



U.S. Citizenship
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Services

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FILE: [REDACTED]
SRC 07 138 55136

Office: TEXAS SERVICE CENTER

Date: **SEP 15 2009**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Inadmissibility pursuant to Section 245A(d)(2)(B)(i) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a(d)(2)(B)(i)

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 waiver application was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the waiver application will be denied.

The record reflects that the applicant was granted temporary resident status under section 245A of the Immigration and Nationality Act (Act) on October 20, 1987. On April 12, 1989, the applicant filed an application for adjustment from temporary to permanent resident status (Form I-698). During the adjudication of the adjustment application, it was determined that the applicant is excludable (now referred to as inadmissible) based on his HIV positive status. The applicant filed a Form I-690 application to request a waiver of this ground of inadmissibility.

On January 30, 1992, the Director, Southern Service Center (now the Texas Service Center) issued the applicant a notice of intent to terminate his temporary residence based on his inadmissibility as an alien who is determined to have been infected with HIV. On July 23, 1992, the Director determined that the applicant failed to submit sufficient documentation to establish his eligibility for a waiver of this ground of inadmissibility and terminated his temporary residence.¹

The applicant, through former counsel, appealed the termination of his residence to the AAO on September 8, 1992. On February 28, 2007, the AAO rejected the applicant's appeal as untimely because it was filed almost five months after the issuance of the termination notice.² On April 2, 2007, the applicant filed a motion to reconsider the termination of his temporary resident status and the rejection of his appeal. On May 24, 2007, the Director, Texas Service Center, denied this motion.

On April 2, 2007, the applicant filed a second Form I-690 waiver application. The Director, Texas Service Center, denied the waiver application because the applicant no longer had an underlying application for benefits under section 245A of the Act. On June 28, 2007, the applicant, through current counsel, appealed the denial of his waiver application. On May 11, 2009, the AAO determined that procedural errors in the applicant's case warrant the AAO to *sua sponte* reconsider the appeal of the termination of his temporary residence and reopen the proceedings.³

The director terminated the applicant's temporary residence because he was found to be inadmissible to the United States pursuant to section 212(a)(1)(A)(i) of the Act, 8 U.S.C. § 1182(a)(1)(A)(i), as an alien who is determined to have been infected with HIV, a communicable disease of public health significance.

¹ USCIS database records show that the application to adjust status from temporary to permanent resident was denied on April 15, 1992. However, the record of proceedings does not contain a copy of the denial notice, or evidence that the applicant was afforded the right to appeal the denial.

² USCIS database records show that the applicant's status was terminated on April 15, 1992. However, the termination notice in the record is dated July 23, 1992. Nevertheless, the applicant's appeal was still untimely filed 47 days later.

³ Although motions to reopen a proceeding or reconsider a decision shall not be considered under Section 245A of the Act, the AAO may *sua sponte* reopen and reconsider any adverse decision. See 8 C.F.R. § 245a.2(q).

Section 212(a)(1)(A)(i), 8 U.S.C. § 1182(a)(1)(A)(i), of the Act provides that any alien who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome is inadmissible.⁴ Aliens infected with HIV, however, upon meeting certain conditions, may have such inadmissibility waived.

Pursuant to 8 C.F.R. § 245a.3(d)(4), an applicant who is inadmissible under section 212(a)(1)(A)(i) of the Act, 8 U.S.C. § 1182(a)(1)(A)(i), due to HIV infection, must demonstrate the following three conditions will be met if a waiver is granted and he is granted adjustment of status from temporary to permanent residence:

- (1) the danger to the public health of the United States created by the alien's admission is minimal;
- (2) the possibility of the spread of the infection created by the applicant's admission is minimal; and
- (3) there will be no cost incurred by any government agency without prior consent of that agency.

If the applicant meets these criteria, the Attorney General [Secretary], may waive such inadmissibility in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i).

Examples of evidence considered sufficient to meet the first two requirements include, but are not limited to:

- (a) evidence that the applicant has arranged for medical treatment in the United States;
- (b) the applicant's awareness of the nature and severity of his or her medical condition;
- (c) evidence of counseling;
- (d) the applicant's willingness to attend educational seminars and counseling sessions; and

⁴ Human Immunodeficiency Virus (HIV) has been determined by the Public Health Service to be a communicable disease of public health significance. 42 C.F.R. § 34.2(b)(4).

(e) the applicant's knowledge of the modes of transmission of the disease.

As for the third requirement, applicants may submit evidence of private insurance, personal financial resources, proof that a hospital, research organization or other type of facility will provide care at no cost to the government, or any other evidence establishing the ability to cover the cost of medical treatment for HIV/AIDS.⁵

On May 11, 2009, the AAO sent a notice to the applicant and counsel requesting additional evidence to demonstrate his eligibility for a waiver of inadmissibility. The AAO requested the applicant to furnish documentation to establish that if he is granted adjustment of status, there will be no cost incurred by any government agency without prior consent of that agency.⁶ See 8 C.F.R. § 245a.3(d)(4). The AAO noted that to satisfy this requirement, the applicant may submit evidence of private insurance, personal financial resources, proof that a hospital, research organization or other type of facility will provide care at no cost to the government, or any other evidence establishing the ability to cover the cost of medical treatment for HIV/AIDS.

On June 12, 2009, the AAO received a response from counsel requesting an extension of 60 days to respond to the request for additional evidence. The AAO granted the 60 days extension. However, as of the date of this decision, the applicant has not furnished any additional documentation. Therefore, the record will be considered complete for purposes of rendering a decision on the appeal.

The AAO has reviewed the record and finds that the applicant has failed to demonstrate that if he is admitted to the United States, there will be no cost incurred by any government agency without prior consent of that agency. Therefore, the applicant has failed to satisfy the requirements for a waiver of inadmissibility under 8 C.F.R. § 245a.3(d)(4) and section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i).

In proceedings for application for waiver of grounds of inadmissibility under section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), the burden of establishing that the application merits approval remains entirely with the applicant. See 8 C.F.R. § 245a.2(d)(5). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed on the grounds that the applicant has failed to demonstrate that if he is admitted to the United States, there will be no cost incurred by any government agency without prior consent of that agency.

⁵ *Immigrant Waivers for Aliens Found Excludable Under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act Due to HIV Infection*, Aleinikoff, Exec. Assoc. Comm., HQ 212.3-P (Sept. 6, 1995); U.S. Citizenship and Immigration Services Adjudicator's Field Manual, *Waiver of Medical Grounds of Inadmissibility*, Chapter 41.3 (updated October 2008).

⁶ The AAO also requested the applicant to furnish additional financial documentation to establish that he is not inadmissible as a public charge pursuant to section 212(a)(4)(A) of the Act, 8 U.S.C. § 1182(a)(4)(A). The AAO now notes that pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), this requirement is waivable for applicants for temporary resident status.

ORDER: The appeal is dismissed. The waiver application is denied.