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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: LOS ANGELES Date: JUN 11 2009

MSC 05 060 10086

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.

IN BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office on your appeal. If your appeal was dismissed or rejected, your file has been sent to the National Benefits Center. You no longer have a case pending before this office. If your appeal was sustained or the matter was remanded for further action, your file has been returned to the office that originally decided your case, and you will be contacted. 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, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had not established that he resided in the United States in a continuous unlawful status during the requisite period. This decision was based on the director's determination that the applicant had exceeded the forty-five (45) day limit for a single absence from the United States during this period.

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).

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).

"Residing continuously" is defined in the regulation at 8 C.F.R. § 245a.1(c)(1), as follows:

> *Continuous residence*. An alien shall be regarded as having resided continuously in the United States if:
>
> (i) No single absence from the United States has exceeded *forty-five (45) days*, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application for temporary resident status is filed, unless the alien can establish that due to *emergent reasons*, his or her return to the United States could not be accomplished within the time period allowed. [Emphasis added.]

The record reflects that the applicant filed a timely Form I-687 application on May 4, 1988. At item 35 on the Form I-687 application, the applicant listed his absences as September 20 1982 to January 7, 1983; December 5, 1984 to May 20, 1985; January 6, 1986 to July 1986; December 10, 1986 to

December 26, 1986; and December 9, 1987 to March 5, 1988. The Director, Western Service Center, denied the application on April 1, 1993, as the applicant had exceeded the forty-five (45) day limit for a single absence from the United States on three separate occasions. The applicant's appeal from the denial of this Form I-687 application was dismissed by the AAO on February 28, 1997.

On his current Form I-687 application, the applicant lists his absences from the United States as September 1982 to October 1982; December 1984 to January 1985; January 1986 to February 1986; during December 1986; and December 1987 to January 1988.

The director, in denying the application on April 7, 2006, noted that at the time of his interview, the applicant testified that he departed the United States in September 1982 and did not return until December 1982. The director determined that due to this absence from the United States the applicant had failed to establish continuous residence in the United States.

On appeal, counsel asserts that the director failed to consider whether the applicant's absence in 1982 was a result of circumstances beyond the alien's control as defined by the regulation. Counsel submits a declaration from the applicant, who asserts that in September 1982, he received a telephone call from his wife, who informed him that his father was critically ill. The applicant asserts he arrived in Mexico in mid-September and intended to stay in Mexico for only a few weeks; however, due to the lack of medical attention in his father's village, he decided to take his father to the nearest town that had better medical facilities and more physicians available to treat the father. The applicant asserts that for six weeks he would transport his father from his village to Tequisquiapan, Queretaro for medical treatment and by the end of October 1982, his father was well enough to be released from [redacted]s care. The applicant asserts that the day before he was to depart for the United States, his mother suddenly became gravely ill. As a result he found it impossible to leave his mother and was forced to remain there until her condition improved. The applicant asserts that he sought the medical treatment of Doctor [redacted] and took his mother to [redacted]s office in Tequisquiapan, Queretaro almost on a daily basis. The applicant asserts that by mid-December his mother's condition had improved and he returned to the United States.

While not dealt with in the district director's decision, there must, nevertheless, be a determination as to whether the applicant's prolonged absence from 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."

An absence of more than 45 days must be "due to emergent reasons" significant enough that the applicant's return "could not be accomplished." In other words, the reasons must be unexpected at the time of departure from the United States and of sufficient magnitude that they made the applicant's return to the United States more than inconvenient, but virtually impossible. That was not the applicant's situation in this case. The applicant's continued stay in Mexico would appear to have been a matter of personal choice, not a situation that was forced upon him by unexpected events. Except for his own statement, the applicant does not provide any independent,

corroborative, contemporaneous evidence to support the events that occurred while in Mexico in 1982. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is noted that the applicant indicated on both of his applications the purpose for his 1982 departure was to "visit" family. Furthermore, the letter from [redacted] submitted on appeal only addresses the applicant's absence from the United States from December 9, 1987 to February 27, 1989.

The applicant, on appeal, asserts that since his arrival in the United States in 1981, "I have only traveled abroad on occasions when my immediate family members where seriously ill. Specifically, I departed from the United States in 1982, 1989, 1994, and 2006."

The applicant's assertion, however, is not supported by the record. As previously noted, on his initial and current applications, the applicant indicated that he departed the United States in 1982, 1984, 1986 and 1987.

The applicant's absence from September 1982 to December 1982 exceeded the 45-day period allowable for a single absence, and interrupted his "continuous residence" in the United States. This absence coupled with the applicant's other absences exceeded the 180 day aggregate total for all absences in the United States during the requisite period.

The applicant has, therefore, failed to establish that he resided in the United States in a continuously unlawful status during the requisite period.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she has *continuously* resided in an unlawful status in the United States from prior to January 1, 1982 through the date of filing, is admissible to the United States under the provisions of section 245A of the Act, 8 U.S.C. § 1255a, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). Due to the absence, the applicant did not continuously reside 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.