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U.S. Citizenship
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Services

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FILE: [REDACTED]
MSC 06 101 17503

Office: CHICAGO

Date: JUN 25 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: SELF-REPRESENTED

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.

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, Chicago. That decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 to U.S. Citizenship and Immigration Services (CIS). The director determined that the applicant had not established by a preponderance of the evidence that she entered the United States on a date before January 1, 1982 and then continuously resided in the United States in an unlawful status for the duration of the requisite period. The director stated that the applicant had an absence from the United States that exceeded 45 days. The director noted that at the time of her interview with a Citizenship and Immigration Services (CIS) officer pursuant to her Form I-687 application, the applicant stated that this absence lasted for longer than the applicant had intended it to due to the sudden and unexpected death of her father during this visit. 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 refers to her previously submitted school records which indicate that she was residing in the United States beginning in 1981. She states that she could not recall the specific dates of her absence from the United States at the time of her interview with a CIS officer. However, she submits evidence that this departure was for less than 45 days.

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. 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).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

The applicant shall be regarded as having resided continuously in the United States if at the time the application for Temporary Resident Status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

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.

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 the United States entered before 1982 and then continuously resided unlawfully in the United States for the duration of the requisite period. In this case, the submitted evidence is relevant, probative and credible.

On January 9, 2006, the applicant filed his I-687 Application. The record includes the following documents in support of her claim of residence in the United States during the requisite period:

- Progress reports, report cards and other school documents showing the applicant attended school in California full time from March 1981 until April 1985. These documents

correspond with the 1980/1981 school year, the 1981/1982 school year, the 1983 school year, the 1984 school year, and the 1985 school year;

- A letter signed by the Oceanside Unified School District's Custodian of Records that shows that the applicant attended school for all semesters beginning in March 1981 and ending on April 30, 1985;
- An attendance record for the applicant showing that she missed a total of five days of class in 1981 and one day of class in 1982;
- A death certificate showing that the applicant's father, [REDACTED], who resided in San Diego, California, died on December 22, 1985 due to injuries resulting from an automobile accident. This certificate shows that [REDACTED] was to be buried in Tonatico, Mexico;
- An Earnings Statement for the applicant for work done in October 1985 in the Burrito Basket in San Clemente, California;
- Earnings Statements for work the applicant completed in the United States in 1987;
- Receipts issued to the applicant in 1987.

The applicant submitted several other documents which make reference to her employment and residence in the United States in California and in Illinois after the requisite period. These documents are not relevant to the applicant's claim.

On October 12, 2006, the director denied the application. In her decision, she stated that the applicant failed to establish that she entered the United States on a date before January 1, 1982.¹ The director further cited the regulation at 8 C.F.R. 245a.1(c)(1)(i) which states that to have maintained continuous residence an applicant cannot have a single absence from the United States during the requisite period that exceeds 45 days 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. The director stated that at the time of the applicant's interview with a CIS officer on September 14, 2006, the applicant stated that she departed the United States around December 15, 1985 to spend Christmas with her family. The applicant further testified that her father died unexpectedly in a car accident while the applicant was in Mexico. The applicant stated that this caused her to delay her re-entry into the United States until the first week of February 1986.² Though the applicant had stated

¹ The AAO notes that the applicant submitted previously noted documents that indicate that the applicant was continuously enrolled in school in California beginning in the spring semester of 1981 beginning in March.

The AAO notes that the applicant's testimony regarding this absence shows that her return was delayed because of the death of her father during her absence. This absence was not anticipated by the applicant when she left for Mexico. Rather, this death was an unexpected situation that came suddenly into being. The regulation at 8 C.F.R. § 245a.2(h) states that an applicant shall be regarded as having resided continuously in the United States if . . . no single absence from the United States has exceeded 45 days . . . unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h). Though the term "emergent reasons" is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

that her return back to the United States was delayed because of an emergent situation that came suddenly into being, the director determined that this absence caused her to be ineligible to adjust status to that of a temporary resident.

