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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEW YORK Date: JUL 30 2008

MSC 06 033 12294

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 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 (together comprising the I-687 Application). The director determined that the applicant failed to establish, by a preponderance of the evidence, continuous unlawful residence for the duration of the requisite period. Specifically, the director noted that the applicant had listed a five month absence from the United States during the requisite period on his Form I-687 application as well as on a corrected Form I-687 application that the applicant later submitted. Although the applicant testified before an immigration officer that he had only been absent for one month during the requisite period, the director relied on the statements made in the Form I-687 applications and found that the applicant had disrupted his "continuous residence" as a result of the five month absence. The director also noted the lack of credible probative evidence submitted by the applicant to prove his continuous residence in the United States for the duration of the requisite period.

On appeal the applicant, through counsel, states that the information provided on his Form I-687 application was inaccurate, and that he has been absent from the United States for only one month in 1987 and one month in 1989. The applicant has not submitted additional evidence in support of his 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)(1).

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)(1) 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 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).

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.

The record shows that the applicant submitted a Form I-687 application and Supplement to Citizenship and Immigration Services (CIS) on November 2, 2005. At part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant listed his residence as [redacted] from January 1981 until February 1988. At part #32 of the Form I-687 Application, which requires applicants to list

all absences from the United States, the applicant indicated that he visited family in Pakistan from March 1987 to August 1987, a period of more than 45 days.

On November 28, 2005 the director issued a Notice of Intent to Deny. In response, on December 23, 2005, the applicant sent a letter to CIS in which he stated that he had reviewed his Form I-687 application and had identified a number of errors. The applicant attached a corrected Form I-687. At part #32 of the corrected form, the applicant again listed an absence from March 1987 to August 1987. The destination country was changed from Pakistan to Canada, and the purpose was changed from family visit to "brief/innocent visit." Notably, at part #30 of the corrected application, the applicant listed his residence as [redacted] March 1981 until March 1987 and again from August 1987 until June 1989. No United States residence is listed on the corrected Form I-687 application for the period from March 1987 until August 1987.

In addition, the applicant submitted three affidavits in support of his application. The affidavit from Lulvadia Hunt provides further confirmation of the applicant's absence from the United States in that the affiant states that the applicant departed the United States in March 1987 and returned in August 1987.

The applicant testified before an immigration officer on April 25, 2006 that he traveled to Canada for one month in 1987. This contradicts the information provided by the applicant in his initial Form I-687 application, the corrected Form I-687 application, and the affidavit of [redacted].

On appeal, the applicant claims that he was the victim of incompetent immigration consultants who provided incorrect information on the Form I-687 application. Even if the applicant had been provided incompetent assistance by immigration consultants, there is no remedy available for an applicant who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on his or her behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

Further, the applicant fails to explain why he submitted a corrected Form I-687 which listed a five month absence in 1987 if, in fact, he was not absent for this period. He also fails to explain [redacted] statement that he was absent from the United States from March 1987 until August 1987. Given this, the applicant's claim to have been absent from the United States for only one month in 1987 is not credible.

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).

The applicant's admitted absence from the United States from March 1987 to August 1987, a period of more than 45 days, is clearly a break in any period of continuous residence he may have established. As he has not provided any evidence that his return to the United States could not be accomplished due to "emergent reasons," he has failed to establish by a preponderance of the evidence that he 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.*

Even aside from the issue of his absence during the requisite period, the applicant has failed to provide sufficient documentation to establish by a preponderance of the evidence that he resided continuously in the United States throughout the requisite period. The applicant submitted the following affidavits in support of his application:

- Affidavit of [redacted] signed and notarized on December 22, 2005. The affiant states that he has known the applicant since July 1981 and that he and the applicant "met each other on different occasion/parties/etc." The affiant does not claim to have personal knowledge of the applicant's residence in the United States during the requisite period. The affiant does not provide details regarding the frequency or nature of his contact with the applicant during the requisite period. Given these deficiencies, the affidavit has little probative value and will be given minimal weight as evidence of the applicant's residence in the United States during the requisite period.

- Affidavit from [redacted] signed and notarized on October 28, 2005. The affiant states that, to the best of his recollection, the applicant entered the United States in late 1980. However, the applicant testified under oath before an immigration officer that he first entered the United States in March of 1981. Further, the affidavit lacks details such as the nature and frequency of the affiant's contact with the applicant. Lacking such relevant detail, the affidavit can be afforded only minimal weight as evidence of the applicant's residence in the United States during the requisite period.

- Affidavit of [redacted] signed and notarized on October 12, 2005. The affiant states that she has known the applicant since 1981. As noted above, the affiant states that the applicant was absent from the United States from March 1987 to August 1987. Further, the affidavit lacks details such as the circumstances under which the affiant came to know the applicant or how she dates her initial acquaintance with the applicant. Lacking such relevant detail, the affidavit can be afforded only minimal weight as evidence of the applicant's residence in the United States during the requisite period.

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts 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 applicant's reliance upon documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United

States for the requisite period. 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.