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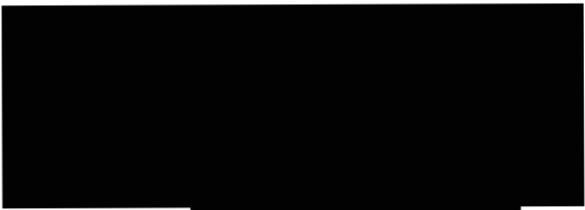
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: [REDACTED]
MSC 05 231 16154

Office: NEW YORK

Date: MAR 09 2010

IN RE: Applicant: [REDACTED]

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: SELF-REPRESENTED

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, New York, New York, 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 his 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: 1) 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; and 2) the applicant's four misdemeanor convictions in the United States.

On appeal, the applicant acknowledges he exceeded the 45-day limit during his visit to Africa in November 1987. The applicant asserts that he had to remain in Senegal because his mother was gravely ill. The applicant also acknowledges his misdemeanor convictions. The applicant requests that his application be reconsidered.

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulation provides relevant definition at 8 C.F.R. 245a.2(c)(1).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

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 first issue to be addressed will be the applicant’s criminal history.

The Federal Bureau of Investigations (FBI) report dated June 16, 2005, reveals the following offenses in the state of New York:

1. On December 2, 1994, the applicant was arrested for trademark counterfeiting in the 3rd degree, a violation of PL sec 165.71. The applicant was subsequently convicted of this misdemeanor offense and ordered to perform four days of community service.
2. On June 18, 1993, the applicant was arrested for trademark counterfeiting in the 2nd degree, a violation of PL sec 165.72, a Class E felony. The applicant was subsequently convicted of a misdemeanor offense and ordered to pay a fine and perform five days of community service.
3. On January 27, 2001 the applicant was arrested for resisting arrest, a violation of PL section 205.30, and AC 20.453. The applicant was subsequently convicted of this misdemeanor offense and ordered to perform three days of community service.
4. On May 12, 2001, the applicant was arrested for resisting arrest, a violation of PL sec. 205.30, and AC 20.453. The applicant was subsequently convicted of this misdemeanor offense and sentenced to serve five days in jail.

As noted above the applicant’s criminal history was obtained from the FBI report. The instructions regarding the usage of the FBI report, and the provisions of 28 C.F.R. §50.12, state, in part, if the information on the record is used to disqualify an applicant, the official making the determination of suitability for licensing or employment shall provide the applicant the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. The deciding official should not deny the license or employment based on the information in the

record until the applicant has been afforded a reasonable time to correct or complete the information, or has declined to do so.

On November 14, 2005, the director issued a Notice of Intent to Deny, which advised the applicant of the above arrests. The applicant was given the opportunity to submit additional evidence. The applicant, in response, did not submit any documentation pertaining to his criminal history; he merely asserted that he appeared before the court for all of his violations.

Regarding his misdemeanor convictions, the applicant, on appeal, asserts:

These are facts that I did not deny during the interview and I will not deny them in my this letter of appeal. This convictions has occurred due to the fact that, I could not get a job to support myself in the country and also to support my family back home in Africa.

Although the applicant did not provide the actual court dispositions for the above offenses, he has acknowledged that he had been convicted of the offenses.

The applicant is ineligible for temporary resident status because of his four misdemeanor convictions. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

The second issue to be addressed is the applicant's absence from the United States during the requisite period.

On November 14, 2005, 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 his prolonged absence from the United States from November 1987 to February 1988, the applicant had failed to establish continuous residence in the United States.

The applicant, in response, indicated, "[d]uring a trip to Africa, my overstayed was on parental grounds my mother was very sick and I had to stay longer to assist her obtain medical treatment."

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. However, in the instant case, that was not the situation. The applicant's continued stay in Senegal 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 Senegal. 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)).

The applicant's absence to Senegal during the requisite period exceeded the 45-day period allowable for a single absence and interrupted his "continuous residence" in the United States. Therefore, the applicant has failed to establish that he resided in the United States in a continuous unlawful status from before January 1, 1982 through the date he attempted to file his application.

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).

The applicant previously filed a Form I-485, Application for Permanent Resident Status under the Legal Immigration Family Equity (LIFE) Act, on February 13, 2002.¹ Accompanying the Form I-485, is a Form G-325A, Biographic Information, signed by the applicant on February 4, 2002. On this form, the applicant indicated that he was married in 1986 in his native country, Senegal.

The applicant did not claim an absence in 1986 on his Form I-687 applications or at the time of his interview on October 20, 2005. The applicant's failure to disclose this absence from the United States is a strong indication that the applicant was not in the United States during this period or may have been outside the United States beyond the period of time allowed by regulation. This further undermines the credibility of the applicant's claim to have continuously resided in the United States during the period in question.

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.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.

¹ The Form I-485 was denied by the director on March 12, 2005, due to abandonment.