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U.S. Citizenship  
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[REDACTED]

FILE:

MSC-04-304-10105

Office: NEW YORK

Date: JUL 01 2008

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Status as a Temporary Resident pursuant to Section 245A of  
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. All documents have been returned to the office that 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, or *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, and is now before the Administrative Appeals Office (AAO) on appeal. The AAO withdraws the director's decision and remands the decision to ensure the applicant receives an opportunity to appeal the director's decision regarding his class membership to the Special Master.

The director determined that the applicant has not established that he is eligible for class membership pursuant to the CSS/Newman Settlement Agreements. The director concluded that on this basis the applicant is ineligible to adjust to Temporary Resident Status and denied the application. The director also stated that the applicant did not prove that he maintained continuous residence in the United States for the duration of the requisite period. Specifically, she stated that the applicant did not present evidence that he entered the United States on a date prior to January 1, 1982. She went on to say that because the applicant has a daughter who was born on December 10, 1982 the applicant must have been out of the United States for more than 45 days to conceive and give birth to this child. The director also noted that the applicant's testimony from his June 2, 2005 interview was considered when she made her decision.

On appeal, counsel for the applicant asserts that the applicant both maintained continuous residency in the United States for the duration of the requisite period and argues that the applicant is a class member. The applicant further submits affidavits in support of his application.

Under the CSS/Newman Settlement Agreements, if the director finds that an applicant is ineligible for class membership, the director must first issue a notice of intent to deny, which explains any perceived deficiency in the applicant's class member application and provide the applicant 30 days to submit additional written evidence or information to remedy the perceived deficiency. CSS Settlement Agreement paragraph 7 at page 4; Newman Settlement Agreement paragraph 7 at page 7. Once the applicant has had an opportunity to respond to any such notice, if the applicant has not overcome the director's finding then the director must issue a written decision to deny an application for class membership to both counsel and the applicant, with a copy to class counsel. CSS Settlement Agreement paragraph 8 at page 5; Newman Settlement Agreement paragraph 8 at page 7. The notice shall explain the reason for the denial of the application, and notify the applicant of his or her right to seek review of such denial by a special master. *Id.*

On August 24, 2006, the director issued a notice of intent to deny (NOID) to the applicant. The director found that based on the applicant's testimony at his interview with a CIS officer, he is not eligible for CSS/Newman class membership. Specifically, the director noted that the applicant previously filed a Form I-687 which was accepted on November 5, 1987 in Long Island City, New York and that this application was approved on May 9, 1988. The director stated that this indicated that the applicant was not a class member. The applicant was afforded

30 days to respond to the notice. The director failed to notify the applicant of his right to seek review of this denial by the special master.

The applicant responded to the NOID with an affidavit stating that his application was previously approved on May 9, 1988. However, he goes on to say that he believes he is a class member because he was turned away when he tried to apply for legalization in 1993. Here, it is noted that to be a class member in the CSS/Newman Settlement Agreements an applicant must prove that he or she was turned away during the original legalization filing period, which was from May 5, 1987 to May 4, 1988. In this case, the applicant states that he was not turned away during that time. Though he appears to have been turned away when he attempted to prove he was a class member in 1993, this does cause the applicant to be a class member as defined in the CSS/Newman Settlement Agreements.

On September 21, 2006, the director issued a denial notice to the applicant stating that he had not overcome the basis for denial of his application as stated in her NOID. The director determined that the applicant was not a CSS/Newman class member. The director further stated that because the applicant has a daughter who was born on December 10, 1982, he must have been absent from the United States for more than 45 days during the requisite period. The director concluded that the applicant failed to meet his burden of establishing that he maintained continuous residence in the United States and denied his application on that basis. The director instructed the applicant to appeal the decision to the AAO by filing a Form I-694, Notice of Appeal.

On appeal, counsel for the applicant asserts the applicant was not interviewed. She goes on to say that the officer assigned to interview the applicant told the applicant he had already proven that he entered the United States before January 1, 1982 when he was granted Temporary Resident Status during the original filing period. Counsel goes on to say that the applicant's wife resided in the United States and therefore the presence of a child born to the applicant's wife does not establish that the applicant was absent from the United States for more than 45 days during the requisite period. Counsel further asserts that the applicant believes he is a class member. The applicant also submits affidavits in support of his application.

Counsel's argument that the applicant's wife resided in the United States at the time the applicant's child was conceived is persuasive. The AAO finds that the leases, tax documents, affidavits and other documents submitted by the applicant previously established that the applicant maintained continuous residency in the United States for the duration of the requisite period. These documents continue to allow him to meet his burden of establishing by a preponderance of the evidence that he resided continuously in the United States for the duration of the requisite period.

Here, the AAO finds that the director erred in stating that the applicant failed to prove that he maintained continuous residence in the United States for the duration of the requisite period. However, this error did not harm the applicant. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,*

925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The director's decision stating that the applicant failed to prove that he maintained continuous residence for the duration of the requisite period is withdrawn.

Pursuant to 8 C.F.R. § 245a.2(p), the AAO has jurisdiction over the denial of an application for Temporary Resident Status under section 245A of the Immigration and Nationality Act. Therefore, the AAO withdraws the portion of this decision that was decided on the merits. However, the AAO does not have jurisdiction over reviewing determinations regarding class membership. Therefore, the director's instruction for the applicant to appeal the decision to the AAO is in error and is withdrawn.

The CSS/Newman Settlement Agreements stipulate that an applicant should be notified of his or her right to seek review of the denial of his class membership application by a special master. This applicant was not notified of this right by the director. The Settlement Agreements also stipulate that CIS is to send a copy of a decision to deny an application for class membership to the applicant, to his or her attorney or record and to Class Counsel. Therefore the AAO returns this decision to provide the applicant with the opportunity to appeal the director's decision regarding his failure to establish class membership to the special master and to allow CIS to notify Class Counsel of the applicant's denial on this basis. The CSS Settlement Agreement specifies that Class Counsel for the purposes of the Settlement Agreement is [REDACTED] and [REDACTED], Center for Human Rights and Constitutional Law, Los Angeles, California 90037. The address for the Center for Human Rights and Constitutional Law is:

Center for Human Rights and Constitutional Law  
Attn: Peter Schey and Carlos R. Holguin  
256 S. Occidental Blvd.  
Los Angeles, California 90057

Finally, the record reflects that on April 6, 1987, the applicant was arrested by the Drug Enforcement Agency and subsequently charged with a violation of the Federal Controlled Substance Act. The charge was amended to *possession of marijuana*. On May 6, 1987, the charge was dismissed. (Case No. F8701072)

**ORDER:** The director's decision is withdrawn. The matter is remanded to provide the applicant with a final decision that informs him of his right to appeal his decision to the Special Master.