

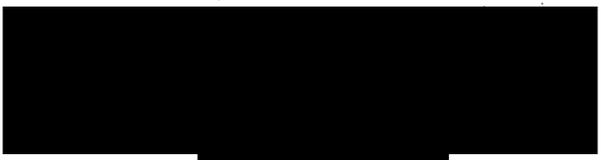
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FILE: [Redacted]
XVN 88-158-1018

Office: California Service Center

Date: DEC 21 2007

IN RE: Applicant: [Redacted]

APPLICATION: Application for Temporary Resident Status under Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT: SELF REPRESENTED

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 termination of the applicant's temporary resident status by the Director, California Service Center, is before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed, and the record will be returned to the California Service Center.

At his interview on August 12, 1988 conducted by an officer of the Immigration and Naturalization Service (or Service, now Citizenship and Immigration Services, or CIS), the applicant was recommended for a grant of temporary resident status pursuant to section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a. However, a check of Federal Bureau of Investigation (FBI) records conducted on November 14, 1988, revealed that in 1986 the applicant had been arrested and charged by the Los Angeles Police Department with "lewd or lascivious acts with a child under 14." On April 7, 1989, the applicant was therefore sent a Request for Information, *i.e.*, the court disposition in the relevant case, noting that "failure to submit the requested information will result in a decision based on the evidence of record." Although there is no indication that the applicant responded, he was subsequently granted temporary resident status on July 18, 1989. According to Service CLAIMS database information, the following day, July 19, 1989, the director issued a Notice of Intent to Terminate the applicant's temporary resident status based on the information in the FBI report, instructing the applicant to submit the relevant court disposition, if available, or a certified letter from the courts where the hearings were held. The record reflects that it was sent to the applicant's address of record on June 26, 1991. The applicant did not respond, and the director issued a Notice of Termination on September 9, 1991. The record reflects that both notices were returned as undeliverable by the post office even though they were sent to the applicant's address of record.

On appeal, the applicant submits a Form I-694, Notice of Appeal of Decision Under Section 210 or 245A, dated July 11, 2007. In an attached statement, he claims that he has been living in the United States since 1976; applied for "amnesty" and was informed that his application had been approved in the late 80's; and cannot believe that his case is still pending, even though he went often over the years to "the Plaza del Sol" [immigration office in Los Angeles] to ask about his case and is now appealing for the third time – some 20 years later – because the Service lost his prior appeals.

The record reflects that the applicant was detained on February 7, 1993 when he sought admission as a temporary resident returning to the United States. He was informed by the Service at that time that his status as a temporary resident had been "denied" on September 9, 1991; he explained that he thought his case was still pending, that he was in contact with the Service and had been informed by telephone that a letter had been sent to him at a former address in 1991, and that he had been trying to get a copy of that letter; he also stated that he had sent letters and a money order for \$85 for the "last phase," which had been returned to him with no explanation. Upon his request, he was given a hearing with an Immigration Judge who advised him to file an appeal. The record reflects that he filed a Form I-694 appeal on May 10, 1993.

He was later sent another "Request for Additional Information" by the Service, on March 31, 1997, acknowledging receipt of the Form I-694 on May 10, 1993 and stating: "We regret to inform you that as of this date, your appeal could not be located within your file. It is hereby requested that you submit a 'reconstructed' appeal, meaning, a copy of the original appeal and supporting documentation, or a new appeal drafted with new or additional documentation in support of the appeal." The record reflects ongoing contact by the applicant with the Service in the years following his grant of temporary resident status, including filing

a Form I-698, Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the [Act]), on March 3, 1994, with his school records from 1978 to 1982; and reporting for fingerprinting. A note in the file, undated, indicates that a CIS officer informed the applicant of the need to reconstruct his I-694 in April 2006. The record also contains a Request for Evidence (Form I-72) sent by CIS to the applicant on June 25, 2007, asking the applicant to furnish a copy of his May 10, 1993 Appeal Form and to include copies of any supporting documentation that was filed with it. This request does not specifically refer to the missing court disposition.

The record also contains a copy of the FBI "official RAP sheet data as of 04/26/2006" showing that the arrest and charge of February 26, 1986 by the Los Angeles Police Department is followed by the notation "PROS REL-DET ONLY/LACK OF CORPUS." An undated Interoffice Memo refers to the arrest and clarifies that it was "detention only, no charges filed." That memo also states that the applicant's "reconstructed 1993 and 1997 appeal are also missing," referring mistakenly to a 1991 appeal and "a third reconstructed appeal, from 2001" in the file. None of the referenced appeals are contained in the record.

As noted above, the record maintained by the Service and CIS in this case is incomplete. It is not clear what documents, if any, accompanied his original appeal. Both the applicant and CIS have stated that the applicant submitted two appeal forms, in 1993 and in 1997, and both were lost. Although the only appeal in the record, dated July 11, 2007, does not include proof that the applicant's 1986 arrest did not result in a conviction, given the admitted gaps in the record, the AAO has no way of knowing if and when the applicant provided such proof to the Service. Moreover, as the 2006 FBI report clarifies that no conviction resulted from that arrest, the AAO finds that the arrest cannot serve as a basis of ineligibility or as a basis to terminate the applicant's temporary resident status.

The issue in this case is whether the applicant was correctly found to be ineligible for temporary resident status, and whether his status was correctly terminated, based on an arrest and charge that appeared on the applicant's FBI record. Related to this issue is the relevance of the applicant's potential failure to provide the court disposition of this arrest or other information indicating the lack of a conviction in light of multiple agency error and failure to maintain records.

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status, and his status can be terminated on the same basis. Section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B); section 245A(b)(2) of the Act, 8 U.S.C. § 1255a(b)(2). The district terminated the applicant's status on this basis of ineligibility, as stated in the Notice of Intent to Terminate. However, the AAO finds that the record does not support this conclusion. The director's finding of ineligibility and basis of termination of status is a 1989 FBI record of an arrest and police charge in 1986; when updated in 2006, however, the FBI record clearly indicated that no charges were filed in court and no conviction resulted from the arrest.

Regarding the applicant's failure to provide the court disposition of his arrest or other information indicating the lack of a conviction, given the facts of this case and the multiple errors committed by the Service, the AAO finds that the applicant should not be penalized for his failure to provide such evidence. First, it cannot be concluded that he did not provide such evidence as it is not possible to determine whether the applicant

responded to any request for information because of the documents admittedly missing from the record. In addition, the applicant was granted temporary resident status pursuant to section 245A of the Act on July 18, 1989, after the request for a court disposition had been sent to him. It is therefore reasonable for him to have concluded that such a document was no longer needed once his status was approved. As he noted in his 2007 "reconstructed" appeal, he was later given contradictory information regarding his grant of status and his almost simultaneous "termination" of status and, as a result, he may not have responded as required. He appealed in 1993 as instructed and tried to reconstruct his appeal at least two times due to agency error.

The appeal of the director's decision to terminate was untimely filed and must be rejected. An adverse decision on an application for temporary resident status may be appealed to the AAO and shall be filed with the Service Center or District Office within thirty (30) days after service of the notice of denial or termination. An appeal received after the thirty-day period has tolled will not be accepted. 8 C.F.R. § 245a.2(p). Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. 8 C.F.R. § 103.5a(b).

The director issued the Notice of Termination on September 9, 1991 and mailed it to the applicant's address of record. The appeal was filed on May 10, 1993 (the appeal in the record, dated July 11, 2007, will be considered a reconstructed version of the missing 1993 appeal). Therefore, the appeal was untimely filed and must be rejected.

ORDER: The appeal is rejected.