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FILE: [REDACTED]
XSI-87-015-1093

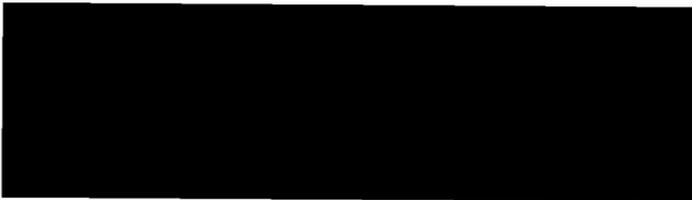
Office: CALIFORNIA SERVICE CENTER

Date **NOV 05 2008**

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the service center that processed 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 Director, California Service Center, denied the application for temporary residence pursuant to section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a, and the applicant appealed that decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on August 8, 2007. The applicant filed a Form I-290B Motion to Reopen on September 6, 2007 and provided additional information.¹ In response, the AAO will *sua sponte* reopen and reconsider the matter. The AAO's decision of August 8, 2007 will be withdrawn, and the appeal will be sustained.

The director denied the applicant's temporary resident status because the applicant had failed to comply with the fingerprinting requirements set forth at 8 C.F.R. § 245a.2(d). Upon further review of the record, however, the AAO finds that there is ample evidence that the applicant attempted to comply with those requirements but was either refused or informed by Citizenship and Immigration Services (CIS) that she did not need to have her fingerprints taken. The AAO has reopened the applicant's claim to consider this evidence and to make a *de novo* decision based on the evidence in the record.² The issue now before the AAO is whether the applicant's failure to have her fingerprints taken, despite evidence of her efforts to do so, rendered her ineligible for adjustment to temporary resident status pursuant to section 245A of the Act.

Applicants for temporary residence under section 245A of the Act must provide documentation in support of their eligibility for the legalization program. 8 C.F.R. § 245a.2(d). Such evidence shall include "documents establishing proof of identity, proof of residence, and proof of financial responsibility, as well as photographs, a complete fingerprint card (Form FD-258), and a completed medical report of examination." *Id.* Applicants for immigration benefits are required to be fingerprinted at a CIS Application Support Center (ASC).

In this case, the applicant filed her Form I-687 Application for Temporary Resident under section 245A of the Act on August 5, 1988. In a Notice of Decision, dated August 7, 2006, the director denied the application, noting that on November 5, 2004, CIS sent the applicant a request to appear for fingerprinting at the "USCIS Salinas" during the 87-day period beginning on November 19, 2004, but that CIS has no record that she appeared for fingerprinting during that period and no record that she requested to have her fingerprint appointment rescheduled during that period. The director found, therefore, that the applicant had failed to meet her burden of establishing admissibility or eligibility for the benefit sought.

On appeal the applicant asserts, through counsel, that she did appear for fingerprinting at CIS during the 87-day period beginning November 19, 2004. She explained that "[s]he went to the ASC in Santa Rosa, CA on or about 11/23/2004 and she went to USCIS San Jose office on 12/08/2004. Each time the Service refused to take her fingerprints." In support of this statement the applicant has submitted a declaration, dated September

¹ Motions to reopen or reconsider a decision on an application for temporary residence are not permitted. 8 C.F.R. § 245a.2(q). The AAO may, however, *sua sponte* reopen any proceeding conducted by the AAO under 8 C.F.R. § 245a and reconsider any decision rendered in such proceeding. 8 C.F.R. § 103.5(b).

² The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

6, 2007, in which she provides a detailed account of the dates and places of her attempts to have her fingerprints taken along with supporting documents that are probative of her past attempts.

