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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[Redacted]

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FILE: [Redacted]
MSC-04-280-12506

Office: NEW YORK

Date: **AUG 18 2008**

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:

[Redacted]

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 your case 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.

Robert P. Wiemann, 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 District Director, New York. 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. This decision was based on the district director's conclusion that the applicant admitted that he had been absent from this country from July 9, 1987 to September 7, 1987, and, therefore, exceeded the forty-five (45) day limit for a single absence from the United States during this period, as set forth in 8 C.F.R. § 245a.15(c)(1)(i). The district director further concluded that the applicant was not continuously physically present in the United States as required by 8 C.F.R. § 245a.16(b) because of his admitted absence from this country from July 9, 1987 to September 7, 1987.

On appeal, the applicant asserts that his absence from the United States from July 9, 1987 to September 9, 1987 was due to a medical emergency and, therefore, constituted a brief, casual, and innocent departure. He includes copies of the same document that had been previously submitted in response to the notice of intent to deny.

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.

"Continuous unlawful residence" is defined at 8 C.F.R. § 245a.15(c)(1), as follows: An alien shall be regarded as having resided continuously in the United States if 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, and May 4, 1988, 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 regulation at 8 C.F.R. § 245a.16(b) reads as follows:

For purposes of this section, an alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences from the United States. Also, brief, casual, and innocent absences from the United States are not limited to absences with advance parole. Brief, casual, and innocent absence(s) as used in this paragraph means temporary, occasional trips abroad as long as the purpose of the absence from the United States was consistent with the policies reflected in the immigration laws of the United States.

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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his burden of establishing continuous unlawful presence in the United States from January 1, 1982 up 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.

At part #35 of the Form I-687 application where applicants were asked to list all absences from the United States beginning from January 1, 1982, the applicant indicated that he had been absent from the United States for an unspecified number of days from July 1987 until September 1987 when he returned to Nepal to visit family.

The record shows that the applicant appeared for an interview relating to his I-687 application at the New York City District Office on July 6, 2005. The notes of the interviewing officer reflect that the applicant testified under oath that he had been absent from the United States from July 1987 until September 7, 1987. The applicant also provided a signed sworn statement dated July 2, 2004, in which he admitted that he had been absent from the United States when he visited his family in Nepal from July 1987 until September 7, 1987. He further indicated that "at no time have I been out of this Country for more than forty-five days." This testimony is directly contradicted by the applicant on appeal. In a statement submitted in support of his appeal, the applicant stated that he was required to stay in Nepal beyond 45 days for the proper treatment of his ill father. This clearly represents a break in continuous residency that exceeds the forty-five day limit for a single absence from this country in the period from January 1, 1982 to May 4, 1988 set forth in 8 C.F.R. § 245a.15(c)(1).

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. The applicant has provided inconsistent testimony regarding his absence from the United States, because his initial statements in his sworn affidavit dated July 2, 2004 directly contradict his statements on appeal. This contradiction casts significant doubt on the reliability of the evidence and the veracity of the applicant's testimony.

Furthermore, the record also reveals that in support of his claim of eligibility, the applicant submitted an affidavit from [REDACTED] who indicated that he had personal knowledge that the applicant left the United States on July 9, 1987 and returned on September 7, 1987.

Thus, based upon the testimony of the applicant and the affidavit from [REDACTED] the applicant departed the United States for 60 days, exceeding the forty-five day limit for a single absence from this country in the period from January 1, 1982 to May 4, 1988 set forth in 8 C.F.R. § 245a.15(c)(1). Therefore, the applicant cannot be considered to have continuously resided in the United States for the requisite period pursuant to 8 C.F.R. § 245a.11(b), because his absence of 60 days exceeded the forty-five day limit for a single absence.

In response to the notice of intent and on appeal, the applicant asserts that his absence from this country from July 1987 to September 1987 occurred as a result of "his father's medical emergency" and that he promptly returned to the United States when his father recovered,

therefore, his 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.”

The applicant attests that he was unable to return earlier as planned because his father was very ill and he had to remain in Nepal to take care of him. In support of this statement, the applicant submitted an affidavit from Western Regional Hospital in Pokhara, Nepal, dated September 4, 2005. This document indicates that Mr. [REDACTED] was admitted to the hospital on June 24, 1987 suffering from a heart attack and that he was in intensive care for 3 weeks and remained in the hospital for an additional month. Since the applicant did not depart the United States until July 9, 1987, 15 days after his father became ill, his father’s illness did not “come unexpectedly into being.” Furthermore, the veracity and reliability of the document submitted is diminished by previous contradictions in the applicant’s testimony.

It is also noted that the applicant submitted affidavits from [REDACTED] and [REDACTED] all of whom claim that they accompanied the applicant on May 10, 1987 to file his legalization application, and that the applicant was turned away because he had departed the United States. Their testimony, however, is contradicted by the applicant’s I-687 application. At part #32, where applicants were asked to list all absences from the United States since January 1, 1982, the applicant listed his visit to Nepal from July 1987 until September 1987. While the applicant’s class membership under the CSS/Newman Settlement Agreements is not within the jurisdiction of the AAO, this inconsistency casts doubt on the reliability of the applicant’s testimony and the testimony of the affiants on his behalf. It is not plausible that the applicant was turned away from filing in May of 1987 since he did not travel until two months after his alleged attempt to file his legalization documents.

As stated previously, doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I. & N. Dec. 582 (BIA 1988). On appeal, the applicant stated that the inconsistencies in the record are “due to a slip of the tongue.” He offers no independent, objective evidence to support his claims.

It is also noted that the applicant is correct in concluding that a brief, casual, and innocent departure by the applicant from the United States in the period from November 6, 1986 to May 4, 1988 would not interrupt his continuous physical presence in this country. However, even if the applicant’s absence of 60 days in 1987 were determined to be brief, casual, and innocent for the purpose of establishing continuous physical presence in this country, such determination would have no impact on the finding he did not continuously reside in the United States during the requisite period, because his absence exceeds the forty-five day limit for a single absence.

The applicant has specifically admitted that he exceeded the forty-five day limit for a single absence from this country when he departed to Nepal on July 9, 1987, and did not return to the United States until September 7, 1987. The applicant has also failed to submit sufficient evidence to establish that an emergent reason delayed his return to the United States. Additionally, the evidence submitted in support of the applicant's claim of continuous residency lacks sufficient detail and is inconsistent. Accordingly, he has failed to establish by a preponderance of the evidence that he has 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.

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