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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEW YORK Date: JUL 24 2008

MSC-06-062-18169

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: SELF-REPRESENTED

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 December 1, 2005 (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. In a Notice of Intent to Deny (NOID), issued on June 20, 2006, the director specifically found that the applicant had testified that he had left the United States in May 1987 and did not return until August 1987, representing a clear break in residence "in excess of a single absence of 45 days during the statutory period from January 1, 1982 until May 4, 1988." The director added that the applicant had offered no evidence that his return to the United States could not be accomplished during the allowed period due to emergent reasons and had also failed to submit credible documentation of residence for the requisite period. In her final decision, the director found that the applicant had failed to overcome the grounds for denial stated in the NOID; that he had submitted affidavits with information that could not be verified; and that he had given contradictory information regarding his admitted absence from the United States, from May 1987 to August 1987, and other absences in 1987 and 1988 which were documented in U.S. immigration records. The director denied the application on March 19, 2007, finding that the applicant had not met his burden of proof by a preponderance of the evidence 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 that he had submitted a "Statement of Emergent Reasons" that prevented him from returning to the United States within 45 days; that under the CSS/Newman Settlement Agreements, failure to provide evidence other than affidavits shall not be the sole basis for finding failure to meet the continuous residence requirement, and that he had submitted an affidavit from the Secretariat of State of Foreign Relations of the Dominican Republic as evidence of such residence; that there is no evidence that the Service ever attempted to verify the information in the affidavits submitted; and that the director erroneously mentioned his travel record until May 13, 1988, since he had applied for legalization on August 6, 1987 and the regulations require continuous residence only until the date of filing the application.

The AAO agrees with the applicant's assertions, including that there is no requirement that the applicant provide evidence of continuous residence beyond the date his application would have been considered filed, which he claims was August 6, 1987. The director however did not base her decision to deny the application on those absences, but rather on the applicant's admitted absence from May to August 1987, a period of over 45 days during the statutory period. She also found that the applicant had not provided sufficient evidence of an emergent reason for the delay in returning. The AAO notes that the applicant submitted three affidavits as evidence of his entry and continuous residence in the United States for the

requisite period, and, as stated by the applicant, there is no indication in the record that attempts were made to verify the information they contain. Absent such evidence, there is no basis to conclude that the information was unverifiable. Despite the errors noted, 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]

Upon review, the AAO finds that the applicant's admitted absence of over 45 days, from May to August 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 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).

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[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).

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. *See* 8 C.F.R. § 245a.2(d)(6).

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, 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.

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 45 days, and the aggregate of all absences has not exceeded 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. 8 C.F.R. § 245a.2(h)(1). The applicant must also have been maintaining a residence in the United States, and the departure must not have been based on an order of deportation. *Id.*

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, 810 (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. The applicant stated on his Form I-687 Application that he was in the Dominican Republic for a family emergency from May to August 1987; at his interview on June 19, 2006, he confirmed this by stating that he left the United States in May 1987 for three to four months to visit family; on appeal, he adds that he "returned to the United States with a B1-B2 Visa, via San Juan, on August 5, 1987 and [he] applied for legalization on August 6, 1987." The AAO notes that the record contains copies of the applicant's passport with entry and exit stamps confirming that the applicant was out of the United States on the dates noted, but that the information provided by the applicant is not consistent with that record. Stamps in the applicant's passport indicate that he was in the Dominican Republic on August 5, 1987, in Canada on August 8, 1987, and in France on August 14, 1987; they also

[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.

show that he was in Haiti in July 1987. These contradictions raise concerns about the credibility of the applicant's testimony regarding his absences.

In response to the director's NOID and the finding that the applicant had been absent for over 45 days, the applicant submitted his own affidavit dated July 19, 2006, a "Statement of Emergent Reasons" explaining his delay in returning to the United States. The applicant claimed that he traveled to the Dominican Republic in May 1987 after his ex-wife telephoned him with news that their daughter was sick and was asking for him. He stated that when he arrived there, he unexpectedly found his daughter suffering from generalized anxiety disorder and his ex-wife with severe depression; that their primary care physician, [redacted], informed him that only the applicant's presence could guarantee their recovery; and that he, therefore, could not return to the United States as he had planned.

The applicant's own statement is the only document he provided as evidence of the reason for his delayed return to the United States. He failed to provide any evidence that his ex-wife and daughter were diagnosed or treated by any physician. He submitted no records from any treatment center or doctor as evidence that they were ill or that they needed or had received any type of treatment or medication at any time, either before or during his visit. He provided no evidence to indicate in what way his personal assistance was suddenly and urgently 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." *Matter of C-*, 19 I&N Dec. at 810. To meet his or her burden of proof, he must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). Given the lack of any official medical evidence in the record, and the lack of any evidence other than the applicant's own statement, his claim of an emergent reason for his delayed return has not been substantiated.

In her decision to deny, the director also noted that the applicant had not submitted sufficient evidence to meet his burden of proof, concluding that there were inconsistencies in the record regarding absences and a paucity of evidence in support of the applicant's claim of continuous unlawful residence throughout the requisite period. The AAO notes that the only documents the applicant submitted in support of his claim of continuous residence were three affidavits and his own statements. The AAO finds it unnecessary, however, to decide this issue here because a single absence of more than 45 days, as in this case, breaks continuous unlawful residence. 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.