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U.S. Citizenship
and Immigration
Services

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FILE:

Office: LOS ANGELES

Date: MAR 26 2008

MSC-05-250-13795

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. 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. Wieman, 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, Los Angeles. 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, counsel for the applicant asserts that she has established her continuous unlawful residence in the United States during the requisite period.

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).

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.* at 80. 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, 431 (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.

The record shows that the applicant submitted a Form I-687 Application and Supplement to Citizenship and Immigration Services (CIS) on June 7, 2005. At part #30 of the Form I-687 application where applicants are asked to list all residences in the United States since first entry, the applicant showed her first address in the United States to be in Wichita, Kansas from July 1981 until December 1986. The applicant amended this period during her interview to reflect her residence in Wichita, Kansas as July 1981 until November 1987. At part #32 of the application, the applicant listed one absence from the United States since her entry. This absence was for travel to Nigeria from December 1987 until January 1988. The applicant amended this date during her interview to reflect her absence from the United States as November 18, 1987 until January 4, 1988. At part #33 of the application, the applicant indicated that she was unemployed from June 1981 until April 1988.

On August 14, 2006, the director issued a denial notice to the applicant. This denial notices provides:

You were interviewed on July 28, 2006. You testified under oath that the first time you entered the U.S. was illegally in 1981 with your husband. Around November 18, 1987,

you returned to Nigeria to visit your mother and you re-entered the U.S. on January 4, 1988. You were asked the same question at least two more times and responded with the same answer. You wrote and signed a sworn statement confirming this before your attorney and an Immigration Officer.

The director cited to section 245A(a)(2)(A) of the Act, providing that an applicant must establish continuous unlawful residence in the United States during the requisite period, and section 245A(a)(3)(A) of the Act, providing that an applicant must establish continuous physical presence in the United States since November 6, 1986. The director cited to an exception delineated in section 245A(a)(3)(B) of the Act, providing that an applicant shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences. Additionally, the director cited to the regulations for continuous residence at 8 C.F.R. § 245a.2(h) and continuous physical presence since November 6, 1986 at 8 C.F.R. § 245a.2(l). The director determined that the applicant failed to meet her burden of proof by a preponderance of the evidence that she resided in the United States for the requisite periods. The director concluded that the applicant is not eligible for temporary resident status under section 245A of the Act and denied the application.

On appeal, counsel for the applicant asserts that she had an emergent reason for her extended absence from the United States. Counsel provides that the applicant had initially planned an absence from the United States that was less than 30 days, but she was hospitalized for bronchial asthma while she was abroad. Second, counsel asserts that the director denied the application without first issuing a Notice of Intent to Deny as required by the CSS settlement agreement and regulations. Third, counsel asserts that the CSS settlement agreement prohibits the denial of an applicant's legalization application solely on the basis of travel abroad after November 6, 1986 without advance parole. Finally, counsel asserts that the applicant's absence from the United States was brief, casual and innocent.

Counsel is mistaken in his assertion that the director violated the terms of the CSS settlement agreement by denying the application without first issuing a Notice of Intent to Deny (NOID). According to the settlement agreements, the director shall issue a NOID before denying an application for class membership. Here, however, the director did not deny the application for class membership. Instead, the director, based on the applicant's class membership, adjudicated the application for temporary residence on the merits. As the director did not deny the applicant the benefit of class membership, the director was not required to issue a NOID prior to issuing the final decision in this case.

The record does not contain enough factual information to analyze whether the applicant's absence from the United States was brief, casual and innocent pursuant to section 245A(a)(3) of the Act. Therefore, the AAO will not make a determination on the issue of the applicant's failure to establish continuous physical presence since November 6, 1986. This proceeding will instead focus on the applicant's continuous residence in the United States during the requisite period pursuant to section 245A(a)(2) of the Act.

An alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

The applicant's sworn statement and application provide that she was absent from the United States for 47 days. This absence is in excess of the 45 day period delineated in the regulations. If the applicant's absence exceeds 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-* defines emergent as "coming unexpectedly into being." 19 I&N Dec. 808 (Comm. 1988).

