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FILE:

MSC-05-201-13129

Office: NEW YORK

Date:

**JAN 30 2008**

IN RE:

Applicant:

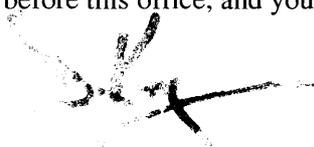
APPLICATION:

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. The file has 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, 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 District Director, New York. 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 (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 she had continuously resided in the United States in an unlawful status for the duration of the requisite period. The director denied the application, finding that the applicant had not met her burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, the applicant claims that the director did not fully consider or give proper weight to the evidence she submitted and the decision denying her application was arbitrary and capricious.

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)(1).

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)(1) 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 at paragraph 11 at page 6, and the Newman Settlement Agreement at paragraph 11 at page 10.

The applicant shall be regarded as having resided continuously in the United States if, at the time of filing no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred eighty (180) days during the requisite period, unless the applicant can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed. 8 C.F.R. § 245a.2(h)(1)(i).

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).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. See 8 C.F.R. § 245a.2(d)(6).

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that she resided in the United States for the duration of the requisite period. Here, the submitted evidence is not relevant, probative, and credible.

The record of proceedings contains a Form I-687 dated November 12, 1989, from the applicant in support of her 1989 request for class membership. The applicant listed at part #35 of that Form I-687 that she was absent from the United States from September of 1981 to January of 1982; April of 1984 to July of 1984; and August of 1987 to September of 1987.

The applicant stated under oath during her interview with an immigration officer on February 28, 2006, that she visited Grenada from September of 1981 through January of 1982; April of 1984 through July of 1984; and August of 1986 through September of 1987. The applicant further stated that she has two children born in Grenada on October 4, 1981 and May 2, 1984, and that their father lived in Canada and has since returned to Grenada.

The applicant submitted Form I-687, Application for Status as a Temporary Resident on April 19, 2005. The applicant listed at part #32 of the I-687 application that she was absent from the United States from September of 1981 through October of 1981; April of 1984 through May of 1984; and August of 1987 through September of 1987.

In response to the director's Notice of Intent to Deny (NOID), the applicant stated in part: "From 1980 to 1986 I have been going back and forth from Canada to [the United States]. I was basically coming to work. I would come [to] work [for] a couple of months then go back to Canada and come right back."

In denying the I-687 application, the director determined that the applicant had failed to overcome the reasons for denial contained in the NOID. In the NOID the director noted that the applicant's absences

from the United States during the requisite period far exceeded the regulatory limits defined in 8 C.F.R. § 245a.4(b)(8).<sup>1</sup> In the decision the director noted the inconsistencies, discrepancies and contradictions found in the applicant's statements, I-687 application, and evidence. The director also noted that the affidavits submitted by the applicant were neither credible nor amenable to verification.

On appeal, the applicant states that the director's decision was against the weight of the evidence, that it was arbitrary and capricious, and that it was without any basis in law or in fact. The applicant also stated that the discrepancies cited by the director were merely subjective differences of opinion, and were either minor or easily reconcilable. The applicant further stated that the director failed to consider all evidence submitted by her in response to the NOID. The applicant does not submit any evidence on appeal.

Contrary to the applicant's assertions, there is insufficient evidence to demonstrate her continuous residence and continuous physical presence in the United States during the statutory periods. The applicant has admitted to multiple absences and has not established that her failure to return to the United States in a timely manner was due to an emergent reason. The applicant states that she left the United States in 1981 and 1984 to give birth to her two children born in Grenada. The applicant also stated that the father of her children lived in Canada, and has since relocated to Grenada. Here, the applicant fails to specify the number of trips she made to Canada or Grenada to be with the father of her children, which resulted in her two pregnancies. It is also noted that the applicant asserts in her statement in response to the NOID that during the requisite period she would frequently travel back and forth from Canada to the United States in order to work.

Although the applicant's visits to Canada were not noted on her I-687 application, even without considering those absences from the United States, the applicant admitted to several absences on her 1989 Form I-687 and at her CIS interview in February of 2006. These admitted absences include one, from April to July of 1984, of over 45 days. Continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless the return could not be accomplished due to emergent reasons. 8 C.F.R. § 245a.2(h)(1)(i). "Emergent reasons" has been defined as "coming unexpectedly into being." *Matter of C*, 19 I&N Dec. 808 (Comm. 1988).

The applicant claims that the delay in returning to the United States was due to the "emergent reason" that she gave birth to a child on May 2, 1984. The child's birth certificate is included in the record. However, giving birth to a child outside the United States is not considered to be an emergent reason for any delay in returning. In *Ruginski v. INS*, 942 F.2d 13 (1<sup>ST</sup> Cir. 1991), the court upheld the determination by the Immigration and Naturalization Service that a person who gave birth abroad and remained beyond the 45 days was not qualified for temporary resident status under section 245A of the Act.

A review of the director's decision reveals that the director accurately set forth a legitimate basis for denial of the application. On appeal, the applicant has not presented any evidence to overcome the director's decision, and her absences represent a clear break in the requisite residence. It is concluded that the applicant has failed to meet her burden of proof and has failed to establish continuous residence in an

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<sup>1</sup> The correct regulation is 8 C.F.R. § 245a.2(h)(1)(i).

unlawful status in the United States by a preponderance of the evidence, as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. The appeal will be dismissed.

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