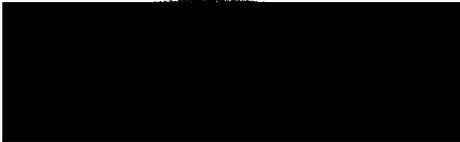


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Services

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FILE:



Office: California Service Center

Date:

NOV 15 2005

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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, Western Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director noted that the applicant had been absent from the United States for over 45 days, and had failed to establish that an emergent reason had delayed her return. The director therefore concluded that the applicant had not resided continuously in the United States, and denied the application.

On appeal, the applicant asserts that she entered the United States numerous times during the eight-month period of absence. She indicates that she was totally absent for only one lengthy period within the eight months, for about 60 days. She explains that she had medical problems with her pregnancy that prevented her from returning earlier to the United States.

An applicant for temporary residence must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2).

An alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

On her Application for Status as a Temporary Resident, Form I-687, the applicant claimed that she established a residence in the United States in 1977, and that she continuously resided in the United States since then. However, the applicant also indicated that she went to Mexico. This information was typed on the application by the preparer. Somebody, apparently the officer of the Immigration and Naturalization Service (INS) who later interviewed the applicant, wrote on the application that the purpose of the applicant's trip was to live in Mexico, and the duration of the absence was from January 1982 to October 1982. On her worksheet the officer stated: "Applicant returned to live in Mexico in January 1982 and returned to the United States October 1982... She returned to live in Mexico on January 1982 because her husband was given a voluntary departure at El Paso, Texas because he was using his friend's identification in order to travel to and from Mexico. Both, applicant and her husband returned to the United States on October 1982 as evidence by her passport as attached."

Subsequently, the director sent a notice to the applicant that asked her to submit a detailed explanation of the reason for her prolonged absence. In response, the applicant submitted a letter from a physician in Mexico that explained that he provided prenatal care to the applicant from January to August of 1982.

The director then denied the application, incorrectly stating that the applicant had not responded. The director concluded that no known emergent reason had delayed the applicant's return to the United States.

On appeal, the applicant reiterates that she left the United States on January 30, 1982 to join her husband in Mexico, as she had two small children and no one to help support them in the United States. She explains that she had paid the apartment rent, in Aztec, New Mexico, through March 1. She further states that:

1. While in Mexico, her husband decided that they should apply for border crossing cards, to eliminate the problems crossing the border;
2. They applied for border crossing cards around February 25, and were issued temporary permission to cross the border by the INS officer;
3. They entered the United States on February 26, and traveled to Aztec, where they had been living, in order to remove and store their furniture, and take care of other matters;
4. They returned to Palomas, Mexico, which is on the border, around March 5, and went to work investing and upgrading their businesses there, and the house they had purchased there in 1978, so that they could sell them for more money;
5. From March through June they traveled once or twice a week to Deming, New Mexico, close to the border, to shop and buy things they needed for the store and restaurant in Mexico;
6. She became pregnant around April 30, had problems with her husband throughout the summer, planned on going to live with her sister in California in early July, relented, decided again in early August to go, but again relented and went to live with her husband's family in another part of Mexico;
7. She became very sick during the trip across Mexico to her husband's family, was ordered to rest in bed by a doctor, and did so until the end of September, at which point she traveled to California and commenced residing there;
8. Upon entering the United States at that point, she was given the actual border crossing card that she had applied for;
9. She left the United States again in February 1983, sold the house in Mexico, and attempted to reenter the United States about two weeks later;
10. She was refused entry because INS concluded she had been living in the United States, and her border crossing card was taken from her, although the INS officer told her that, because her children were U.S. citizens, she would be able to take them to a doctor in the United States at times if necessary;
11. About a week later, based on her daughter's sore throat and rash, she was given authorization to enter the United States for a brief period, and she then took her children and returned to California after an absence of less than a month.

Thus, the applicant's claim is that, because she entered the United States briefly numerous times from late February 1982 through June 1982, she was not absent from the United States for more than 45 consecutive days during that period. She does concede that she was then absent for about two months in August and September 1982, due to the mandatory bed rest because of problems with her pregnancy, before returning to the United States. She also claims that her 1983 absence was for less than a month.

Counsel points out that the applicant's husband's application for temporary residence was approved, even though he was basically absent for the same periods. Also, in an attempt to show that the applicant was not

making the improvements to the businesses and house in Mexico with the intention of living there, counsel explains that the applicant's businesses and house in Mexico were sold in the six months after she returned to the United States in September 1982.

