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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[Redacted]

FILE: [Redacted]
MSC 06 097 13494

Office: NATIONAL BENEFITS CENTER

Date: **AUG 13 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:

[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.

Handwritten signature of Robert P. Wiemann in black ink.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: An adverse decision regarding the applicant's 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 issued by the Director, National Benefits Center, and is now before the Administrative Appeals Office on appeal. This matter will be remanded for further action and consideration.

The director concluded that the applicant had not filed his Form I-687 within the prescribed time limit, which allowed applicants until December 31, 2005 to file their respective applications, extending the prior deadline of May 23, 2005. Specifically, the director determined that the applicant's Form I-687 application was postmarked January 5, 2006, thereby indicating that the application was not timely filed. It is noted, however, that the postmark date cannot be established without the original envelope that was used to mail the application. As this envelope is not presently in the applicant's record, the director's statement cannot be corroborated. The record only contains the date stamp on the applicant's Form I-687, which indicates that it was received on January 5, 2006. This receipt date of January 5, 2006 is corroborated by the electronic records of the U.S. Citizenship and Immigration Services (CIS).

On appeal, counsel provides documentation from the United States postal service which he claims proves that the applicant's Form I-687 was delivered to the National Benefits Center's post office box in Chicago, Illinois on December 30, 2005, which is one day prior to the filing deadline. However, upon review of the copy of the express mail receipt provided by counsel, there is no indication that this receipt corresponds to the applicant's I-687 application. On the contrary, the express mail receipt indicates that the package was from a [REDACTED] in Arizona and that it was mailed at the Silverado Station in Las Vegas, Nevada. As the applicant and his counsel are located in Virginia, it is highly unlikely that this express mail receipt belongs to the applicant's application. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As such, the express mail receipt and corresponding tracking information is hereby rejected and may not be used as evidence of the timely filing of the applicant's application in this matter.¹

Having said that, both the director and counsel correctly refer to the postmark rule in the CSS/Newman (LULAC) Settlement Agreements, which states in pertinent part the following:

Applications shall be deemed filed on the date postmarked in accordance with the provisions at 8 C.F.R. § 245a.12(a).

¹ It is noted that it is a crime to knowingly make a false representation or to use any false document in connection with this type of application. *See* § 245A(c)(6) of the Act, 8 U.S.C. § 1255a(c)(6). If tried and convicted, the punishment for an alien or any person who supplied the false document is a fine, imprisonment for not more than five years, or both. *Id.*

Title 8 C.F.R. § 245a.12(a)(1) states that:

If the postmark is illegible or missing, and the application was mailed from within the United States the Service will consider the application to be timely filed if it is received on or before June 9, 2003.

The date of June 9, 2003 provided in 8 C.F.R. § 245a.12(a)(1) is five calendar days past the postmarked required date of June 4, 2003. Extrapolating the same date for purposes of CSS/Newman (LULAC) gives us January 5, 2006 as the date by which an application with a missing postmark must be received in order to be considered as timely filed. In this case, as the application's postmark is missing and as the application was stamped by CIS as being received on January 5, 2006, the application must be treated as timely filed pursuant to the terms of the CSS/Newman (LULAC) settlement agreements and 8 C.F.R. § 245a.12(a)(1). Thus, the sole basis for the director's adverse decision has been overcome.

Accordingly, the decision of the director is withdrawn. The case will be remanded for the director's full consideration of the merits of the applicant's claim, including first and foremost the issue of the applicant's eligibility for class membership. If the director determines that the applicant has established class membership, he must then determine whether the applicant is eligible for temporary resident status.

If the director finds that the alien 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 provides the applicant 30 days to submit additional written evidence or information to remedy the perceived deficiency. Once the alien 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 new decision regarding the applicant's eligibility for class membership to both counsel and the applicant. Any new adverse decision and appeal that is still pending shall be forwarded to the Special Master as designated in paragraph 9, page 5 of the CSS Settlement Agreement and paragraph 9, pages 7 and 8 of the Newman Settlement Agreement for review and adjudication of the applicant's appeal as it relates to his eligibility for class membership.

If the director determines that the alien has established class membership or if the applicant's appeal is sustained by the Special Master with respect to the issue of his class membership, the director shall then adjudicate the application as it relates to the issue of the applicant's eligibility for temporary resident status within the parameters of the relevant regulatory and statutory provisions.

ORDER: This matter is remanded for further action and consideration pursuant to the above.