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U.S. Citizenship
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Services

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FILE: [REDACTED]
MSC-05-244-11540

Office: NEW YORK

Date: JUN 26 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: SELF-REPRESENTED

INSTRUCTIONS:

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

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. 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; and was continuously physically present in the United States through the date of filing. The director noted in his decision that the applicant had stated under oath in a signed sworn statement that he was absent from the United States on three separate occasions during the requisite period that exceeded the 45 day and the aggregate 180 day absence limitations, thus making him ineligible for the immigration benefits sought. The director denied the application 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 that he has no evidence to substantiate his claim but, is in the process of trying to discover some. The applicant submits an affidavit from an acquaintance as evidence.

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).

An applicant shall be regarded as having resided continuously in the United States if, at the time of filing no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred eighty (180) days between January 1, 1982, and the date of filing his or her application for Temporary Resident Status, unless the applicant can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed. *See* 8 C.F.R. § 245a.2(h)(1)(i).

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 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).

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.

Even if the director has some doubt as to the truth, if the petitioner 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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his or her burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The record shows that the applicant submitted a Form I-687 application and Supplement to Citizenship and Immigration Services (CIS), on June 1, 2005. He previously filed a Form I-589 asylum application.

The director noted in the Notice of Intent to Deny (NOID) dated March 9, 2006, that the applicant claimed, in a signed sworn statement given at the time of his interview in connection with his I-687 application, that he arrived in the United States in June of 1981. The director also noted that the applicant testified under oath and in a signed sworn statement that he left the United States in 1982 and spent the next year and a half in Senegal, returning to America in 1983. The director noted that the applicant also stated that he left the United States again in 1985 and remained in Senegal for 6 months before returning to this country at the end of 1985. The applicant also stated under oath that he was absent from the United States from April of 1988 to 1992. The director further noted that during the applicant’s removal

proceedings he testified under oath of being present in Senegal from 1984 to 1992. The director also noted that during his asylum interview on May 14, 1998, the applicant testified that he was followed by agents in Senegal in 1986 or 1987.

In response to the NOID, the applicant asserts that his former wife threatened him to return to Senegal to help with his children in 1982, and in 1985 he again left the United States to help with a relative who had to have brain surgery. The applicant also asserts that he was front-desked and discouraged from filing and as a result, he returned to Senegal in April of 1988 until 1992.

In denying the application the director determined that the absence from the United States represented a clear break in the applicant's residency, as it far exceeded a 45-day absence and an aggregate 180-day absence from the country. The director also determined that the applicant had failed to submit any form of documentation to explain the inconsistencies or to substantiate his claim of continuous unlawful residence and continuous physical presence in the United States since before January 1, 1982.

On appeal, the applicant asserts that he does not have evidence to prove his entry into the United States in June of 1981, that he is still in the process of trying to locate old acquaintances, and that he hopes to provide additional evidence of his presence in the United States. The applicant submits the following attestation as evidence:

- A declaration dated March 5, 2006 from [REDACTED] in which he stated that he has known the applicant since December 11, 1985 and that the applicant was his neighbor. Here, the declarant fails to specify the address where he lived or where the applicant lived when he met him in 1985. He also fails to indicate the frequency with which he saw and communicated with the applicant during the requisite period. Because the declaration is lacking in detail, it can be accorded only minimal weight in establishing that the applicant resided in the United States throughout the requisite period.

In the instant case, the applicant has failed to provide sufficient, credible and probative evidence to establish his continuous unlawful residence and physical presence in the United States since prior to January 1, 1982, and throughout the requisite period. The applicant has failed to present a logical explanation for his extended absences from the United States. The applicant contends that he could not obtain documentation to support his claims due to the passage of time.

More significantly, the applicant failed to explain the discrepancies between his testimony provided in court and at interviews with Service officers. In court, he testified that he was a student in Dakar in 1981, began work in Dakar in 1985 and that between 1985 and 1992, the applicant was contacted by members of a rebel movement every two or three months. He failed to explain the contradictions in claims he made in his asylum application, with those made in his legalization application. In his asylum application, he indicated he was in Senegal throughout the legalization requisite period.

Although the applicant claims to be eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements, the evidence along with his sworn statements demonstrate his

absence from the United States for more than forty-five (45) days, which interrupted the continuous residency requirement.

In the absence of any other independent documentary evidence, it is determined that the applicant was absent from the United States for more than forty-five (45) days, as he evidently stated to the interviewing officers and as he indicated to immigration officials during his asylum hearing and deportation proceedings. As the applicant's absence exceeded the forty-five (45) day period allowed for a single absence, and it does not appear from the record of proceedings that his untimely return to the United States was due to an emergent reason, it is concluded that he did not reside continuously in the United States for the requisite period.

Given the paucity of credible supporting documentation, and the inconsistencies in the evidence, it is concluded that the applicant has failed to meet his burden of proof and has failed to establish continuous residence in an unlawful status in the United States during the requisite period. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. The appeal will be dismissed.

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