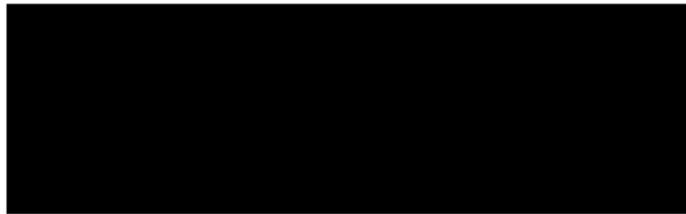


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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**

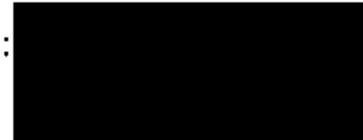


L1

DATE: **SEP 04 2012**

OFFICE: SAN ANTONIO

FILE:



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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, and *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the director of the San Antonio office. The applicant subsequently appealed the director's decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal and a subsequent motion to reopen. The AAO will dismiss the instant motion.

On December 22, 2004, the applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act) pursuant to the terms of the CSS/Newman Settlement Agreement. In connection with the application, a Form G-28, Notice of Entry of Appearance as Attorney or Representative, was submitted by Raul Garcia (former counsel). The record reflects that the Form I-687 application was approved and a Notice was sent to the applicant and former counsel on December 22, 2004. The Notice stated that the applicant was required to file an application to adjust status from temporary to permanent resident within forty-three (43) months of receiving his temporary resident status. See 8 C.F.R. § 245a.3(b)(1). Pursuant to section 245A(b)(2)(C) of the Act, 8 U.S.C. § 1255a(b)(2)(C), a failure to file an application for adjustment to permanent residence within this statutory filing period will result in the termination of the applicant's temporary residence. The applicant failed to file his application to adjust status from temporary to permanent resident within the statutory filing period. The director terminated the applicant's temporary resident status, finding that he failed to timely file his Form I-698 application.

The regulations at 8 C.F.R. § 245a.2(u) states:

The temporary resident status may be terminated upon the occurrence of any of the following:

- (i) It is determined that the alien was ineligible for temporary residence under section 245A of this Act;
- (ii) The alien commits an act which renders him or her inadmissible as an immigrant, unless a waiver is secured pursuant to § 245a.2(k)(2).
- (iii) The alien is convicted of any felony, or three or more misdemeanors;
- (iv) The 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 under § 245a.1 of this part.

Former counsel submitted a Form I-694, Notice of Appeal of Decision Under Section 210 or 245A. On appeal, former counsel asserted that the applicant was physically unable to file his Form I-698 application due to a medical surgery, which rendered him impaired and bedridden. The AAO determined that, while the applicant submitted evidence of his physical limitations during the period of February 17, 2010 through May 21, 2010, the evidence did not support a finding that the applicant was unable to file his Form I-698 prior to February 17, 2010.

Present counsel filed a motion to reopen and asserted that the reason for the applicant's failure to file in a timely manner was due to ineffective assistance of his former counsel. The AAO determined that the evidence did not support that the applicant had met all three prongs in the *Matter of Lozada*¹ test, and therefore, he failed to establish his claim of ineffective assistance of counsel. The motion was rejected. In response, counsel renews the request for *sua sponte* reopening and asserts a claim of ineffective assistance by an agency² committing an unauthorized practice of law. Counsel asserts that [REDACTED] gave the applicant faulty advice and thus constituted the unauthorized practice of law. Counsel contends that if the agency had assisted the applicant in February of 2010 when he asked for their assistance, the applicant would be a resident. The AAO will consider the applicant's claim [REDACTED] evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6).³

In counsel's brief, she states that a complaint has been filed with the appropriate disciplinary authorities, namely the Attorney General of Texas. Counsel further states that former counsel was publicly reprimanded by the State Bar for fee-splitting with a non-lawyer, furthering the unauthorized practice of law, and practicing law under a trade name. On March 30, 2011, [REDACTED] was found to be in contempt of the 1995 consent decree, specifically noting the agency director's actions in "giving legal advice without a member of the State Bar of Texas establishing an attorney/client relationship." Based on the above, the agency was an unaccredited organization at the time it represented the applicant. *Matter of Lozada* is inapplicable to cases where the alleged "ineffective assistance" was provided by someone other than an attorney.

While the record reflects that the Form G-28 was signed by [REDACTED] at the time the applicant's I-687 application was filed, both present counsel and Mr. [REDACTED] indicate that he was not affiliated with the agency at the time of claimed ineffective assistance of counsel. In counsel's brief, she states that she has not filed a State Bar complaint against Mr. [REDACTED] because he was not affiliated with [REDACTED] at the time of the ineffective assistance of counsel. In a letter from Mr. [REDACTED], he states that he left employment at [REDACTED] several years ago, is not handling the applicant's case, and is not associated with the agency in any way.

While counsel describes recent disciplinary action taken against the agency and former counsel, the record does not reflect that the applicant was given any advice directly related to his Form I-698 application by the agency in February 2010. The record contains an affidavit from the applicant in which he states that he went to the agency prior to his surgery, in February 2010, to seek help regarding his work permit because it was going to expire in August of 2010. The

¹ *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

² Cristo Vive.

³ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

applicant states that a secretary pulled out his file, reviewed his case and gave him an appointment with the agency on June 5, 2010, to apply for his residency. He asserts that he was not told about a deadline. On June 5th, he met with the agency director, Mr. [REDACTED] and was informed that the deadline had passed.

Based on the applicant's affidavit, the applicant went to [REDACTED] to inquire about obtaining an extension of his employment authorization, not his conditional resident status. A non-attorney personnel provided no advice, scheduled an appointment and provided the applicant information regarding the fees he would need to pay, presumably in relation to his application to extend his employment authorization. The record contains a copy of the appointment card with certain fees noted on the card. None of the fees listed are associated with the filing fee for a Form I-698 application. Given this, the applicant went to the agency and scheduled an appointment solely pertaining to his employment authorization.

The issue here is whether the applicant was notified of the Form I-698 filing deadline and, if not, whether manifest injustice would occur if the prior decision were permitted to stand. See *Matter of O-*, 19 I&N Dec. 871 (Comm'r 1989).

As previously stated, the record reflects that the Notice approving the applicant's temporary resident status was mailed to the applicant and counsel's at their addresses of record. The Notice was dated August 22, 2006. The Notice states that the applicant is required to file the Form I-698 within 43 months from the date of his approval, which would have been March 22, 2010. There is no evidence in the record that the Notice was returned as undeliverable. The AAO considers the applicant to have been notified as of the date of the Notice. It is noted that prior decisions erred and stated an approval date of September 7, 2006 and filing deadline of April 6, 2010. The portions of these decisions pertaining to the approval and filing dates will be withdrawn as harmless error as, based on the facts of this case, the applicant missed this filing deadline as well.

Based on the above, the applicant was notified of the filing deadline and failed to timely file his Form I-698 application. Given this, the AAO affirms the director's decision to terminate the applicant's temporary resident status and the motion will be dismissed.

ORDER: The motion is dismissed.