Counsel asserts on appeal that the applicant had initially planned an absence from the United States that was less than 30 days, but she was hospitalized for bronchial asthma while she was abroad. As evidence of the applicant's hospitalization, counsel submits an affidavit from the applicant and a document from the Ankuri Hospital in Nigeria. The applicant claims in her affidavit that she has been absent from the United States on one occasion from the period of November 18, 1987 until January 4, 1988. The applicant further provides that she had planned to spend three weeks abroad, but was hospitalized from December 12, 1987 through January 2, 1988 at the Ankuri Hospital. The document from Ankuri Hospital shows the applicant's admission on December 12, 1987 for bronchial asthma and her discharge on January 2, 1988.

The applicant's evidence and assertions are inconsistent with other documentation in her record. The applicant's record contains a copy of her passport, issued in Lagos, Nigeria on September 4, 1987. This passport shows that the applicant entered the United States on January 4, 1988. Thus, the applicant's absence from the United States was at least since September 4, 1987. The period from September 4, 1987 until January 4, 1988 is 122 days, which far exceeds the 45 day allowed time period. It also makes irrelevant the applicant's claimed emergent reason for her untimely return to the United States. Even if the applicant had been hospitalized on December 12, 1987, she still would have already been absent from the United States for at least 99 days.

Additionally, the applicant's file contains a signed Form G-325A, Biographic Information Sheet, which provides that the date of her marriage was on December 18, 1987 in Lagos, Nigeria. This date is inconsistent with the applicant's claim that she was admitted to the Ankuri Hospital from December 12, 1987 until January 2, 1988. These significant inconsistencies draw into question the overall credibility of the applicant's claim of continuous residence in the United States. Therefore, the applicant has not overcome the director's determination that she failed to establish continuous residence in the United States during the requisite period pursuant to section 245A(a)(2) of the Act.

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 application. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Even if the applicant's record did not contain the above mentioned inconsistencies, she would still be ineligible for temporary resident status because she has failed to provide credible, reliable and probative evidence of her residence in the United States during the entire requisite period.

As evidence of her residence in the United States, the applicant submitted a fill-in-the-blank affidavit from her husband, [REDACTED]. Mr. [REDACTED] states in this affidavit that he has personal knowledge of the applicant's residence in the United States in Wichita, Kansas from June 1981 until February 1991. [REDACTED]'s affidavit provides, "[REDACTED] and I entered the United States in June 1981. We were together in Wichita Kansas until she went back to Nigeria in November 1987 and came back from Nigeria on January 3, 1988." [REDACTED]'s claims are inconsistent with documentation in the record. As noted, the applicant's passport shows that she was in Nigeria in September 1987. Additionally, the applicant's Form I-687 indicates that during her interview she testified that she resided in Wichita, Kansas from July 1981 until November 1987. The applicant testified that she thereafter resided in California. Based on these inconsistencies, this affidavit cannot be afforded any weight as probative evidence of the applicant's residence in the United States during the requisite period.

The applicant submitted a Social Security Administration statement showing her FICA earnings for 1988. The applicant's Form I-687 provides that her first employment in the United States was with Brier Oak Terrace Convention Center in Burbank, California, as a nurse assistant from April 1988 until July 1989. The requisite period at issue is from prior to January 1, 1982 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. Therefore, this statement only covers one month of the applicant's residence in the United States during the requisite period.

The applicant submitted a copy of a declaration she completed for determination of her class membership in the League of United Latin American Citizens (LULAC) vs. INS. The applicant also submitted a copy of a Form I-687 application she completed for the determination of her class membership in LULAC. Pursuant to 8 C.F.R. § 245a.2(d)(6), to meet her burden of proof, an applicant must provide evidence of eligibility apart from her own testimony. Without credible and reliable corroborating documentation, these documents alone are not probative evidence of the applicant's residence in the United States during the requisite period.

In conclusion, when viewed either by itself or within the totality, the evidence in the applicant's record is not probative of her continuous residence in the United States during the entire requisite period. The applicant has been given the opportunity to satisfy her burden of proof with a broad range of evidence. See 8 C.F.R. § 245a.2(d)(3). However, the applicant has failed to provide credible, reliable and probative evidence of her continuous residence. The applicant's failure to

establish her continuous residence in the United States during the entire requisite period renders a finding that she has failed to satisfy her burden of proof, as delineated in 8 C.F.R. § 245a.2(d)(5). For this additional reason, the applicant is ineligible 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).

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, as well as the inconsistencies and contradictions noted in the record, seriously detract from the credibility of his claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the inconsistencies in the record and the lack of credible supporting documentation, it is concluded that 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.

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