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

(b)(6)

U.S. Citizenship and Immigration Services

Date: SEP 2 0 2013 Office: DALLAS FILE:

IN RE: Applicant:

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:

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.

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Dallas Field Office (director), denied the application to adjust from temporary to permanent resident and the matter is now before the Administrative Appeals Office (AAO) on appeal. This matter will be remanded for further action and consideration.

The applicant is a native and citizen of Mexico. On August 11, 2010, the applicant filed a Form I-698, Application to Adjust from Temporary to Permanent Resident under Section 245A of the Immigration and Nationality Act (Act or INA), 8 U.S.C. § 1225a. The record reflects that United States Immigration & Naturalization Services (USCIS) sent the applicant an interview notice at her address of record to appear for an interview on January 24, 2012. The application for permanent resident status was denied because the applicant failed to appear for the scheduled interview. On appeal, counsel asserts that neither he nor the applicant received notice of the scheduled interview, and requests a second opportunity for an adjustment interview. Counsel has submitted a brief and additional evidence on appeal.

An adverse decision on an application to adjust from temporary to permanent status may be appealed to the AAO; the appeal with the required fee must be filed within thirty (30) days after service of the notice of denial. 8 C.F.R. § 245a.2(p). The date of filing is not the date of mailing, but the date of actual receipt. 8 C.F.R. § 103.2(a)(7)(i). An appeal that is not timely filed will not be accepted. 8 C.F.R. § 245a.2(p).

The record indicates that the director issued the decision on August 24, 2012 and mailed it to the applicant and to counsel. According to the date stamp on the Form I-290B Notice of Appeal, it was received by USCIS on January 10, 2013, or 139 days after the decision was issued. Accordingly, the appeal was untimely filed. Neither the Act nor the pertinent regulations grant the AAO the authority to extend the 33-day time limit for filing an appeal.

However, the AAO may *sua sponte* reopen, on its own motion, a matter previously adjudicated, if the record reveals an error in the adjudication of the application for permanent residence that would warrant reopening. Upon review, the AAO finds that the evidence of record warrants reopening the matter *sua sponte*.

The record reveals that the applicant was scheduled to appear for an interview on January 24, 2012 at the Dallas Field Office in connection with her application for adjustment from temporary to permanent residence status. The applicant failed to appear for the interview and the director denied her application, pursuant to 8 C.F.R. § 103.2(b)(13), which provides that if an applicant fails to appear for a scheduled interview, the application may be summarily denied as abandoned. However, the regulation at 8 C.F.R. § 103.2(b)(13) does not pertain to the present case.

The regulations for adjudicating applications for adjustment of status under section 245A of the Immigration and Nationality Act (Act) are provided at 8 C.F.R. § 245a.3. The regulation at 8 C.F.R. § 245a.3(e) provides, in pertinent part:

> Each applicant shall be interviewed by an immigration officer . . . . An applicant failing to appear for the scheduled interview may, for good cause, be afforded another interview. Where an applicant fails to appear for two scheduled interviews, his or her application shall be held in abeyance until the end of 43 months from the date the application for temporary residence was approved and adjudicated on the basis of the existing record.

In the present case, the sole basis for the director's denial is the applicant's failure to appear for the scheduled interview. As stated in the above-cited regulation, an applicant may be rescheduled for a second interview if she establishes she had good cause for her failure to appear for the first interview. We find the applicant has established establish good cause for her failure to appear. Although the record reveals that the interview notice was mailed to the applicant at the address listed on the Form I-698 application, and contains no indication that the interview notice was returned as undeliverable, on appeal counsel asserts that "due to clerical error" the application listed an incorrect residence address for the applicant of " instead of " ". Counsel has submitted a sworn declaration from the applicant that she did not receive the interview notice and that her correct address as " "[1] In addition, a review of the record reveals that a copy of the interview notice was not sent to counsel of record. The regulation at 8 C.F.R. § 292.5 states that notice shall be given to the attorney of record. The AAO finds that the applicant has established good cause for her failure to appear, which should afford her a second interview.

Since the director's decision fails to adhere to the above regulatory requirements, the decision to deny the application as abandoned is in error and shall be withdrawn. The matter shall be remanded to the Dallas Field Office, and the applicant shall be afforded an adjustment interview at that office.

At her interview, the applicant must establish that she satisfies the English and civics requirements of the Act. These requirements shall be waived for persons who, as of the date of application or the date of eligibility for permanent residence, whichever date is later, are: over 50 years of age who have resided in the United States for at least 20 years and submit evidence establishing the 20-year qualification requirement. *See* 8 C.F.R. § 245a.3(b)(4)(ii)(C).

ORDER: The director's decision is withdrawn. The matter is remanded for further action and consideration. If the director issues a decision adverse to the applicant, he or she shall certify the decision to the AAO.

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[1] The AAO notes the record further supports the assertions of counsel and the applicant on appeal. The record contains other applications filed by the applicant listing the applicant's residence address as " including a Form I-485, application to adjust to permanent resident status, and a Form I-765, application for employment authorization, both filed in 2001, as well as a Form I-687, application for status as a temporary resident, filed in 2005. Although the record contains a Form I-765, application for employment authorization, listing the applicant's residence address as " on appeal counsel provides a letter sent to the National Benefits Center stating the applicant did not receive an employment authorization card subsequent to the approval of that Form I-765 application.