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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

[REDACTED]

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FILE: [REDACTED] Office: CHICAGO Date: **APR 10 2009**
MSC-06-070-11854

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. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed or rejected, 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.

John F. Grissom
Acting 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 Director, Chicago. 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 denied the application, finding that the applicant had failed to meet his burden of proving by a preponderance of the evidence that he entered the United States before January 1, 1982 and had resided continuously in the United States in an unlawful status throughout the requisite period. Specifically, the director noted that the applicant's multiple trips outside the United States between 1987 and 2005 exceeded the maximum allowable time for multiple absences, in violation of section 245a.1 of the Act.

On appeal, counsel for the applicant asserts that the applicant resided continuously and was physically present in the United States during the requisite periods. He indicates further that the applicant's absences from the United States in 1995, 1996, 1997, 2004, as well as in 2005 should not be considered as having interrupted the applicant's continuous residence. Counsel states that the applicant, prior to leaving the United States in those years, has applied and received advance paroles from United States Citizenship and Immigration Service (USCIS). Additionally, counsel claims that the evidence originally submitted with the application is sufficient and credible as evidence of the applicant's continuous residence in the United States throughout the requisite period. Further, counsel states that the director should have notified the applicant of his right to seek the appointment of the Special Master.

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).

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).

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, "[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.

On appeal, counsel for the applicant contends that the applicant's multiple absences from the United States between 1987 and 2005 did not interrupt his continuous residence in the United States during the requisite period. Based on the evidence of record, the applicant claims to have maintained continuous residence in the United States from the date he first entered the United States in December 6, 1980 through the date he attempted to file the application in December 1987. The only recorded absence between December 1980 and December 1987, according to the evidence of record, is from August 9, 1987 to September 6, 1987. Upon a *de novo* review, the AAO finds that all of the applicant's absences after December 1987 do not relate to the requisite period and do not interrupt the applicant's continuous residence in the United States. The director's conclusion that the applicant is ineligible for temporary resident status due to his aggregate absences from the United States for more than 180 days between 1987 and 2005 is, therefore, withdrawn.

Further, counsel claims on appeal that the director violated the CSS/Newman Settlement Agreements by denying the application without notifying the applicant of his right to seek the appointment of the Special Master. Under the CSS/Newman Settlement Agreements, the AAO shall have no jurisdiction over the denial of the application if the director denies the application solely because the applicant is determined to be a non-class member. Further, the denial notice shall explain the reason for the denial of the application for class membership and notify the applicant of his or her right to seek review of such denial by a Special Master. *See* CSS Settlement Agreement paragraph 8 at page 5; Newman Settlement Agreement paragraph 8 at page 7.

Here, the director denied the application because of the applicant's stated absences from the United States between 1987 and 2005. The director adjudicated the merits of the application and treated the applicant as a class member. The AAO finds that the denial of the application was not based on the applicant's lack of class membership, and the director, therefore, properly instructed the applicant to appeal this matter to the AAO.

The sole issue here is whether the applicant has furnished sufficient credible evidence to meet his burden of proving by a preponderance of the evidence that he continuously and unlawfully resided in the United States from before January 1, 1982 through the date he filed or attempted to file the application in December 1987.

As evidence of his continuous residence in the United States throughout the requisite period, the applicant submitted a photocopy of an envelope addressed to the applicant in the United States, a letter from [REDACTED], and two affidavits from his friends.

Upon review, the photocopy of the envelope is not probative as evidence of the applicant's continuous residence in the United States during the requisite period. The date when the mail was postmarked is not decipherable. The address on the envelope also shows an apartment

number not listed in the applicant's Forms I-687 filed in 1991 and 2005, further weakening the probative value of the envelope.

The letter from [REDACTED] states that the applicant was an employee at the [REDACTED] location and the [REDACTED] shop between January 1981 and June 1988 and from July 1988 to the present date, November 9, 1990, respectively. The letter was signed by [REDACTED]. This letter, however, lacks probative value because the author fails to offer specific details about the applicant's employment as prescribed by the regulations at 8 C.F.R. § 245a.2(d)(3)(i). Specifically, the author fails to provide information about where the applicant resided at the time of employment, what his specific duties with the company were, whether or not the information was taken from official company records, and where such records are located and whether USCIS may have access to the records. The author of the letter relates information obtained from [REDACTED], a franchise owner at three locations. [REDACTED] has not submitted any evidence.¹

[REDACTED] in his affidavit claims that he has known the applicant since 1981. [REDACTED] states in his affidavit that he has personal knowledge of the applicant's absence from the United States in August 1987 and attempt to file the application in December 1987. Both [REDACTED] and [REDACTED] however, offer no other detailed information about the applicant and his residence in the United States. Pursuant to the regulations, the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Since neither affiant describes with sufficient detail how long he has known the applicant, how he first met him in the United States, or whether he has direct personal knowledge of the applicant's residence in the United States since 1981, the affidavits lack probative value and have only minimal weight as evidence of the applicant's residence in the United States during the requisite period.

The absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period and the lack of detail in the record 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 the applicant 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.

Beyond the decision of the director, the applicant is inadmissible, thus ineligible for temporary resident status due to his attempt to enter the United States by fraud or willfully misrepresenting a material fact on December 26, 1989, in violation of section 212(a)(6)(C) of the Act; 8 U.S.C. §

¹ Handwritten notes of record indicate that the director was unsuccessful in attempting to verify the applicant's employment at [REDACTED] during the requisite period.

1182(a)(6)(C). The record contains an arrest incident report by border patrol officials on December 26, 1989. According to the report, the applicant identified himself as [REDACTED] and had [REDACTED] passport and visa as he was trying to enter the United States on that date.² Thus, the applicant is inadmissible to the United States on the grounds of materially misrepresenting a material fact and is therefore, ineligible for the benefit. Section 212(a)(6)(C) of the Act; 8 U.S.C. § 1182(a)(6)(C); 8 C.F.R. § 245a.2(c)(3). Although the applicant's inadmissibility may be waived "for humanitarian purposes, to assure family unity or when it is otherwise in the public interest," pursuant to Section 245A(d)(2)(B)(i) of the Act; 8 U.S.C. § 1255a(d)(2)(B)(i); 8 C.F.R. § 245a.18(c), the applicant has not obtained a waiver of inadmissibility. The application may not be approved for this additional reason.

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

² Contemporaneous notes of an interview before an immigration officer reflect that the applicant claimed no address, property, or other indicia of permanent residence in the United States at the time of his reentry on December 26, 1989.