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U.S. Citizenship
and Immigration
Services

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FILE:

XPS-89-119-00611

Office: Miami

Date:

FEB 25 2009

IN RE:

Applicant:

APPLICATION: Application for Adjustment from Temporary to Permanent Resident Status 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. 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 if your case was remanded for further action, you will be contacted.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for adjustment from temporary resident status to permanent resident status was denied by the Director, Miami. It is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant twice failed to demonstrate a minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States.

On appeal, the applicant states through counsel that he is developmentally disabled as defined at 8 C.F.R. §245a.3(b)(4)(ii)(D), and should have been provided the opportunity to present medical evidence of his disability.

Any alien who has been lawfully admitted for temporary resident status may apply for adjustment of status if the alien (A) can demonstrate that he or she meets the requirements of section 312 of the Immigration and Nationality Act (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); **or**, (B) can demonstrate he or she is satisfactorily pursuing a course of study recognized by the Attorney General to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States. *See* 8 C.F.R. § 245a.3(b)(4).

An applicant may demonstrate that the section 312 requirements have been met by speaking and understanding English during the course of the permanent residence interview, **or** by passing a standardized section 312 test given in the English language by the Legalization Assistance Board with the Educational Testing Service or the California State Department of Education with the Comprehensive Adult Student Assessment System. *See* 8 C.F.R. § 245a.3(b)(4)(iii).

The applicant appeared for the permanent residence interview on August 17, 2006, and failed the history, government and English language test on that date. The applicant was given another opportunity to demonstrate these competencies on April 26, 2007 pursuant to 8 C.F.R. § 245a.3(b)(4)(iii)(B), and again failed the history, government and English language test. The director found the applicant ineligible to adjust status from temporary to permanent resident, and denied the Form I-698 application.

On appeal, counsel states that the applicant did not have legal representation at his adjustment interview and should have been provided the opportunity to submit medical evidence of his disability.¹ Counsel submits a psychological evaluation of the applicant indicating a severely impaired level of performance on five levels of cognitive abilities, functional limitations, alcohol abuse, illiteracy, developmental delays, and the inability to learn new tasks.

The regulation at 8 C.F.R. § 245a.3(b)(4)(ii)(D) provides that the English and civics requirements shall be waived without formal application for persons who, as of the date of application or the date of eligibility for permanent residence, whichever is later, are developmentally disabled as defined at 8

¹ The record reflects that the applicant was represented by newly retained counsel at the time of the second interview.

C.F.R. § 245a.1(v), which defines developmental disability as a severe, chronic disability of a person which:

- (1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (2) Is manifested before the person attains age twenty-two;
- (3) Is likely to continue indefinitely;
- (4) Results in substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and
- (5) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

A person who claims exemption from the English and civics requirements on the grounds of developmental disability must submit medical evidence of his or her developmental disability. 8 C.F.R. § 245a.3(b)(4)(ii)(D)

It is noted that on the Form I-693 Medical Examination of Aliens Seeking Adjustment of Status the physician who examined the applicant on July 9, 1987 indicated no apparent defect, disease or disability. He did not check any of the boxes indicating that the applicant suffered from mental defect, mental retardation or other congenital disability. The psychological evaluation submitted on appeal indicates the applicant's functional limitations, but does not state that the applicant's disability manifested before age 22, requires special, interdisciplinary or generic treatment or other services of extended duration and individually planned and coordinated, or that the functional limitations are the result of mental and/or physical impairments. The applicant has not established that he is developmentally disabled as defined in the regulation.

The applicant has not shown that he meets the requirements concerning the English language and history and government of the United States. Therefore, he is ineligible for permanent residence in the legalization program.

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