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U.S. Citizenship  
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[REDACTED]

FILE:

[REDACTED]  
MSC 06-081-12061

Office: CHARLOTTE

Date: DEC 17 2008

IN RE:

Applicant: [REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. 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. If your appeal was sustained or remanded for further action, you will be contacted.

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, and *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the Director, Charlotte. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act, and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director determined that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. The director noted that the applicant claimed on his Form I-687 to have last entered the United States on October 1, 1981, without inspection, however, according to the service records, the applicant was admitted to the United States on or about August 16, 1985 as a J-2 dependent of a J-1, the applicant's father, [REDACTED] and that the applicant was subsequently granted extensions of his J-2 status until August 16, 1986, August 16, 1987, and September 16, 1988. The director also noted that the applicant was in lawful nonimmigrant status as a J-2 exchange visitor dependent during the requisite period. The director determined that the applicant was therefore not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, counsel asserts that the applicant's testimony and the documentation and affidavits submitted are sufficient to support his claim of eligibility for temporary resident status. Counsel also asserts that the applicant's father was admitted into the United States in 1981 as a visitor, and that the J visa obtained by the applicant's parent did not negate the applicant's eligibility for the immigration benefit sought, in that the applicant remained in unlawful status during the requisite period, as required by law.

Counsel further asserts that the applicant's due process rights were violated in that the director failed to issue a Notice of Intent to Deny (NOID), granting the applicant an opportunity to explain any inconsistencies or to provide additional documentation to support his claim of eligibility. However, counsel mistakenly asserts that the director was required to issue a NOID pursuant to paragraph 7, page 4 of the CSS Settlement Agreement and paragraph 7, page 7 of the Newman Settlement Agreement. According to the settlement agreements, the director shall issue a NOID before denying an application for class membership. Here, the director adjudicated the Form I-687 Application on the merits. As a result, the director is found not to have denied the application solely on the basis of class membership. Therefore, the director was not required to issue a NOID prior to issuing the final decision in this case.

An applicant for temporary resident status 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). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term “until the date of filing” in 8 C.F.R. § 245a.2(b) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. *See* CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

At issue in this proceeding is whether the applicant has submitted sufficient evidence to establish his continuous unlawful residence and continuous physical presence in the United States during the requisite period.

In denying the application, the director noted that based upon the information contained in the service records, the applicant was a J-2 visa holder from approximately August of 1985 to September of 1988; and therefore, he was in lawful status as a non-immigrant during the requisite period.

On appeal, counsel reasserts the applicant’s claim of continuous unlawful residence in the United States during the requisite period. The applicant submits copies of documents that are either dated subsequent to the requisite period or that are not identifiable as the applicant’s. Therefore, the documents cannot be considered to support the applicant’s claim of eligibility for the immigration benefit sought.

In the instant case, the applicant has failed to overcome the basis of the director’s denial. While counsel asserts that the applicant was in unlawful status during the requisite period, the record contains copies of the applicant’s father’s immigration status statements addressed to the Immigration and Naturalization Service and dated July of 1985, April of 1986, and April of 1988, which indicate his status with respect to his J-1 visa and his family’s J-2 visas (including the applicant born August 21, 1987). It is noted by the AAO that the record also contains copies of the applicant’s Form I-530 Report of Action-Nonimmigrant where it was requested that his stay in the United States as J-2 exchange visitor dependent be extended for 1986 and 1988. Therefore, it

cannot be concluded that the applicant continuously resided in an unlawful status in the United States for the requisite period.

The applicant has the burden of proving by a preponderance of evidence that he has *continuously* resided in an unlawful status in the United States from prior to January 1, 1982, through the requisite period, 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). Based upon the applicant's failure to demonstrate continuous unlawful status during the requisite period, the AAO concludes that he is not eligible for the immigration benefit sought.

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