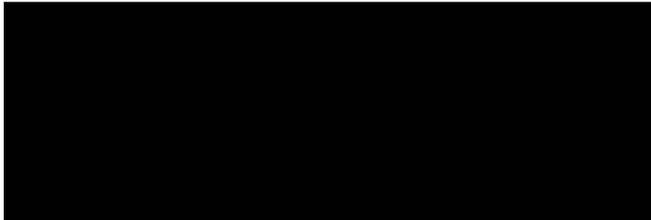
U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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

**PUBLIC COPY**

H<sub>2</sub>



FILE: [REDACTED]  
SRC 07 138 55136

Office: TEXAS SERVICE CENTER

Date: JAN 14 2010

IN RE: Applicant: [REDACTED]

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 subsequently withdrew its previous decision and reopened the appeal *sua sponte*. The application 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.

As the record does not establish that the applicant is not likely to become a public charge, the Form I-687 Application to Adjust to Temporary Residence accompanying the current Form I-690 will be remanded concurrently with this decision 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.

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 the 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 dismissed the appeal of the denial of the Form I-690 and subsequently reopened the appeal. The decision denying the Form I-690 will be remanded concurrently with the Form I-687 in order for the director to determine whether the applicant, if inadmissible on public charge grounds, is eligible for a waiver of such inadmissibility under the current Form I-690. The director may request such information from the applicant as is required to make such determination.

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).

**ORDER:** The director's decision is withdrawn.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