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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: DALLAS

Date:

OCT 16 2009

MSC 05 249 13990

IN RE:

Applicant:



PETITION: 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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter 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.

Perry Rhew
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, Dallas, Texas, and 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 (the Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director denied the application, finding that the applicant had not met her burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements. 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 the requisite period.

On appeal, counsel puts forth a brief disputing the director's findings.

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). An alien shall not be considered to have failed to maintain continuous physical presence by virtue of brief, casual and innocent absences. Section 245A(a)(3)(B) of the Act.

“*Continuous residence*” is defined in the regulation at 8 C.F.R. § 245a.2(6)(h)(1), as follows:

Continuous residence. An applicant shall be regarded as having resided continuously in the United States if, at the time of filing the application:

- (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 applicant indicated on her Form I-687 application to have departed the United States in December 1986 and did not return until March 1987.

On August 30, 2007, the applicant was advised in writing of the director's intent to deny the application. In her notice of intent, the director indicated that, due to the applicant's absence from the United States from December 1986 to March 1987, she had failed to establish continuous residence in the United States. The director also indicated that no evidence was provided establishing that an emergent reason prevented the applicant from returning within the required period.

The director, in denying the application, noted that the applicant had failed to respond to the notice. However, the record reflects that a response was received prior to the issuance of the Notice of Decision. As such, counsel's response will be considered on appeal.

Counsel, in response, asserted that the applicant's absence was due to an emergent reason. Counsel stated the applicant traveled back to Kenya to attend her uncle's funeral and "was unable to return back to the USA immediately because of traditional funeral rites performed which required her and other family members to stay at home for an extended period after the death of a senior member of the family." Counsel asserted that he was providing a copy of the uncle's death certificate along with traditional rites requirement of the applicant's local tribe in Kenya as sufficient reason for remaining beyond the single absence of 45 days

Counsel, on appeal, asserts that the basis for the denial of the application was because the applicant "did not provide evidence that she met the requirements under the Class Membership Definition" and the applicant "did not provide sufficient evidence that she had resided in the United States for the requisite period."

Counsel's assertions, however, are incorrect as the sole basis for the denial of the application was the applicant's failure to have *continuously* resided in the United States during required period due to her absence of over 45 days.

Although emergent reason 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 other words, the reason must be unexpected at the time of departure from the United States and of sufficient magnitude that it made the applicant's return to the United States more than inconvenient, but virtually impossible.

While the AAO takes into consideration the applicant complying with the custom of her tribe, the fact remains that this delay in returning to the United States was not due to any emergent reason as the applicant is from the same village as her family, the customs of the village were not unforeseen at the time of her departure.

The applicant's prolonged absence would appear to have been a matter of personal choice, not a situation that was forced upon her by unexpected events. The applicant's December 1986 to March 1987 stay in Kenya during the requisite period interrupted her "continuous residence" in the United States. Therefore, the applicant has failed to establish that she resided in the United States in

a continuous unlawful status from before January 1, 1982 through the date she attempted to file her application.

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.