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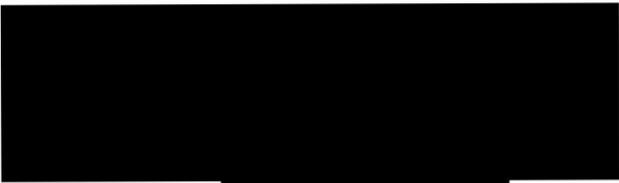
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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Services

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FILE: [REDACTED]
MSC-08-099-12205

Office: TEXAS SERVICE CENTER

Date: **MAR 03 2009**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Adjustment from Temporary to Permanent Resident Status under 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 denial of the applicant's permanent resident status by the Director, Texas Service Center, is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the file returned to the director for further action and consideration.

The director determined that the applicant is ineligible to adjust status from temporary to permanent resident because his temporary residence was terminated.

The applicant, through counsel, filed a motion to reopen the proceeding stating that he failed to timely file his application for permanent resident status due to USCIS error. However, motions to reopen a proceeding are not permitted for permanent residence applications filed under section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255(a). *See* 8 C.F.R. § 103.5(b). Therefore, the AAO will treat counsel's motion to reopen as an appeal.

The regulation at 8 C.F.R. § 245a.3(b) provides:

Any alien who has been lawfully admitted for temporary resident status under section 245A of the Act, such status not having been terminated, may apply for adjustment of status of that of an alien lawfully admitted for permanent residence.

The director determined that pursuant to the above cited regulation, the applicant is no longer eligible to apply for permanent resident status because his temporary residence was terminated. On appeal, the applicant addressed the basis for the termination of his temporary resident status. However, the instant appeal is related to the denial of his application for permanent residence. The applicant has not addressed the denial of this application in his appeal. Therefore, the appeal must be dismissed.

The AAO finds, however, that the record reveals significant errors in the adjudication of this matter that warrants the director to *sua sponte* reopen the applicant's Form I-687, Application for Status as a Temporary Resident, for further action and consideration.¹

On October 18, 2007, the director terminated the applicant's temporary residence status because he failed to respond to the notice of intent to terminate. The director determined that because the applicant failed to respond to the notice, his temporary resident status would be denied as abandoned. The director indicated that pursuant to the regulation at 8 C.F.R. § 103.2(b)(15), a denial due to abandonment may not be appealed. However, this regulation does not pertain to a proceeding for termination of temporary residence under section 245A of the Act. The regulation at 8 C.F.R. § 245a.2(u) delineates the procedures for termination of temporary resident status. This regulation provides in pertinent part:

¹ The Regional Processing Facility director may reopen and reconsider any adverse decision *sua sponte*. 8 C.F.R. § 245a.3(k).

If the alien's status is terminated, the director of the regional processing facility shall notify the alien of the decision and the reasons for the termination . . . The alien may appeal the decision to the Associate Commissioner, Examinations (Administrative Appeals Unit). Any appeal with the required fee shall be filed with the regional processing facility within thirty (30) days after the service of the notice of termination.

According to the above cited regulation, the applicant should have been informed of his right to file an appeal with the AAO within 30 days after service of the notice of termination. Therefore, the director's decision to deny (terminate) the applicant's temporary resident status as abandoned is in error.

The AAO further finds that the record reflects additional errors in the adjudication of this matter that warrant action by the director. The applicant was granted temporary resident status on January 23, 2004 by the Texas Service Center, without a Field Office or District Office interview. According to 8 C.F.R. § 245a.2(j), each applicant for temporary resident status shall be interviewed by an immigration officer, except that the interview may be waived for a child under 14, or when it is impractical because of the health or advanced age of the applicant. The applicant in this case is neither under 14 nor of advanced age. Additionally, the applicant has not shown that an interview would be impractical because of health concerns.

An issue to be addressed in this case is whether the applicant was in a continuous unlawful status for the duration of the requisite period. The record reflects that the applicant was issued an A-2 multiple entry visa in September 1976. The applicant was admitted to the United States on January 16, 1983 on A-2 status. The regulation at 8 C.F.R. § 245a.2(c)(3) provides that eligibility for temporary resident status pertains to:

An alien who establishes that he or she entered the United States as a nonimmigrant prior to January 1, 1982, and whose unlawful status was known to the Government as of January 1, 1982, and who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

The *Northwest Immigrants Rights Project, et al., v. United States Citizenship and Immigration Services*, CIV NO. No. 88-379R (W.D. Wash.) September 9, 2008 (NWIRP Settlement Agreement) provides the following enumerated categories aliens in an unlawful status known to the government:

(1) Persons who violated the terms of their nonimmigrant status prior to January 1, 1982 in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records

of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government;

(2) Persons who violated the terms of their nonimmigrant visas before January 1, 1982, for whom INS/DHS records for the relevant period (including required school and employer reports of status violations) are not contained in the alien's A-file, and who are unable to meet the requirements of 8 C.F.R. §§ 245a.1(d) and 245a.2(d) without such records; and

(3) Persons whose facially valid "lawful status" on or after January 1, 1982 was obtained by fraud or mistake, whether such "lawful status" was the result of (a) reinstatement to nonimmigrant status; (b) change of nonimmigrant status pursuant to INA § 248; (c) adjustment of status pursuant to INA § 245; or (d) grant of some other immigration benefit deemed to interrupt the continuous unlawful residence or continuous physical presence requirements of INA § 245A.

NWIRP Settlement Agreement paragraph 2 at pages 6, 7.

Based on the foregoing, the AAO suggests that the director reopen the matter *sua sponte*, withdraw the termination of the applicant's temporary resident status and forward his record to the local field office with jurisdiction over this matter. The AAO suggests that the applicant should be interviewed at the field office to assess his eligibility for temporary resident status in light of evidence in the record indicating that he was in lawful status during the requisite period. The director should then, pursuant to 8 C.F.R. § 245a.2(u), issue the applicant a notice of intent to terminate, based on the late filing of his permanent residence application, and any other findings the director has made. If the director terminates the applicant's temporary resident status, the applicant shall be notified of his right to appeal the termination to the AAO. The AAO notes that the applicant's permanent residence application may be reopened by the director *sua sponte* if the applicant overcomes the basis of the termination.

ORDER: The appeal is dismissed and the file returned to the director for further action and consideration pursuant to the above.