U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

L1

[redacted]

FILE: [redacted] Office: NEWARK Date: FEB 03 2009

MSC 04 360 10110

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. 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.

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, Newark. The decision is now before the Administrative Appeals Office (AAO), on appeal. The appeal will be rejected.

The director denied the application because the applicant did not establish that he continuously resided in the United States for the duration of the requisite period. In so finding, the director noted that in his sworn statement to an Immigration Inspector at the Newark International Airport on November 17, 2003, the applicant testified that his first entry into the United States was 13 years previously in 1988 or 1989.

On appeal, counsel states the current appeal is timely because the applicant did not receive notice of the United States Citizenship and Immigration Services (USCIS) denial of his form I-687 until September 7, 2006, when he obtained his file from prior counsel and current counsel reviewed the file and learned that no appeal had been filed after the Form I-687 denial. Counsel further states that the applicant's prior counsel was ineffective as he failed to file an appeal of the USCIS decision and failed to inform the applicant of the decision, thus preventing him from pursuing alternative representation or filing a *pro se* appeal brief. Counsel indicates his appeal is timely because the time period for filing an appeal is equitably tolled due to the prior ineffective assistance of counsel. Counsel argues that the airport interview does not support a finding of denial because the officer did not ask the applicant when he first entered the United States, rather how many times he had been to the United States. Counsel asserts that the applicant obviously understood that the officer was asking how many times he had legally entered the United States via immigration inspection.

The record reflects that the director's May 2, 2006 decision was mailed to the applicant. Counsel acknowledges that the decision was received by the applicant's prior counsel. The applicant has failed to produce evidence concerning an ineffective assistance of counsel claim.

The record reflects that on his Form I-877, Record of Sworn Statement in Administrative Proceedings, dated November 17, 2003, completed as part of a process to determine whether he should be admitted to this country from abroad, the applicant was asked "How many times have you been to the United States?." He responded "1 time before." He was then asked "How long did you stay on that trip?" He responded "13 years." He was then asked "When did you enter the United States?" He responded "In either 1988 or 1999 (sic). I'm not sure." Counsel argues that the airport interview does not support a finding of denial because the officer did not ask the applicant when he first entered the United States, rather how many times he had been to the United States. Counsel asserts that the applicant obviously understood that the officer was asking how many times he had legally entered the United States via immigration inspection. Counsel did not offer any evidence in support of his assertions. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

An adverse decision on an application for temporary resident status may be appealed to the AAO; the appeal with the required fee must be filed within 30 days after service of the notice of denial. 8 C.F.R. § 245a.2(p). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). An appeal that is not timely filed will not be accepted. 8 C.F.R. § 245a.2(p).

In this case, the director issued the notice of denial on May 2, 2006 and mailed it to the applicant's address of record. The appeal was received on September 15, 2006, 136 days later. Therefore, the appeal was untimely filed and shall be rejected.

ORDER: The appeal is rejected.