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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

L1

[Redacted]

Date: JUN 22 2012 Office: LOS ANGELES

FILE: [Redacted]

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:

[Redacted]

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.

Erin K. McCracken

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant was granted temporary resident status under section 245A of the Immigration and Nationality Act (Act) on December 17, 1988. The record reflects that the director terminated the applicant's temporary resident status on October 23, 1992, finding the applicant had failed to submit a Form I-693, Medical Examination of Aliens seeking Adjustment of Status. On August 26, 1994, the Administrative Appeals Office (AAO) dismissed the appeal. On May 20, 2009, the applicant filed a motion to reopen or reconsider as a class member under the *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration Services, et al.*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). On August 4, 2009, the director approved the motion and withdrew its decision to terminate the applicant's temporary resident status. On July 30, 2010, the director denied the application and determined that the applicant was inadmissible as he is likely to become a public charge. The AAO dismissed a subsequent appeal on July 11, 2011. On March 6, 2012, the AAO *sua sponte* reopened the proceeding at the request of the applicant and requested further evidence.¹ The AAO sent a supplemental RFE on April 30, 2012.

Upon review, the AAO affirms the director's determination finding the applicant failed to establish his eligibility for temporary resident status pursuant to Section 245A of the Immigration and Nationality Act (Act) under NWIRP. For the reasons outlined below, the AAO shall remand the matter to the director.

The director determined that the applicant was inadmissible because he was likely to become a public charge pursuant to section 212(a)(4)(A) of the Act, 8 U.S.C. § 1182(a)(4)(A). The applicant states that the public charge provisions do not apply in this case, as the applicant has worked 40 qualifying quarters of coverage as defined under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, citing 8 C.F.R. § 213a.2(a)(2)(ii)(C). The cited regulation applies to situations in which an intending immigrant seeks an immigrant visa, admission as an immigrant, or adjustment of status as an immediate relative, family-based immigrant under section 203(a) of the Act, or employment-based immigrant under section 203(b) of the Act, and does not apply to the application for temporary residence under review. *See*, 8 C.F.R. § 213a.2(a)(2)(i). Thus, whether the applicant has worked 40 quarters under Title II of the Security Act is not relevant.

An applicant for temporary resident status must establish that he is admissible to the United States as an immigrant. Section 245A(a)(4)(A) of the Act, 8 U.S.C. § 1255a(a)(4)(A). Section

¹ The AAO also requested evidence regarding the applicant's identity. The applicant initially indicated on his Form I-687 that his date of birth is [REDACTED]. In support of his Form I-687 application, he submitted a copy of an asylum interview notice. Review of his asylum application shows that he listed his date of birth as [REDACTED]. He indicated on his school transcripts that his birthday is [REDACTED]. The applicant's California driver's license issued in 2008 indicates that his birthdate is [REDACTED]. In response to the AAO's RFE, the applicant submitted a certified translation of his birth certificate indicating that his date of birth is [REDACTED] and an explanation for the discrepancies. The applicant has established his identity and birth date.

212(a)(4) of the Act states in pertinent part that any alien who: “is likely at any time to become a public charge is inadmissible.”

The regulation at 8 C.F.R. § 245a.2(d)(4) provides:

Proof of financial responsibility. An applicant for adjustment of status . . . is subject to the provisions of section 212(a)(15) of the Act relating to [inadmissibility] of aliens likely to become public charges. Generally, the evidence of employment submitted by an applicant pursuant to 8 C.F.R. § 245a.2(d)(3)(i) will serve to demonstrate the applicant's financial responsibility during the documented period(s) of employment. If the applicant's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the applicant may be required to provide proof that he or she has not received public cash assistance. Pursuant to 8 C.F.R. § 245a.2(d)(4), the burden of proof to demonstrate the inapplicability of the ground of inadmissibility arising under section 212(a)(4) of the Act lies with the applicant who may provide:

- (i) Evidence of a history of employment (i.e., employment letter, W - 2 Forms, income tax returns, etc.);
- (ii) Evidence that he/she is self-supporting (i.e., bank statements, stocks, other assets, etc.); or
- (iii) Form I - 134, Affidavit of Support, completed by a spouse in behalf of the applicant and/or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the affidavit of support shall be extended to other family members where family circumstances warrant.

To evaluate whether an applicant for temporary resident status is likely to become a public charge, the USCIS applies the special rule for determination of public charge. 8 C.F.R. § 245a.2(k)(4). Under the special rule, an alien who has a consistent employment history and shows the ability to support himself even though his income may be below the poverty level is not inadmissible as a public charge. 8 C.F.R. § 245a.3(k)(4). The alien's employment history should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. 8 C.F.R. § 245a.3(g)(4)(iii).

Evidence of employment history:

As evidence of his employment history, the applicant submitted a March 23, 2009 Social Security Administration statement showing he had earnings in 1980 through 1993 in amounts ranging from \$18 to \$14,649. He showed no earnings for 1994. He showed \$65 earnings in 1995. He showed no earnings for the years 1996 through 2004 or in 2007. 2008 earnings were

not yet recorded as of March 23, 2009. The applicant submitted employer letters that cover the same years as the Social Security Administration statement. In response to a notice of intent to deny (NOID), the applicant submitted a declaration stating he receives money from Iran and earns some income for doing "side jobs" including tutoring and consulting. The record shows that the applicant has had a limited and sporadic history of employment. He failed to indicate the amount of income he earns doing "side jobs."

