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FILE:

MSC-06-088-10512

Office: BOSTON

Date: SEP 29 2008

IN RE:

Applicant:



APPLICATION:

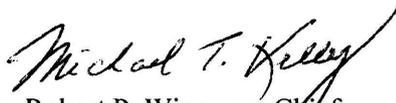
Application for Status as a Temporary Resident pursuant to Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, your file has 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 if your case was remanded for further action, you will be contacted.

for 
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, Boston. 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 during the applicant's August 22, 2006 interview, the applicant stated that she left the United States in June 1986, gave birth in Brazil in August 1986, and returned to the United States in September 1986. The director found that the applicant was absent from the United States for over 45 days during the period from January 1, 1982 to May 4, 1988. 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.

On appeal, counsel states that over the "twenty-seven (27) year period [the applicant] has resided continuously in the United States," the applicant has only been absent "approximately one hundred (100) days." Counsel adds that "this is well within the one hundred and eighty (180) day aggregate set out in Title 8 245a.2(h)(1)(i)." Counsel does not submit any evidence on appeal.

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. See 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, 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 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.

In the present case, the applicant claimed on the Form I-687, at part #32 which requires applicants to list all absences from the United States, that she visited Brazil from March 1996 to March 1996. The Form I-687 does not include the visit to Brazil during which she gave birth. The Form I-687

does not identify any other trips to Brazil. However, in a sworn statement of November 6, 2006 the applicant reiterated the two trips to Brazil that she identified in her interview and that the acting director cited in her decision denying the application. As is obvious in the excerpt below from the applicant's sworn statement of November 6, 2006, the applicant acknowledged two trips to Brazil, each for the birth of a child and each of which trip included at least 45 days outside the United States during the requisite period for establishing continuous residence in the United States:

5. In December, 1985, I learned that I was pregnant with my first child.
6. My husband, and I, agreed that it was best for me to deliver my child in Brazil. We had no immediate family in the United States. I wanted be near my mother.
7. Towards the end of June, 1986, I was seven (7) months pregnant. I returned to Brazil and I gave birth to a beautiful baby boy, [REDACTED]. Shortly thereafter, I returned to the United States. I crossed the border, on foot, at San Diego, California.
8. Approximately one (1) year later, that is, in September 1987, I learned I was pregnant a second time. Again, I wanted to be near my mother for the delivery. I returned to Brazil in February, 1988, and I gave birth to another beautiful baby boy, [REDACTED] on March 9, 1988. There were complications at delivery and I was hospitalized for several days. Once I felt better, I returned to the United States. I arrived back in the United States in June of 1988.

On appeal, counsel mentions the testimony given by the applicant during her interview regarding her absences from the United States. Although counsel argues that the applicant's aggregate absences from the United States total less than 180 days, he does not provide evidence that each of the applicant's absences lasted less than 45 days.

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).

During her interview, the applicant's admitted absence from the United States from June 1986 to September 1986 and from February 1988 to June 1988, each for a period of more than 45 days, breaking any period of continuous residence that she may have established. As she has not established "emergent reason" as the cause for her failure to return to the United States in a timely manner, 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.