



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

LI

FILE:



Office: California Service Center

Date: OCT 28 2005

IN RE:

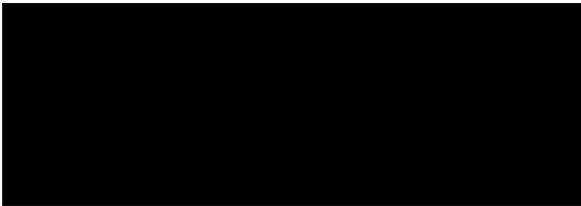
Applicant:



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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have 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, Director
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, Western Regional Processing Facility, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The director denied the application because the applicant failed to demonstrate that she resided continuously in the United States in an unlawful status since January 1, 1982.

On appeal, counsel points out that the applicant derived her status from her father, and he was found to have been in an unlawful status during the requisite period.

An applicant for temporary residence must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, such alien must establish that the period of authorized stay as a nonimmigrant expired before such date through the passage of time or that the alien's unlawful status was known to the Government as of such date. Section 245A(a)(2) of the Act, 8 U.S.C. 1255a(a)(2).

Eligibility also exists for an alien who would otherwise be eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant in order to return to an unrelinquished unlawful residence. 8 C.F.R. § 245a.2(b)(9). An alien described in this paragraph must receive a waiver of the excludable charge as an alien who entered the United States by fraud. Section 212(a)(19) of the Act, 8 U.S.C. § 1182(a)(19); 8 C.F.R. § 245a.2(b)(10).

The applicant, who was an infant at the time, was admitted to the United States on July 1, 1981 as a nonimmigrant visitor. There is no actual proof in the record as to when her authorized stay expired. The director did not find that the applicant still had an authorized stay as of January 1, 1982. Furthermore, the director found that the applicant's parents' authorized stays had expired by January 1, 1982, and he approved their legalization applications. There is no reason to conclude that the applicant, an infant, would have been granted a longer period of authorized stay than her parents. Given all of these factors, it is concluded that the applicant's stay expired prior to January 1, 1982. She meets the threshold legalization requirement of having been in an unlawful status in the United States through the passage of time prior to January 1, 1982. At issue is whether she maintained unlawful status since that date.

The director noted that the applicant was admitted into the United States after January 1, 1982, on June 5, 1985, as an "L-2" dependent of an "L-1" intra-company transferee. The director found that the admission was lawful, that the applicant enjoyed lawful L-2 nonimmigrant status, and the applicant cannot therefore be considered to have been in an unlawful status since the 1985 admission.

Pursuant to 8 C.F.R. § 245a.2(b)(9), supra, an alien who establishes that she resided in the United States in an unlawful status as of January 1, 1982 can be considered to have thereafter maintained unlawful status in spite of a subsequent, seemingly lawful admission as a nonimmigrant, if the alien was simply using the nonimmigrant visa to return to the unlawful, unrelinquished residence. In this case, the director found that

the L-1 principal alien (the applicant's father) and the L-2 mother did reenter the United States with nonimmigrant visas solely to resume an unlawful residence, and granted them legalization. L-2 dependent aliens derive their nonimmigrant status from the L-1 intra-company transferee; if the L-1 violates status and falls into an unlawful status, then so do each of the L-2 dependents. Having found the applicant's father to have remained in an unlawful status in spite of the L-1 admission into the United States, the director cannot nevertheless find the applicant to have been in a lawful L-2 status. Thus, it is concluded that the applicant resided continuously in the United States in an unlawful status since prior to January 1, 1982.

As stated above, an alien who reentered the United States with a nonimmigrant visa by fraud or misrepresentation in order to resume an unlawful residence is inadmissible, and may be allowed to seek a waiver of such inadmissibility. However, counsel is correct; the applicant, as a minor, cannot be held to have engaged in fraud or misrepresentation when she reentered the United States. Therefore, she is not inadmissible, and no waiver is required.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, 8 U.S.C. 1255a, and is otherwise eligible for adjustment of status. 8 C.F.R. 245a.2(d)(5). The applicant has met this burden.

ORDER: The appeal is sustained. The director shall complete action on the application for temporary residence and, if it is granted, advise the applicant as to the procedure for applying for adjustment to permanent residence.