

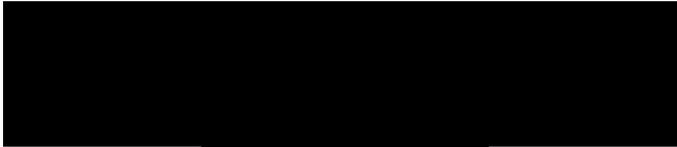
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and Immigration
Services

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FILE:

MSC-04-311-11132

Office: NEW YORK

Date:

JUL 02 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. The file has 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, New York. 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, on August 6, 2004 (together, the I-687 Application). The director determined that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. She specifically found that the applicant's absences from the United States, from March 20, 1986 to July 8, 1986 and from March 16, 1987 to May 15, 1987, and his departure on August 11, 1987, constitute a clear break in continuous residence during the requisite period, and that the applicant failed to provide evidence that his return to the United States had been delayed due to emergent circumstances. The director also found that the applicant's absence from March 16, 1987 until May 15, 1987 was not authorized by the Immigration and Naturalization Service (Service, now U.S. Citizenship and Immigration Services, or CIS) and was clearly a violation of the physical presence requirements of 8 C.F.R. § 245a.2(l). The director denied the application on June 15, 2007, finding that the applicant had not met his 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 asserts, through counsel, that the grounds for denial in the director's decision of June 15, 2007 are erroneous, both factually and legally. In her accompanying brief, counsel also lists 37 affidavits and other documents submitted prior to the denial and notes errors made by CIS in past Notices of Intent to Deny and a prior Notice of Denial that was amended on June 15, 2007. This decision will address the applicant's appeal of the June 15, 2007 denial, taking into consideration all of the evidence in the record.

The AAO agrees with counsel's assertion that the director erred in finding the applicant ineligible for temporary residence based on his failure to prove "continuous physical presence" in the United States since November 6, 1986. That portion of the director's decision will be withdrawn. Counsel also noted that the director mistakenly indicated that the applicant's absence from the United States from March 16, 1987 to May 15, 1987 was for 100 days, and the AAO notes that the absence was for 60 days. Despite these errors, however, upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director's conclusion that the applicant has not established by a preponderance of the evidence that he is eligible for the benefit sought.¹

¹ The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Upon review, the AAO finds that the applicant's admitted absence of over 45 days, from March 16, 1987 to May 15, 1987, constitutes a clear break in any continuous residence the applicant may have established during the requisite period; and that the applicant failed to provide sufficient evidence that his return to the United States had been delayed due to emergent circumstances.

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).

Under the CSS/Newman Settlement Agreements, for purposes of establishing residence and physical presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file. 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 periods, 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, *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. *See* 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the

time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

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 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 applicant shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status,² no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is considered filed, 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 residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h)(1).

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 issue in this proceeding is whether the applicant has submitted sufficient evidence to establish that his absence during the requisite period and failure to timely return to the United States within 45 days was due to emergent reasons. Although the director referred to three separate absences of over 45 days in her decision, the applicant admits to two absences of over 45 days, from March 16, 1987 to May 15, 1987 and from August 11, 1987 to September 30, 1987. The absence from March 16, 1987 to May 15, 1987 was clearly before the applicant could have filed an application for temporary resident status, or before the application could have been considered filed pursuant to the CSS/Newman Settlement Agreements. It is this absence during the requisite period, admitted by the applicant, which will be addressed here.³

² Under the CSS/Newman Settlement Agreements, this refers to the time the applicant attempted to file or was caused not to timely file the application.

³ Counsel asserts in her Memorandum of Law dated February 14, 2006 that the applicant attempted to file an application for legalization with the Service sometime after returning to the United States on September 30, 1987 after his second prolonged absence. However, it does not appear from the record that the applicant has made that claim, and the record does not contain any evidence of the date he attempted to file his application. The AAO notes that absences during the requisite period, from before January 1, 1982 through the date the applicant attempted to file, are relevant to this analysis. If counsel's claim is true, then this analysis would also apply to the prolonged absence from August 11, 1987 to September 30, 1987.

A copy of a British Airways ticket issued to the applicant shows he traveled to the United States from India on May 15, 1987 and was questioned at that time by the Service regarding his admission into the United States on a B-1 non-immigrant visa. During the interview, he stated that he had previously entered the United States on July 8, 1986 and had been given an extension from the Service to remain in the United States until March 17, 1987 and that he had left the country on March 16, 1987. He explained that he was in the United States on business and that he brought in goods to sell to shops.

The applicant claims that his failure to timely return to the United States was due to his mother's illness in India. In her Memorandum of Law, dated February 14, 2006, counsel asserts that, since approximately February of 1981, the applicant has maintained continuous physical presence in the United States except for brief and casual absences for "emergent purposes to visit and care for his ailing mother in India who had a heart condition," and that the second of the applicant's three absences since 1981 was from March 16, 1987 to May 15, 1987, when he "departed the U.S. for a brief absence to visit his ailing mother." In support of this claim, the applicant submitted an affidavit from [REDACTED] of the JAS Clinic in Chandigarh, India, dated April 5, 2006.

[REDACTED] certifies that the applicant's mother

had been found to be suffering from Diabetes Mellitus, Hypertension . . . [illegible] . . . in the year 1986 & had been under medical supervision. She had also taken specialist's advice.

She was taken seriously ill due to her above mentioned disease in March 1987 & again in July-Aug. 1987. She needed constant medical care & supervision. During this period she was well looked after by her family, husband [REDACTED] & son [the applicant], which was instrumental in her recovery.

[REDACTED] does not claim that he diagnosed or treated the applicant's mother and does not indicate whether he consulted any medical records as the basis of his statements. No records from any treatment center or doctor have been submitted as evidence that the applicant's mother was ill or that any sudden change in her condition arose unexpectedly. There is no evidence of the time or place or type of treatment or medication that might have been administered, either in 1986 or during or after any sudden change in her medical condition. The affidavit does not indicate whether the applicant's mother was taken seriously ill before or after his departure for India and does not indicate in what way the applicant's personal assistance was suddenly needed to the extent that he could not return as planned.

As noted above, the applicant must establish that due to emergent reasons he could not return to the United States within the time period allowed; emergent means "coming unexpectedly into being." Given the lack of any official medical evidence in the record, and the lack of relevant details in [REDACTED]'s affidavit, the applicant's claim of an emergent reason for his delayed return has not been substantiated.

In her decision to deny, the director did not address the sufficiency of the evidence submitted in support of the applicant's claim of continuous unlawful residence throughout the requisite period. On appeal, the applicant did not focus on this issue, but referred to documentation previously submitted as evidence of

residence. The AAO will not decide this issue here, however, because continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless timely return could not be accomplished due to emergent reasons. 8 C.F.R. 245a.2(h)(1)(i). In light of the applicant's admission that he was absent from the United States for more than 45 days on at least one occasion, and his failure to provide sufficient evidence that his return was delayed due to emergent reasons, any continuous unlawful residence he may have had in the United States during the requisite period has been broken. Due to his absence, the applicant has failed to demonstrate continuous unlawful residence in the United States for the requisite period. The applicant is therefore ineligible for temporary resident status under section 245A of the Act on that basis.

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