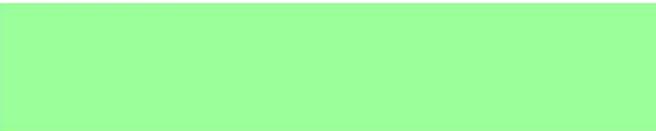


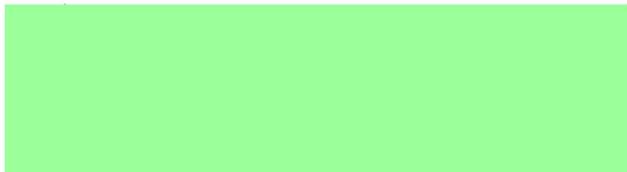


U.S. Citizenship
and Immigration
Services

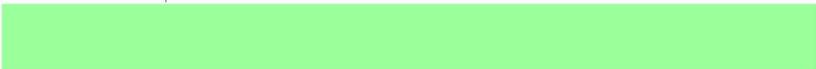
(b)(6)



Date: NOV 22 2013 Office: NEW YORK

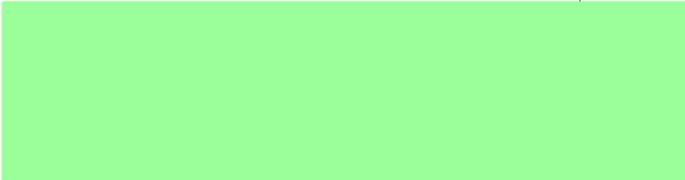


IN RE:



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 Field Office Director, New York, revoked the approval of the application to adjust from temporary to permanent resident and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the appeal will be remanded for further action.

The applicant filed a Form I-698, Application to Adjust Status from Temporary to Permanent Resident under section 245A of the Immigration and Nationality Act (Act), as amended, 8 U.S.C. § 1255a.¹ The record reflects that on December 21, 2012, the I-698 application was approved. The applicant was given a stamp in his passport designating him a lawful permanent resident (I-551 stamp) with a United States Citizenship and Immigration Services (USCIS) lawful permanent resident class code of W-16, for the period from December 21, 2012 to December 20, 2013.²

Section 101(a)(20) of the Act, 8 U.S.C. § 1101(a)(20) defines the term "lawfully admitted for permanent residence" as, "[t]he status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." "[L]awfully denotes compliance with substantive legal requirements, not mere procedural regularity." *Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1186 (8th Cir. 2005) (quotations and citations omitted.) The term "lawfully admitted for permanent residence" does not apply to aliens who "obtained their permanent residence by fraud, or had otherwise not been entitled to it." *Id.* at 1187.

The director determined, in the present matter, that the applicant was erroneously granted lawful permanent resident status. In a decision dated April 9, 2013, the director stated she was revoking the approval of the I-698 application, finding the applicant was ineligible for temporary and permanent resident status pursuant to the NWIRP Settlement Agreement because the evidence in the record does not establish the applicant is a NWIRP class member.³ Specifically, the director determined that the evidence in the

¹ Any alien who has been lawfully admitted for temporary resident status under section 245A of the Immigration and Nationality Act, such status not having been terminated, may apply for adjustment of status of that of an alien lawfully admitted for permanent residence if the alien: timely applies for adjustment; establishes continuous residence in the United States since the date the alien was granted temporary resident status; is admissible; has not been convicted of any felony, or three or more misdemeanors; and can demonstrate that the alien meets the English/civics requirements of the Act. 8 C.F.R. § 245a.3(b). The record reflects the applicant's Form I-687, Application for Status as a Temporary Resident, was approved on June 15, 2010, pursuant to the terms of the *Northwest Immigrant Rights Project (NWIRP) Settlement Agreement*.

² The USCIS class code W16 is given to a lawful permanent resident who was previously a lawful temporary resident.

