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U.S. Citizenship
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FILE:

MSC 05 160 10360

Office: MIAMI

Date:

MAR 05 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. 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, 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, Miami. 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 (together comprising the I-687 Application). The director noted that the applicant had been absent from the United States for over 45 days and had failed to establish that her return had been delayed due to an emergent reason. The director acknowledged the applicant's testimony that a study abroad program she attended from August 1984 to January 1985 was a requirement for graduation from Smith College. However the director noted that Citizenship and Immigration Services (CIS) contacted the college on three different occasions and had confirmed that the applicant's study abroad program was not in fact mandatory for completion of her degree. The director, therefore, concluded that the applicant had not resided continuously in the United States for the requisite period and was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements. The director also raised the question of whether the applicant was in an unlawful status for the duration of the requisite period, but did not enter a determination on this separate issue.

On appeal, the applicant explains that she entered her study abroad program under special circumstances in 1984 and that the college's current staff could not have known "how things transpired over 20 years ago." She states that she neither applied for nor volunteered for the program, rather the opportunity to study in London was awarded to her as recognition of her athletic accomplishments. She states that no one informed her that she had the right of refusal and she did not ask questions or consider disobeying her elders. The applicant states that she understood that she was required to attend the program in order to remain at Smith College. She states that her absence should therefore not be considered disruptive of her continuous residence in the United States.

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. CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

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, 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 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 "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, "[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 applicant 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 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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet her burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

In this case, the applicant claimed on her I-687 Application that she entered the United States in 1979 and that she has resided in the United States since that time. At part #32 of the I-687 Application, which requires applicants to list all absences from the United States, the applicant indicated that she was in England from August 1984 until January 1985, participating in a study abroad program. The applicant submitted the following documentation related to this program:

1. A "Financial Guarantee" signed by _____ President of the Institute of European Studies in Chicago, Illinois, certifying that the applicant was accepted into full-time study in an Institute academic program in the United Kingdom, and that her educational expenses were financially supported for the fall semester of 1984 (August 28, 1984 to January 16, 1985). The document shows that the financial expenses were assumed by Smith College.
2. A letter dated August 23, 1984 from _____, Associate Professor of Psychology at Smith College, who stated his relationship with the applicant as a professor and coach, attested to her good character and stated that during her stay in England to study at the Institute of European Studies, her expenses would be fully covered by Smith College.
3. A letter dated August 8, 1984, addressed to the Embassy of Great Britain, from _____ Acting Associate Dean for Intercollegiate Study at Smith College. _____ stated that the applicant was a student in good standing at Smith College and would be studying at the Institute of European Studies in London from August 28, 1984 until January 16, 1985 on an Independent study Abroad program arranged through Smith College, which would pay all expenses associated with the program.
4. A Form I-20A, Certificate of Eligibility for Nonimmigrant (F-1) Student Status, issued to the applicant by Smith College, indicating that the applicant was expected to report to the school no later than January 16, 1985 for completion of her undergraduate studies.

The applicant was interviewed under oath by a CIS officer on April 17, 2006, at which time she was questioned regarding her semester abroad. The officer's notes from the interview indicate that the applicant initially stated that she could have turned down the opportunity to study abroad, but that she subsequently claimed that the program was a requirement for graduation. On the date of her interview, the applicant signed a statement in which she indicated the following:

I was asked by my professors if I was interested in attending a semester abroad or working in Washington, D.C. as part of the requirement to graduate. As part of my studies I attended London School of Economics in the political science area. I studied in London from August 28, 1984 to January 16, 1985.

The applicant was advised that her absence of 141 days would disrupt her period of continuous residence in the United States unless she established that due to emergent reasons, her return could not be completed within the time allowed. The applicant argued that the program was a requirement for her to graduate and should not be considered as having broken her continuous residence.

The applicant was asked to provide evidence from Smith College that the study abroad program was a requirement for her degree and graduation. In response, the applicant re-submitted the four documents listed above, along with a letter dated June 20, 1984 from [REDACTED] of the London School of Economics and Political Science. [REDACTED] certified that the applicant had been accepted for a period of full-time study in the United Kingdom for the 1984-1985 academic year.

The director denied the application on July 24, 2006, concluding that the applicant's absence of 141 days interrupted her continuous residence and that she had failed to show any emergent reasons compelling her to remain in the United Kingdom. The director acknowledged the evidence submitted by the applicant subsequent to her interview, but noted that none of the documents addressed whether the study abroad program was a requirement for the applicant's academic degree.

The director also stated that CIS had contacted Smith College on three different dates in an attempt to verify whether the applicant's program was in fact a graduation requirement. The director indicated that on April 17, 2006, [REDACTED] of the Office of International Studies advised that studying abroad was never a requirement to graduate. He stated that if it was an individual requirement for the applicant, her documents would show this. The director further noted that on April 18, 2006, [REDACTED] of the Study Abroad Program advised CIS that the program to study abroad was highly selective, that students must apply for the program, have good grades, and submit recommendations from professors. The director indicated that CIS contacted the college once again on April 26, 2006 and at that time, [REDACTED] stated definitively that study abroad has never been a requirement for a degree or for graduation from Smith College.