Regarding the applicant's claim that her border crossing card was lifted by INS in March 1983, computer records within Citizenship and Immigration Services, formerly INS, do show that a border crossing card was "denied" in April 1983. Given some lag time for the information to be entered into the database, it appears this entry into the computer records does reflect the lifting of her card in March 1983 as she stated.

The applicant has also stated that her husband's border crossing card was denied in August 1982, when they were planning on reentering the U.S. She has produced the form INS issued to her husband, voiding his border crossing card. It appears this was actually a voidance of the temporary border crossing permit INS had issued him. Thus, some elements of the applicant's overall claim are supported by documents, which may serve to enhance her credibility.

Taking into account the applicant's claimed one-day visits into the United States, once or twice a week over a period of months, she was still absent from the United States for over 200 days from late January 1982 through September 1982, and for another 25 days or so in 1983. Thus, the aggregate of her absences well exceeded 180 days. Furthermore, she states she was continuously absent from the beginning of August through September 29, 1982, a period in excess of 45 days. Because of the absences, she must, by regulation, establish that due to emergent reasons, the returns to the United States could not be accomplished within the time period allowed, *and that she was maintaining residence in the United States.*

According to the applicant, she initially went to Mexico in January 1982 because her husband was not able to return to the United States, and she needed him to support her and her children. While in Mexico, they proceeded to make property and business improvements, and within a month secured temporary permission from INS to cross into the United States, resolving her husbands' problem. Although they were able to return to the United States to live, they *chose* to live in Mexico for the time being, stored their belongings in New Mexico, and gave up their apartment there. They clearly did not seize upon the first opportunity to move back to the United States, but rather decided to live in Mexico for the time being and *visit* the United States. Concerning the first six months of the overall absence, February through July 1982, the applicant has not claimed that an emergent reason delayed her return to the United States.

Given her claimed brief entries into the United States, the applicant would not have accumulated 180 days of absence from the United States in the February-July period. However, combined with her continual absence in August and September, her total days of absence exceeded 180, and her consecutive days of absence exceeded 45.

The applicant's claim is that her much worsened medical condition, beginning around August 1, is an emergent reason that delayed her return beyond 45 days and 180 days in the aggregate. It is noted that the applicant has not presented any evidence of her worsened condition, other than her own statement. To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. 8 C.F.R. 245a.2(d)(5). Indeed, the only medical evidence submitted is a brief letter from a

physician that simply confirms that he provided her prenatal care from January to August 1982. It is noted that the applicant claims to have become pregnant around the end of April 1982.

In summary, while there is no question that the applicant was pregnant, and did later give birth, there is no independent evidence that her condition worsened to such a degree that she could not travel. It is not clear that an emergent reason delayed her return to the United States.

Importantly, the other condition to be met, *if* an alien has shown that an emergent reason delayed her return, is to demonstrate that she was *maintaining residence in the United States*. For the reasons stated above, it is concluded that she was not residing in the United States from the end of January through September 1982. The applicant gave up her apartment in New Mexico, and attended to her businesses and house in Mexico. Through misrepresentation she was able to acquire permission to enter the United States, but then, for a long time, entered only for very brief visits while maintaining a residence in Mexico. The applicant was essentially absent for eight months, with some brief interruptions for one-day trips into the United States border region, but those trips cannot be construed as actual returns to a residence in this country. When the applicant again came to the United States to live in September 1982, she did not return to her previous home, but rather traveled to California and started to reside in a new residence there.

Counsel refers to a previous unpublished decision in which the Legalization Appeals Unit ruled favorably in the case of an alien who had been absent for an extended period due to her mother's illness, and due to her own efforts to obtain a visitor visa in order to return to the United States. However, in this case, the applicant did not have an ill relative, and became pregnant about three months *after* she moved to Mexico. Also, shortly after she moved to Mexico, she obtained a temporary permit that authorized her to cross the border, and yet she continued to live in Mexico.

In summary, there is no evidence that an emergent reason delayed the applicant's return to the United States. Even if her unsupported claim regarding that point were to be accepted, the applicant was not maintaining a residence in the United States, and had at best a vague intent to move back to the United States at some point.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she has *continuously* resided in an unlawful status in the United States from prior to January 1, 1982 through the date of filing, is admissible to the United States under the provisions of section 245A of the Act, 8 U.S.C. § 1255a, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). The applicant has not met this burden.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.