³ On September 9, 2008 the court approved a Stipulation of Settlement in the class action *Northwest Immigrant Rights Project, et al vs. USCIS, et al*, 88-CV-00379 JLR (W.D. Was.) (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 –

record failed to establish that the applicant was "front-desked" [misled or discouraged from filing] from applying for the Immigration Reform and Control Act (IRCA) legalization program. In her decision, the director further stated as follows:

Upon review of your record, the Service finds that you do not qualify under NWIRP I-687 for the following reasons: In order for an applicant to qualify for a NWIRP I-687, the

(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 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 CIS action or inaction was because INS or CIS 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.

applicant needed to be front-desked during the IRCA filing period. Upon review of your file, the Service found that you had an IRCA application that was accepted by the Service on May 2[0], 1988. The application was subsequently denied on February 9, 1990 because you failed to fulfill your foreign residence requirements.⁴ In light of the above noted facts your I-698 is hereby denied.

The director concluded the applicant is not a NWIRP class member and is, therefore, ineligible for temporary resident status and permanent resident status under section 245A of the Act on this basis.

On appeal, counsel contends that since the applicant has already adjusted status to that of a lawful permanent resident the director is precluded from revoking approval of the application. In support of the appeal counsel has provided a copy of the applicant's I-551 passport stamp, contained in page 11 of [REDACTED]. Counsel asserts that any challenge to the approval of the I-698 application must be through rescission proceedings pursuant to section 246 of the Act, 8 U.S.C. § 1256.

Specific statutory and regulatory procedures must be followed in order to rescind an alien's lawful permanent resident status. The field office director's determination regarding the applicant's lawful permanent resident status was, therefore, premature.

Section 246(a) of the Act, 8 U.S.C. § 1256(a), provides in pertinent part that:

If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or section 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General [Secretary, Department of Homeland Security] that the person was not in fact eligible for such adjustment of status, the Attorney General [Secretary] shall rescind the action taken granting an adjustment of status to such person and canceling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General [Secretary] to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

The regulation at 8 C.F.R. § 246.1, describes the procedure for rescinding lawful permanent resident status at the district level, by stating in pertinent part that:

⁴ The record reflects the applicant is a native and citizen of Egypt who obtained J-1 nonimmigrant exchange visitor status in Cairo on April 26, 1981 and entered the U.S. in J-1 status at New York on May 3, 1981. The applicant is subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The record further reflects that on September 1, 1995, the applicant's Form I-612, Application to Waive Foreign Residence Requirements, was approved upon favorable recommendation from the U.S. Information Agency.

If it appears to a district director that a person residing in his or her district was not in fact eligible for the adjustment of status made in his or her case . . . a proceeding shall be commenced by the personal service upon such person of a notice of intent to rescind, which shall inform him or her of the allegations upon which it is intended to rescind the adjustment of his or her status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he or she may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he or she may, within such period, request a hearing before an immigration judge in support of, or in lieu of, his or her written answer. The respondent shall further be informed that he or she may have the assistance of or be represented by counsel or representative of his or her choice qualified under part 292 of this chapter, at no expense to the Government, in the preparation of his or her answer or in connection with his or her hearing, and that he or she may present such evidence in his or her behalf as may be relevant to the rescission.

In the present matter, fewer than five years have lapsed since the applicant was granted U.S. lawful permanent resident status.⁵ Thus, the director may initiate rescission proceedings at the district level.

The director revoked the Form I-698 application based on the determination that the applicant erroneously obtained permanent resident status. The director did not, however, follow the procedures for rescission of adjustment of status set forth in section 246(a) of the Act, or the regulation at 8 C.F.R. § 246.1. As such, the applicant remains a U.S. lawful permanent resident.

Upon review, the director's decision is in error and will be withdrawn. The matter will be remanded to the director for initiation of rescission of adjustment of status proceedings, if deemed appropriate. If proceedings are not initiated, the applicant remains a lawful permanent resident

ORDER: The director's April 9, 2013 decision is withdrawn. The matter is remanded to the director for further action consistent with this decision.

⁵ The applicant's Form I-698 was approved on December 21, 2012.