The director concluded that the information received from the school affirms that the study abroad program was a voluntary program for which a student must apply and be accepted, rather than a requirement for graduation. Therefore, the director found that the applicant's stay abroad for 141 days broke her continuous residence in the United States and rendered her ineligible for temporary resident status.

On appeal, the applicant contends that although the information provided by [REDACTED] may have been accurate, the study abroad program requirements cited by her do not apply in the applicant's situation. The applicant states that the [REDACTED] "could not have known how things transpired over 20 years ago." She contends that she was not aware of the existence of the study abroad program, did not apply for it, did not have good grades that would have met the program requirements, and did not solicit recommendations from professors to gain entry to the program.

The applicant further explains that the then president of Smith College, [REDACTED], without the applicant's knowledge, wanted to honor her for her performance at the NCAA Division III Nationals in track and field. She states that [REDACTED] had hoped to arrange for her to compete in the 1984 Olympics representing her home country of Ghana, but was informed that Ghana was not sending an Olympic team to the Los Angeles

games. The applicant states that [redacted] informed her that she would send her to England to study, because she was not able to get the applicant into a similar program in Washington, D.C. The applicant asserts that everything had been arranged by the school and that she "accepted what I was told to do and understood it as a requirement for my remaining at Smith College." She states that no one informed her that she had the choice of refusal and that she was made to understand that she was required to attend the program. The applicant concludes that if she had known that she had a choice or that the semester abroad would hurt her chances of becoming a permanent resident in the United States, she would have made a different decision.

Upon review, the applicant's assertions are not persuasive. Continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless 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's participation in a study abroad program with a fixed four and a half month timeframe, cannot be considered an "emergent" reason for her prolonged absence from the United States. The applicant departed the United States with a fixed date for her return and did not delay her return due for any reason that came unexpectedly into being.

Furthermore, as noted by the director, the applicant's testimony related to her participation in the study abroad program has not been consistent. The applicant initially indicated during her interview that she could have turned the program down, but subsequently stated that the study abroad program was a graduation requirement. On the same day, the applicant signed a written statement indicating that she was asked by her professors if she was interested in attending a semester abroad or working in Washington D.C., thus implying that she did have a choice in the matter and chose to study outside the United States. Now, on appeal, the applicant offers a different version of the events, stating that the President of Smith College called her into the office and told her that all arrangements had been made for her to study in the United Kingdom, without her knowledge. She also now states that she did not have the option to study in Washington, D.C. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

As noted by the director, three different contacts at Smith College, including a dean, have confirmed that the college has never required a study abroad program as a graduation requirement. The applicant has not offered evidence that the program was required in her specific circumstances, and in fact now states that she only believed at the time that it was required. While she offers new testimony that she entered the program in an unorthodox fashion, her statements are not corroborated by any supporting evidence from the college. Even if the applicant did not apply for the program through the normal process, the fact remains that she entered a voluntary study-abroad program with full knowledge that the program would

require her to be outside the United States for more than 140 days. The applicant has not submitted evidence on appeal to overcome the director's determination.

Therefore, the applicant's admitted absence from the United States from August 1984 until January 1985, a period of more than 45 days, is clearly a break in any period of continuous residence she may have established. As she has not provided any evidence other than her own attestation that the program was a graduation requirement and thus should be considered an "emergent reason" for her absence from the United States, she has failed to establish by a preponderance of the evidence that she has continuously resided in an unlawful status in the United States for the requisite period, 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.

Beyond the decision of the director, it is noted that the applicant has not established that she is among the categories of aliens eligible for temporary status pursuant to section 245A of the Act and 8 C.F.R. § 245a.2(b). The record shows that the applicant first entered the United States in September 1979 as an F-1 nonimmigrant student to attend the Hotchkiss School, a private high school in Connecticut. She later attended Smith College from September 1982 until May 1986, also as an F-1 nonimmigrant student.

Section 245A(a)(2)(B) of the Act provides the following:

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

The director stated in her decision that while the applicant established her residence in the United States prior to January 1, 1982, her "illegal status is questioned on that date and later" since the applicant was in F-1 status. The director did not further address this issue in her decision, nor did the applicant address it on appeal.

Here, the applicant's period of stay as an F-1 nonimmigrant student did not expire through the passage of time prior to January 1, 1982. This would have been during her senior year at Hotchkiss School where it appears that she maintained her status as a full-time high school student. The applicant claims that she violated her F-1 status by doing babysitting work in college without permission from the Immigration and Naturalization Service (INS, now CIS). However, there is no evidence that this violation occurred prior to January 1, 1982 or that it was known to the government as of that date. The applicant has not claimed that any violation of her F-1 status occurred prior to January 1, 1982. Thus, it is reasonable to conclude that she remained in a lawful status as of that date. The record contains a copy of the applicant's Social Security Statement prepared on April 5, 2000 which shows that she first worked in 1983, earning \$65.00, with no income reported in 1984 or 1985.

Therefore, based on the evidence of record, the applicant's status did not expire prior to January 1, 1982, nor did she violate her legal status prior to January 1, 1982. Therefore, she is not eligible for temporary resident status under section 245A of the Act.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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