



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: NOV 20 2013 OFFICE: CALIFORNIA SERVICE CENTER

IN RE:

PETITION: 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:

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 "R. Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (director), terminated the applicant's temporary 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 The previous decisions of the AAO and the director will be withdrawn and the matter remanded for further action.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 application for temporary resident status was terminated by the Director, Western Service Center (now the California Service Center), finding that the applicant failed to submit sufficient documentation to establish his eligibility for a waiver of inadmissibility. 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 a Form I-698, application to adjust status from temporary to permanent resident. During the adjudication of the adjustment 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 issued the applicant a notice of intent to terminate his temporary resident status 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.

On October 24, 2002, the director denied the applicant's Form I-698 application based upon the termination of the applicant's temporary resident status. 8 C.F.R. § 245a.3(b). On September 24, 2004, the AAO dismissed the applicant's appeal.

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). Based on the foregoing, the applicant is not inadmissible under section 212(a)(1)(A)(i) of the Act, 8 U.S.C. § 1182(a)(1)(A)(i).

The AAO now reopens its original decision *sua sponte*, on Service motion, pursuant to 8 C.F.R. § 103.5(a)(5)(i). The AAO will withdraw its prior decision denying the waiver application and terminating temporary resident status, along with the decision of the director, as the applicant is no longer inadmissible, the waiver application is moot and the basis for the termination of the applicant's temporary resident status is no longer valid.³ The matter will be returned to the director with instructions to adjudicate the Form I-690 waiver of inadmissibility.

ORDER: The prior decisions of the AAO and the director are withdrawn and the matter is remanded to the director to adjudicate the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility.

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).