Evidence of self-support:

The applicant submitted documentation from several banks. He submitted a copy of a bank book dated 1987, showing a single deposit in the amount of \$5,120.09 and a bank deposit verification showing a balance of \$1,783.11 as of September 28, 1987. The applicant submitted a letter from the [REDACTED] dated May 23, 2011, showing the applicant opened an account in July of 2000 and maintained an average balance of approximately \$6,500. After the director denied his application on the basis of finding the applicant likely to become a public charge, the applicant submitted a letter from the same bank showing a current balance of \$20,000. In the absence of sufficient evidence as to the source of the applicant's funds, he has not established that he is self-supporting.

The applicant submitted a statement from a brokerage house in the name of a friend and housemate, [REDACTED]. The applicant asserted that due to health issues and poor computer skills, he relied on his friend to invest his money. In response to the NOID, the applicant submitted a declaration from Mr. [REDACTED] to confirm the applicant's assertions about the brokerage house account. The evidence is not persuasive.

The applicant stated that he owns a car and pays low rent. He provided no evidence of his car ownership or of the car's value. He failed to state his expenses. He has not established that he is self-supporting.

Affidavit of support:

The AAO issued a notice of intent to deny (NOID) informing the applicant of the deficiencies in the record and providing him with an opportunity to respond. The applicant submitted some of the evidence requested, but he indicated that he was unable to obtain a signed Form I-134, Affidavit of Support, and that the Form I-864, Affidavit of Support Under Section 213A of the Act previously submitted should be sufficient. The pertinent regulations provide that the appropriate Form is the Form I-134 and not the Form I-864. See 8 C.F.R. § 245a.2(d)(4). As noted above, pursuant to 8 C.F.R. § 245a.2(d)(4), the Form I-134 should be completed by a spouse, child, parent or other family member of the applicant. The Form I-864 was completed by Mr. [REDACTED] and there is no evidence in the record of proceeding that he is the applicant's family member. On appeal, counsel for the applicant asserts that Mr. [REDACTED] is a third cousin of the applicant. He failed to submit any evidence in support of this assertion.

The applicant is inadmissible as he is likely to become a public charge. This ground of inadmissibility is waivable.² The applicant attempted to file a Form I-690 application for waiver of grounds of inadmissibility with the AAO. The applicant should follow the form instructions to properly file the Form I-690 application. The matter will be remanded to permit the applicant to properly file the Form I-690, and to allow the director to adjudicate the application.

NWIRP Class Membership

Beyond the director's decision, the AAO notes that the director adjudicated the application on the merits and presumptively found the applicant to be eligible for class membership under the terms of the NWIRP class-action. On September 9, 2008, the court approved a final Stipulation of Settlement in the class-action NWIRP. Class members are defined, in relevant part, as:

1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who –

(A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a Qualified Designated Agency (QDE), and whose applications were rejected for filing (hereinafter referred to as 'Subclass A members'); or

(B) between May 5, 1987 and May 4, 1988, attempted to apply for legalization with an INS officer, or agent acting on behalf of the INS, including a QDE, under § 245A of the INA, but were advised that they were ineligible for legalization, or were refused legalization application forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to file or complete a timely written application (hereinafter referred to as 'Sub-class B' members); or

(C) filed a legalization application under INA § 245A and fees with an INS officer or agent acting on behalf of the INS, including a QDE, and whose application

- i. *has not been finally adjudicated or whose temporary resident status has been proposed for termination (hereinafter referred to as 'Sub-class C.i. members')*,
- ii. *was denied or whose temporary resident status was terminated, where the INS or USCIS action or inaction was because INS or*

² An applicant for temporary residence may obtain a waiver of the public charge provision. See Section 245A(d)(2)(B)(ii) of the Act, 8 U.S.C. § 1255(d)(2)(B)(ii).

USCIS believed the applicant had failed to meet the 'known to the government' requirement, or the requirement that s/he demonstrate that his/her unlawful residence was continuous (hereinafter referred to as 'Sub-class C.ii members').

2. Enumerated Categories

- (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.
- (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.

The AAO finds that the applicant has failed to establish that he is a member of the NWIRP class as enumerated above because he has failed to establish when he entered the United States and whether he was inspected at entry, and if so, in which nonimmigrant status, if any.³

On appeal, counsel for the applicant asserts "as evidence by the attached transcript, [the applicant] entered the United States in the autumn of 1975 on a F-1 student visa" A transcript is not evidence of an entry into the United States. The AAO notes that the applicant has submitted partial copies of his passport to the Service, but not a visa or entry stamp.

³ The applicant filed an application for asylum in 1983. In support of his application, he submitted letters from a Dr. [REDACTED] and the [REDACTED] indicating the latter institution awarded a scholarship to the applicant. If the applicant entered the United States on a J-1 exchange visitor's visa, he may be subject to the two-year foreign residency requirement.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5). The applicant has established his continuous residence in the United States during the requisite period.

The case will be remanded for the director to permit the applicant to submit a Form I-690, waiver of grounds of inadmissibility, and for the director to adjudicate the waiver application. If the waiver application is approved, the director will render a new decision on the application for temporary resident status which addresses the issue of class membership. If the waiver application is denied, the director will render a new decision on the application, and will certify the decision to the AAO. If the director determines that the applicant has established that he is not likely to become a public charge but finds that the applicant has failed to establish he is an NWIRP class member, the director shall follow the procedures outlined in the NWIRP Settlement Agreement to accord the applicant Special Master appeal rights.

ORDER: The case is remanded for further consideration and action.