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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

L1

[redacted]

FILE: [redacted] Office: NEWARK Date: APR 0 6 2010

MSC-06-096-17673

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. 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.

Elizabeth McCormack

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, Newark. 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 determined 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. Specifically, the director found that the applicant testified that he entered the United States in lawful student status in 1979, however he had not provided sufficient evidence of the entry. Furthermore, the director noted that if the applicant had entered the United States in lawful student status, he failed to demonstrative that his authorized period of admission did not expire prior to January 1, 1982. Finally, the director noted that the applicant's absence in summer of 1985 represented a break in any continuous residence that the applicant may have established. Accordingly, the application was denied on March 6, 2007.

On appeal, the applicant asserts that his absence in the summer of 1985 was due to an emergent reason, specifically, to care for his ill parents. He provides no documentary evidence of their illness nor does he explain the discrepancy between this explanation and the explanation listed on his Form I-687. The applicant does not address the director's finding that the applicant failed to prove that he entered the United States before January 1, 1982 or that he was in unlawful status in the United States prior to January 1, 1982 in a manner known to the government.

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.

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).

Following *de novo* review, the AAO finds that the applicant has failed to establish that he entered the United States prior to January 1, 1982. While he testified that he entered in 1979 using an F-1 nonimmigrant student visa, the applicant has not produced this visa, a copy of his I-20 Notice of Eligibility for Student Status, or any other documentation that he made a lawful

entry. Furthermore, transcripts from Cheyney University in Pennsylvania indicate that the applicant did not begin his studies until the spring 1984. The applicant has not explained this gap in his residency.

The record does support the applicant's residence in the United States beginning in spring 1984 throughout the end of the relevant period. The applicant has submitted transcripts, bank statements, rental agreements, a property deed and several awards and affidavits. This evidence tends to support the applicant's assertion that he lived in the United States during this period. The only evidence contained in the record which deals with the period prior to spring 1984 is the following:

- A TOEFL record containing the applicant's name, dated January 1982;
- Affidavits from [redacted] and [redacted] The affiants provide only general statements regarding the applicant's character and his residence in the United States during the relevant period. [redacted] indicates that the applicant lived with him from 1979 until 1980, however, he does not provide any details of their relationship. None of the affiants indicate how they date their initial acquaintance with the applicant or how they have direct personal knowledge of the applicant's residence in the United States for the duration of the relevant period.

Finally, as the director noted, the applicant testified at his interview with United States Citizenship and Immigration Services (USCIS) that he was absent from the United States from June 1985 until September 1985. On his Form I-687, he lists the reason for this absence as "visit-holiday." Noting that this absence represents a break in any continuous residence that the applicant may have established, the director denied the application.

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."

On appeal, the applicant indicates that the delay in his return was due to an emergent reason,

namely, that his parents were sick and he remained in Nigeria to care for them. He does not submit any evidence to substantiate his assertions, nor does he explain the discrepancy between his testimony and his Form I-687. As noted above, the applicant must provide evidence apart from his own testimony. Thus, the AAO finds that the applicant has not met his burden and his absence shall be considered a break in his continuous residence.

It is further noted that the applicant submitted a declaration dated May 9, 1999 in which he declared that he departed the United States on July 16, 1984 to return to Nigeria for summer holiday. He indicated that he did not return to the United States until September 19, 1984. This represents another break in continuous residence for which the applicant has not provided an explanation and which was not listed on his Form I-687.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and 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.