On appeal, the applicant asserts that she was only estimating the approximate dates of her absence from the United States during the requisite period at the time of her interview with the CIS officer. She states that she has spoken with relatives and now recalls the dates of her absence with more accuracy. She submits documents attesting to the dates of her absence during the requisite period. Additional documentation submitted by the applicant to establish her residency during the requisite period includes the following:

- A declaration from the applicant that is dated October 26, 2006. In this declaration, the applicant asserts that she intended to be absent from the United States briefly to celebrate Christmas with her family in 1985. However, just after she arrived in Mexico she was informed that her father had died in an automobile accident in California. It is noted here that the applicant's father's death certificate indicates that he was to be buried in Mexico. The applicant asserts that she could not recall exactly when she returned to the United States at the time of the interview but she thought it was around the last week of January or the first week of February in 1986. The applicant goes on to say that after consulting her family she now knows that she arrived in Mexico on December 16, 1985 and returned on January 26, 1986.
- An affidavit from [REDACTED] who states that the applicant resided with him and his wife, who is the applicant's aunt, after the applicant returned from Mexico in 1986. He states the applicant returned on January 26, 1986 and that she resided with this affiant after her return and then until 1987.
- An affidavit from [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED], the sisters and mother of the applicant, who all state that the applicant arrived in Mexico on December 16, 1985, were informed that the applicant's father died in California on December 22, 1985, and that the body of the applicant's father was transported and the buried in Mexico. The affiants go on to say that the applicant remained after the burial to resolve family matters that arose as a consequence of her father's death. Therefore, she remained in Mexico until January 26, 1986. It is noted that this constitutes an absence of 41 days.

The contemporaneous documents submitted by the applicant appear to be credible. The letters, declarations and affidavits submitted by the applicant appear to be credible and amenable to verification in that each include contact telephone numbers and/or contact addresses.

The applicant gave testimony that was consistent with information in the record when she testified regarding her attending school in California from 1981 until 1985 and then working in California. She stated that she had one absence from the United States when she intended to go to Mexico only to celebrate Christmas but, due to the death of her father, she remained for 41 days. Therefore, the applicant has overcome the director's assertion that she failed to maintain continuous residence in the United States for the duration of the requisite period.

Further, had the applicant's absence exceeded 45 days, she has established that her return from Mexico was delayed because of emergent circumstances that came suddenly into being. The death

certificate submitted by the applicant is consistent with her testimony that her father passed away on December 22, 1985 while she was absent from the United States. Both the regulation at 8 C.F.R. § 245a.2(h) and *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988) establish that an absence of more than 45 days does not constitute a break in an applicant's residency if an applicant's return is delayed due to an emergent circumstance that came suddenly into being. Clearly, the applicant could not have foreseen or anticipated that her father would pass away unexpectedly while she was outside of the United States. Because the applicant's return to the United States was delayed because of an emergent circumstance, had her absence exceeded 45 days, this absence would not have caused a break in this applicant's residency.

The director has not established that the information on the many supporting documents in the record was inconsistent with the applicant's testimony or with the claims made on her I-687 Application; that any inconsistencies exist *within* the claims made on the supporting documents; or that the documents contain false information. As stated in *Matter of E-M-*, 20 I&N Dec. at 80, when something is to be established by a preponderance of the evidence, the proof submitted by the applicant has to establish only that the asserted claim is probably true. That decision also states that, under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence. *Id.* at 79. The documents that have been furnished in this case may be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of residence in the United States for the requisite period.

The applicant has established by a preponderance of the evidence that she entered the United States before January 1, 1982 and maintained continuous, unlawful residence for the duration of the requisite period. Consequently, the applicant has overcome the particular basis of denial cited by the director.

The appeal will be sustained. The director shall continue the adjudication of the application for Temporary Resident Status.

ORDER: The appeal is sustained.