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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

FILE:

Office: CHICAGO

Date:

JUN 23 2009

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. 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 remanded for further action, you will be contacted.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The District Director, Chicago, terminated the applicant's temporary resident status. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The director terminated the applicant's temporary resident status because the applicant failed to apply for adjustment to permanent resident status within the required period.

On appeal, the applicant requests reconsideration of the termination of his temporary resident status.

An adverse decision on an application for temporary resident status may be appealed to the AAO; the appeal with the required fee must be filed within 30 days after service of the notice of denial. 8 C.F.R. § 245a.2(p). The date of filing is not the date of mailing, but the date of actual receipt. See 8 C.F.R. § 103.2(a)(7)(i). An appeal that is not timely filed will not be accepted. 8 C.F.R. § 245a.2(p).

In this case, the director issued the notice of denial on June 5, 2007 and mailed it to the applicant's address of record. The appeal was received on July 11, 2007, 36 days later. Therefore, the appeal was untimely filed and must be rejected.

It is noted that even if the appeal was timely, it could not be sustained.

Section 245A(b)(2) of the Act states, in pertinent part:

Termination of temporary residence. – The [Secretary of Homeland Security] shall provide for termination of temporary resident status granted an alien under subsection (a) –

* * *

(C) at the end of the 43rd month beginning after the date the alien is granted such status, unless the alien has filed an application for adjustment of such status pursuant to paragraph (1) and such application has not been denied.

The corresponding regulation at 8 C.F.R. § 245a.2(u)(1)(iv) further prescribes that 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 “[t]he alien fails to file for adjustment of status from temporary resident to permanent resident on Form I-698 within forty-three (43) months of the date he/she was granted status as a temporary resident[.]” The applicant bears the burden to timely file the application for adjustment from temporary to permanent resident status within the prescribed 43-month period. See 8 C.F.R. § 245a.3(b)(1). The statute and regulations do not allow a waiver of untimely filing.

The record in this case shows that the applicant was granted temporary resident status under section 245A(a)(1) of the Act on June 20, 1989. The record also shows that the applicant had until January 20, 1993 in which to file his Form I-698, Application to Adjust Status from Temporary to Permanent Resident. The record shows that the applicant filed two Form I-698 applications. He filed a Form I-698 on March 3, 1993 and another on October 30, 2006. The director sent a Notice

of Intent to Terminate Temporary Resident Status (NOITTRS) to the applicant at his last known address on March 9, 2007. The applicant responded to the NOITTRS by stating that he hired an attorney in late 1992 or 1993 to file his Form I-698 application. He also stated that although he attempted on several occasions to contact his former attorney, who has subsequently been disbarred from the practice of law, he was unable to ascertain the status of his case. He further stated that the records pertaining to his Form I-698 application are not in his possession because his former attorney's office is closed and he cannot be found.

The director terminated the applicant's temporary resident status after determining that the applicant had failed to file his Form I-698 application within the prescribed 43-month filing period which ended on January 20, 1993. The director noted that the initial Form I-698 application was received by USCIS on March 4, 1993 and was denied on March 12, 1993 because it had been filed subsequent to the filing period. The director also noted that service records showed that a copy of the denial notice dated March 12, 1993 was mailed to the applicant's last known address and to his former attorney's office.

On appeal, counsel asserts that the previous attorney mishandled the applicant's case and that the applicant was unable to follow up on his case because of death in his family. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

In the instant case, the applicant failed to file an application for adjustment of status by the end of the 43rd month after he was granted temporary resident status. Although counsel claims that the former attorney mishandled the applicant's case he has presented no evidence, other than a notice of disbarment, to demonstrate that the attorney's disbarment was directly related to his mishandling the applicant's case. It is noted that a Form I-698 application was filed in 1993, but that its filing date was after the 43-month filing period. It is also noted that although counsel asserts that a death in the family made it difficult for the applicant to follow up with his case, there is no waiver for untimely filing the Form I-698. 8 C.F.R. § 103.3(a)(3)(iv). Accordingly, the applicant's status was properly terminated pursuant to section 245A(b)(2) of the Act and the corresponding regulation at 8 C.F.R. § 245a.2(u)(1)(iv). The director properly set forth in the Notice Decision a valid basis for termination of the applicant's status. The applicant's statement on appeal fails to overcome the basis for the termination.

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