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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

DATE: NOV 20 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application to Adjust Status from Temporary to Permanent Resident Status pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (director), denied the application to adjust from temporary to permanent resident status and the appeal was dismissed by the Administrative Appeals Office (AAO). The AAO will now reopen its original decision *sua sponte*. The previous decisions of the AAO and the director will be withdrawn and the matter remanded for further action.

The director denied the Form I-698, Application to Adjust Status from Temporary to Permanent Resident, finding that the applicant was ineligible for adjustment because his temporary resident status had been terminated. *See* 8 C.F.R. § 245a.3(b).

The applicant is a native and citizen of Mexico who was previously inadmissible to the United States under section 212(a)(1)(A)(i) [previously numbered 212(a)(6)] of the Immigration and Nationality Act (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.

The record reflects that the applicant was granted temporary resident status under section 245A of the Immigration and Nationality Act (Act) on March 10, 1989. On January 23, 1990, the applicant filed this Form I-698 application. During the adjudication of the Form I-698 application, it was determined that the applicant was excludable (now referred to as inadmissible) based on his HIV positive status.

Section 212(a)(1)(A)(i) of the Act, , 8 U.S.C. § 1182(a)(1)(A)(i), provided 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 at that time included infection with the etiologic agent for acquired immune deficiency syndrome, is inadmissible.¹ Aliens infected with HIV, however, upon meeting certain conditions, could have such inadmissibility waived.² The applicant filed a Form I-690 application to request a waiver of this ground of inadmissibility.

¹ Human Immunodeficiency Virus (HIV) was at that time determined by the Public Health Service to be a communicable disease of public health significance. 42 C.F.R. § 34.2(b)(4).

² Pursuant to 8 C.F.R. § 245a.3(d)(4), an applicant who was inadmissible under section 212(a)(1)(A)(i) of the Act, 8 U.S.C. § 1182(a)(1)(A)(i), due to HIV infection, was required to demonstrate the following three conditions would be met for a waiver to be granted and to be 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 met these criteria, the Attorney General [Secretary], could waive such inadmissibility in the case of individual aliens for humanitarian purposes, to assure family unity, or when it was otherwise in the public interest. Section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i).

On November 12, 1991, the Director, Western Service Center (now the California 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 March 31, 1992, the Director terminated the applicant's temporary resident status, finding that the applicant failed to submit sufficient documentation to establish his eligibility for a waiver of that ground of inadmissibility. The applicant appealed the decision terminating his temporary resident status to the AAO.

On September 6, 2001, the AAO sent a notice to the applicant requesting additional evidence to demonstrate his eligibility for a waiver of inadmissibility. On August 13, 2002, the AAO denied the waiver application, finding that the applicant 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). Accordingly, also on that date, the AAO dismissed the appeal of the director's decision terminating the applicant's temporary resident status.

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 to that of an alien lawfully admitted for permanent residence.

On October 24, 2002, the director denied the applicant's Form I-698 based upon the termination of the applicant's temporary resident status. On September 24, 2004, the AAO dismissed the applicant's appeal.³

As of January 4, 2010, HIV infection no longer renders an applicant inadmissible under section 212(a)(1)(A)(i) of the Act, as the regulation at 42 C.F.R. § 34.2(b) was amended to remove HIV infection from the definition of "communicable disease of public health significance." 74 Fed. Reg. 56547 (November 2, 2009). Therefore, the applicant is no longer inadmissible into the United States based solely on the ground that he is infected with HIV.⁴

The AAO now reopens its original decision *sua sponte*, on Service motion, pursuant to 8 C.F.R. § 103.5(a)(5)(i).⁵ The AAO will withdraw its prior decision, along with the decision of the director. The

³ The AAO has withdrawn its prior decision along with the decision of the director terminating the applicant's temporary resident status, as the basis for the termination of temporary resident status is no longer valid.

⁴ The applicant's Form I-687 application indicates at question 15 that the applicant was arrested by the legacy Immigration and Naturalization Service (INS) in 1981 "and deported by Voluntary leaving," and that the applicant was detained by the INS in 1983 "and deported by voluntary leaving."

⁵ 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. § 103.5(b).

matter will be returned to the director with instructions to reopen and continue processing the applicant's Form I-698, Application to Adjust Status from Temporary to Permanent Resident.⁶

ORDER: The prior decisions of the AAO and the director are withdrawn and the matter is remanded to the director to reopen and continue processing the applicant's Form I-698, Application to Adjust Status from Temporary to Permanent Resident.

⁶ Upon review, the Forms I-693, Medical Examination forms, submitted by the applicant in 1990 and 1991 appear to be incomplete, so the applicant will need to submit to the director another completed Form I-693.