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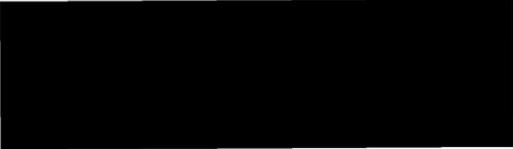
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FILE: Office: Vermont Service Center Date: JAN 08 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The termination of the applicant's temporary resident status by the Director, Vermont Service Center, is before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director terminated the applicant's temporary resident status because the applicant failed to file an application for adjustment of status from temporary to permanent residence within the 43-month application period.

On appeal, counsel states there were exceptional circumstances beyond the control of the applicant that prevented him from filing a timely application.

The status of an alien lawfully admitted for temporary residence under section 245A(a)(1) of the Act may be terminated at any time if the alien fails to file for adjustment of status from temporary to permanent resident on Form I-698 within forty-three months of the date he/she was granted status as a temporary resident under § 245a.1 of this part. 8 C.F.R. § 245a.2(u)(1)(iv).

The applicant was granted temporary resident status on October 10, 1987. The 43-month eligibility period for filing for adjustment expired on May 10, 1991. The Application for Adjustment of Status from Temporary to Permanent Resident (Form I-698) was first received by the Immigration and Naturalization Service (INS) on August 24, 1994. The director, therefore, denied the application and terminated the applicant's temporary resident status.

Counsel points out that the denial of the adjustment application was not preceded by a notice of intent to deny, and that the director incorrectly stated in the termination notice that such a notice was issued on April 9, 2003. Counsel is correct on both points. Nevertheless, there is no requirement for the issuance of a notice of intent to deny the application, and the director did comply with the requirement for the issuance of a notice of intent to terminate status on April 9, 2003. The director's mischaracterization of the intent notice is innocent error that does not affect the outcome of this proceeding.

Counsel explains that the applicant lost his job in 1990, and the applicant's life spiraled downward into chronic alcoholism and homelessness for the next four years. Counsel provides evidence of the applicant's treatment. Further, the record reveals the applicant was arrested for numerous alcohol-related offenses during that period.

The point in 1990 at which the applicant lost his job has not been divulged. Even if it were early in the year, the applicant had more than two years prior to that, from October 1987 to January 1990, to file his adjustment application. The applicant was certainly aware of the requirement to file the application, as he undertook the preparatory English language and civics course during the summer of 1989 and was awarded his Certificate of Satisfactory Pursuit on September 13, 1989. His prior representative indicated in a letter dated June 9, 1994 that the applicant was issued a temporary residence card with an expiration date of February 4, 1990. She also stated that he renewed the card on three different occasions. If by that she meant to say he renewed it three times *prior* to February 4, 1990, then he was capable of filing applications, or obtaining assistance to do so, prior to 1990. If she meant the renewals were obtained *after* February 4, 1990, then it is further indication that he was competent to file applications through May

10, 1991, the end of the 43-month period. While there is no question that the applicant suffered from alcoholism, it cannot be held that he was unable to file the adjustment application throughout the entire 43-month period.

Counsel asserts the law provides a presumption which is read into every federal statute of limitations that filing deadlines are subject to equitable tolling. He also mentions that Citizenship and Immigration Services may rebut the presumption of equitable tolling by showing that there is a good reason to believe that Congress did not want the equitable tolling doctrine to apply. The law, at section 245A(f)(2) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a(f)(2), states:

No review for late filings. - No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

Thus, it is concluded that Congress, by disallowing a review of a late filing, did not want the doctrine of equitable tolling to apply.

The legacy Immigration and Naturalization Service and private voluntary organizations widely publicized the requirement of applying for adjustment to permanent residence within the requisite period. Furthermore, the original eligibility period of 31 months was extended to 43 months to better enable applicants to file timely applications. The burden to file the adjustment application in a timely manner remains with the applicant. *See* 8 C.F.R. § 245a.3(d).

The applicant's statements made on appeal have been considered. Nevertheless, there is no waiver available, even for humanitarian reasons, of the requirements stated above. As the applicant has not overcome the grounds for termination of status, the appeal must be dismissed.

Beyond the director's decision, the applicant is ineligible for temporary residence because he has been convicted of twelve misdemeanors. The applicant's criminal record in Latham, Massachusetts is as follows:

1. Arraigned on April 18, 1989 for *Operating Under Influence of Liquor*, docket # [REDACTED] convicted on May 8, 1989;
2. Arraigned on February 21, 1990 for *Shoplifting*, docket # [REDACTED], convicted on May 1, 1990;
3. Arraigned on February 23, 1990 for *Assault and Battery with Dangerous Weapon*, docket # [REDACTED], convicted on May 17, 1990;
4. Arraigned on February 23, 1990 for *Leaving Scene: Property Damage*, docket # [REDACTED] convicted on May 17, 1990;
5. Arraigned on March 30, 1990 for *Intimidation of a Witness*, docket # [REDACTED] convicted on May 17, 1990;
6. Arraigned on April 27, 1992 for *Trespass*, docket # [REDACTED], convicted on September 22, 1992;
7. Arraigned on September 18, 1992 for *Drinking Alcohol in Public*, docket # [REDACTED] convicted on September 22, 1992;

8. Arraigned on January 19, 1993 for *Disturbing the Peace (Breach)*, docket # [REDACTED] convicted on January 26, 1993;
9. Arraigned on March 4, 1993 for *Consuming Alcoholic Beverage on Public Street*, docket # [REDACTED] convicted on March 31, 1993;
10. Arraigned on April 5, 1993 for *Disturbing the Peace (Breach)*, docket # [REDACTED] subsequently convicted;
11. Arraigned on May 14, 1993 for *Disturbing the Peace (Breach)*, docket # [REDACTED], convicted on July 13, 1993;
12. Arraigned on July 23, 1993 for *Disorderly Person*, docket # [REDACTED] convicted on August 9, 1993.

The temporary resident status of an alien who has been convicted of a felony or three or more misdemeanors in the United States may be terminated at any time. 8 C.F.R. § 245a.2(u)(1)(iii). Thus, the applicant is no longer eligible for temporary residence on this basis as well.

It is noted that counsel has submitted documentation indicating that convictions # 2, 3, 4 and 5 above were later vacated on June 18, 2001. Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Any subsequent action which overturns a conviction, other than on the merits of the case, is ineffective to expunge a conviction for immigration purposes. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Thus, the applicant remains convicted of twelve misdemeanors.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

The applicant is ineligible for temporary residence for the above stated reasons, with each considered as an independent and alternative basis for termination of status.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.