The applicant submits the following evidence:

- **A copy of a Fingerprint Notice, dated November 5, 2004.** The applicant states that this initial appointment letter was sent to her mother's address, and that the applicant did not receive it until November 19, 2004, the date of her scheduled appointment. The notice was sent to the applicant at [REDACTED]. A review of CIS records confirms that at the time the notice was mailed, her parents resided at [REDACTED] but the applicant's address of record was [REDACTED].
- A copy of the applicant's INFOPASS appointment notice, printed on November 23, 2004, for December 8, 2004 for an "Information Question." In her declaration, the applicant states that on November 23, 2004, she went to the ASC in Santa Rosa California, where a CIS officer refused to fingerprint her, noting that there was no need for fingerprints since she had an approved work permit (Form I-765). The applicant states that she then tried to obtain more information from CIS, and that she was given the same information by the CIS office in San Jose on December 8, 2004 when she was given her work permit. The INFOPASS notice supports this statement, showing that her appointment was for that date.
- A copy of a letter to the California Service Center from the applicant's former attorney, dated August 28, 2006, requesting a new fingerprint appointment, along with the applicant's statement of August 24, 2006, explaining her earlier attempts to be fingerprinted. The letter was written after the applicant received the Notice of Denial in August 2006 for failure to appear for fingerprinting and after she had, in response, attempted once again to have her fingerprints taken at the Santa Rosa ASC, but was refused because her 2004 notice was too old. The applicant also pointed out in her statement accompanying the letter that on November 19, 2004 she had received both the Fingerprint Notice and a separate notice that her employment authorization request (Form I-765 application) was granted. She added that at the bottom of the Fingerprint Notice were instructions to disregard the notice if her application had been granted. She tried to reschedule her appointment, as noted above, but was confused by the instruction and the fact that she had simultaneously been notified that her Form I-765 application had been granted; she was also informed that she did not need fingerprinting for that reason.
- A copy of an ASC Appointment Notice for biometrics processing in connection with the applicant's I-765 application, stamped to indicate that biometrics were taken on May 23, 2007. The applicant points out that having had her biometrics taken at the ASC in Santa Rosa for her work permit indicates that she is not trying to hide any information or avoid being fingerprinted.
- A copy of the applicant's INFOPASS appointment notice, printed on August 29, 2007, for August 30, 2007 for a "Question about case." The applicant explains that she made the appointment to be issued a new fingerprint notice but was told that she could not get a new fingerprint notice until she filed a Motion to Reopen her case.

The applicant concludes in her declaration on appeal that she did everything in her power to have her fingerprints taken, both in 2004 and in 2006, and reasonably relied on advice from two different CIS Offices, in Santa Rosa and San Jose in 2004 that she did not need them. She asserts that it is not just to deny her case for failure to provide fingerprints that she tried, but was unable, to obtain. The AAO agrees.

The evidence submitted by the applicant supports her account of her attempts to be fingerprinted. The evidence also rebuts the director's finding that CIS "has no record that you appeared for fingerprinting during [the 87-day] period [beginning on November 19, 2004]." The evidence clearly shows that the Fingerprint Notice was misdirected to her parents' apartment; she claims that she went to the ASC in Santa Rosa to see if she could be fingerprinted there, but was turned away; the evidence shows that she then requested an INFOPASS appointment on November 23, 2004 for an "Information Question" to clarify the fingerprint requirement and set a new appointment if necessary; she appeared for this appointment at a CIS office in San Jose on December 8, 2004 when she was given her work permit. She claims that she was again told that fingerprints were unnecessary. These appointments and appearances fall within the 87-day period noted above. Moreover, the applicant's explanations of why she made these appointments are reasonable, as is her confusion regarding the fingerprinting requirement, given the concurrent processing of her Form I-765 and her pending I-687 Application, the different requirements for both and the apparent lack of clear instructions by CIS regarding those requirements. The I-687 Application cannot, therefore, be denied on the basis that the applicant failed to comply with the requirement to be fingerprinted and thus failed to meet her burden of establishing admissibility or eligibility for temporary residence.

In summary, the AAO finds that the applicant has provided proof that she complied to the extent possible with CIS requirements, but was unable to timely provide her fingerprints. Given the circumstances noted above, failure to provide the fingerprints cannot serve as a basis for denial. As the applicant has overcome the basis for denial, her case is being remanded to the Service Center for processing of her application for adjustment to temporary resident status under section 245A of the Act. The AAO's decision of August 8, 2007 is withdrawn. The appeal is sustained, and the case remanded for further action in compliance with this decision. If the director's decision is adverse to the applicant, the case shall be certified to the AAO for review.

ORDER: The AAO's decision of August 8, 2007 is withdrawn. The appeal is sustained. The case is remanded for further action in compliance with this decision.