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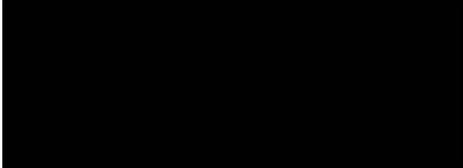
U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: [REDACTED]
MSC-05-180-11451

Office: HARTFORD

Date: **OCT 24 2006**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 Field Office Director, Hartford. 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 denied the application, noting that the applicant was absent from the United States on five occasions, exceeding the 180-day limit for absence from the United States. The director also noted 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. 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 his return to the United States was delayed for an emergent reason. He also asserts that he has submitted sufficient evidence of continuous residence in the United States.

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 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 March 29, 2005. In support of his application, the applicant submitted the following documentation:

- A declaration from [REDACTED], who states that he has known the applicant since 1982. The applicant does not include any additional relevant details. The declarant does not indicate under what circumstances he met the applicant in 1982, how he dates his acquaintance with the applicant, where the applicant resided in the United States, or how frequently he had contact with him.
- An affidavit from [REDACTED] who indicates that the applicant lived with him from September 1981 until March 1984 and that the rent receipts and household bills were in his name. He does not provide any additional relevant evidence or information.

The director denied the application for temporary residence on February 12, 2007. In denying the application, the director found that the applicant had failed to meet his burden of proof by a

preponderance of the evidence that he had continuously resided in the United States during the relevant period.

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." In the denial, the director noted that the applicant listed 5 absences from the United States on his Form I-687 application, which constitute absences in excess of the 180-day limit.

The director indicates that the applicant's five absences from the United States constitute "an absence in excess of the 180-day limit; and it was not brief, casual or innocent." On appeal, the AAO finds this conclusion to be erroneous. First, as the applicant indicates on appeal, only four absences from the United States are listed on the Form I-687 application. They are as follows:

1. December 1992 until August 1993
2. December 1990 until April 1991
3. June 1987 until August 1987
4. May 1985 until June 1985

It is unclear from the record whether any of these absences constituted an absence in excess of 45 days, however, the record indicates that only two of the absences fall within the requisite period, the absence in 1985 and the absence in 1987. The later two trips are irrelevant to the applicant's eligibility for the benefit sought.

The AAO notes that an applicant for temporary residence under the CSS/Newman Settlement Agreements need only 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 applicant attempted to file a Form I-687 application or was caused not to timely file.

The AAO finds that, as explained above, it is unclear whether the applicant's absences in 1985 and 1987 were for more than 45 days, since only the months and years of are provided in the application. The other two absences, in the early 1990's are not relevant to the applicant's eligibility because they occurred after the relevant period. Accordingly, that portion of the decision regarding residence will be withdrawn.

eligibility because they occurred after the relevant period. Accordingly, that portion of the decision regarding residence will be withdrawn.

On appeal, the applicant asserts that his returns to the United States in 1991 and later in 1993 were delayed due to emergent reasons. This argument is irrelevant since the absences which the applicant is claiming were delayed are not relevant to the applicant's continuous residency. On appeal, the applicant does not address the earlier absences. Accordingly, the AAO finds that the applicant's continuous residency was likely not broken by his absences in 1985 or 1987.

The director's error is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). 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). After *de novo* review, the AAO finds that the director did articulate a legitimate basis for denial of the benefit sought. The director indicated that the applicant had not proven, by a preponderance of the evidence, that he had resided in the United States for the duration of the relevant period.

The record indicates that the applicant submitted only two affidavits. Both lack credibility and probative value for the reasons noted above. The absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, as well as the paucity of evidence in the record, seriously detract 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 lack of credible supporting documentation, it is concluded that 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*. 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.