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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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[redacted]

FILE: [redacted] Office: BOSTON Date: JAN 26 2010

MSC 06 076 13642

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 M. 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, Boston Massachusetts, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant had not demonstrated that she had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that she attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now United States Citizenship and Immigration Services or USCIS) in the original legalization application period between May 5, 1987 to May 4, 1988. The director further determined that the applicant was not physically present in the United States in that period from November 6, 1986 through the date that she attempted to file the Form I-687 application with the Service in the original legalization application period. These determinations were based upon the applicant's admission that she was out of the United States from June 1987 to October 1987 at part #32 of the Form I-687 application as well as testimony she provided at her interview on October 24, 2006. Therefore, the director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to section 245A of the Immigration and Nationality Act (Act) and the terms of the CSS/Newman Settlement Agreements and denied the application.

On appeal, the applicant reiterates her claim of residence in this country for the required period and asserts that she submitted sufficient evidence in support of such claim. The applicant provides copies of previously submitted documentation in support of the appeal.

An applicant for temporary residence 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) and 8 C.F.R. § 245a.2(b).

An alien applying for adjustment to temporary resident status must 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 and 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. *See* Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

"Continuous unlawful residence" is defined at 8 C.F.R. § 245a.2(h)(1), as follows:

> An applicant for *temporary resident status* shall be regarded as having resided continuously in the United States if no single absence from the United States if, at the time of filing of the application: no absence 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 was 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.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, 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. *See* 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 including affidavits 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.* 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 (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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to establish both continuous residence and continuous physical presence in the United States for each respective requisite period. Here, the applicant has failed to meet this burden.

The record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on December 15, 2005. At part #32 of the Form I-687 application where applicants were asked to list all absences from the United States since January 1, 1982, the applicant listed an absence from this country when she traveled to Brazil for a family visit from an unspecified date in June 1987 to an unspecified date in October 1987. Even if the applicant had departed the United States on June 30, 1987 and subsequently returned to this country on October 1, 1987, such an absence would constitute a minimum of 93 days. Clearly, the applicant's absence from the United States from June 1987 to October 1987 exceeded the 45 day limit for single absence from this country set forth in 8 C.F.R. § 245a.2(h)(1)

The record reflects that the applicant was interviewed utilizing a translator at the Boston, Massachusetts office of USCIS on October 24, 2006. The notes of the interviewing officer reflect that the applicant reiterated her prior testimony that she departed the United States in June 1987 and returned to this country in October 1987.

The applicant's testimony both at part #32 of the Form I-687 application and her interview on October 24, 2006 in which she admitted that she had been absent from the United States for a minimum of 93 days establishes that she was absent from this country in excess of the 45 day limit put forth at 8 C.F.R. § 245a.2(h)(1). Moreover, the applicant's admission that she was out of the United States for such an extended period establishes that she was not continuously physically present in the United States since November 6, 1986. A legalization applicant must show continuous physical presence in the United States after November 6, 1986 through May 4, 1988. Section 245A(a)(3)(A) of the Act, 8 U.S.C. § 1255a(a)(3)(A). An absence during this period which is found to be brief, casual and innocent shall not break a legalization applicant's continuous physical presence. Section 245A(a)(3)(B) of the Act, 8 U.S.C. § 1255a(a)(3)(B). *See e.g. Espinoza-Gutierrez v. Smith, INS, et al.,* 94 F.3d 1270 (9th Cir. 1996). The *Espinoza-Gutierrez* court held that a legalization applicant's absence would not represent a break in continuous physical presence if it was found that the absence was brief, casual and innocent as defined by the court in *Rosenburg v. Fleuti,* 374 U.S. 449 (1963) *See also Assa'ad v. U.S. Attorney General, INS,* 332 F.3d 1321 (11th Cir. 2003)(which affirmed the portion of the holding in *Espinoza-Gutierrez* relied upon here, but disagreed with a different aspect of that holding). The AAO finds that the applicant's absence from the United States in this case was not brief in that the applicant herself testified that she was absent from the United States for more than 45 days.[1]

[1] The regulation implementing the statutory requirement of "continuous unlawful residence" in the United States defines that term as no single absence from the United States exceeding 45 days and absences in the aggregate not exceeding 180 days. *See,* section 245A(a)(2)(A) of the Act, 8 U.S.C. § 1255a(a)(2)(A) and 8 C.F.R.

The director determined that the applicant failed to establish her continuous residence and continuous physical presence in the United States for each respective requisite period. Therefore, the director concluded that the applicant was ineligible to adjust to permanent residence and denied the Form I-687 application on April 3, 2007.

On appeal, the applicant claims that she was actually absent from the United States when she traveled to Brazil in August 1988 and returned to this country in 1991. The applicant asserts that the individual who was utilized as a translator at her interview on October 24, 2006 misunderstood and confused the dates of her absence. However, the applicant's statements do not explain how she herself had previously testified that she had been absent from the United States from June 1987 to October 1987 at part #32 of the Form I-687 application filed on December 15, 2005. In addition, the applicant failed to submit any evidence from the translator utilized at her interview that such a mistake had occurred or any documentation to establish that she was absent from this country when she traveled to Brazil from August 1988 to 1991 rather than from June 1987 to October 1987. "To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony." 8 C.F.R. 245a.2(d)(6).

The applicant's contradictory testimony seriously undermines the credibility of her claim of residence in this country for the requisite period as well as her claim of continuous physical presence in the United States since November 6, 1986. Pursuant to 8 C.F.R. § 245a.2(d)(3), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. The applicant herself has failed to provide sufficient credible testimony to meet her burden of proof in establishing that she has either continuously resided in the United States since prior to January 1, 1982 or been continuously physically present in the country since November 6, 1986 by a preponderance of the evidence as required under both 8 C.F.R. § 245a.2(d)(3) and *Matter of E- M-*, 20 I&N Dec. 77 (Comm. 1989).

Given the applicant's own contradictory testimony, it is concluded that she has failed to establish either continuous residence in an unlawful status in the United States from prior to January 1, 1982 through May 4, 1988 or continuous physical presence in this country from November 6, 1986 through May 4, 1988 as required under section 245A the Act. 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.

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§ 245a.1(c)(1)(i). The term "continuous physical presence" suggests that a shorter time frame should be applied to determine the permissible length of single and aggregate absences from the United States during the period from November 6, 1986 to May 4, 1988.