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FILE: [Redacted] Office: SAN FRANCISCO Date: **AUG 29 2008**
MSC-04-310-10001

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.

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, San Francisco. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further action and consideration.

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 did not establish that he attempted to apply for legalization during the original filing period. The director noted inconsistencies in the record regarding the date the applicant claimed to have attempted to apply for legalization during the original filing period and found that these inconsistencies cast doubt on whether the applicant attempted to apply for legalization during that time. The director stated that the applicant therefore failed to meet the requirements for adjustment to temporary resident status pursuant to the section 245A of the Immigration and Nationality Act (Act) and he denied the application.

On appeal, the applicant asserts that he attempted to apply for legalization in 1987 rather than 1997. He goes on to say that communication errors resulted in the denial of his application. He submits additional evidence in support of his application.

Under the CSS/Newman Settlement Agreements, if the director finds that an applicant is ineligible for class membership, the director must first issue a notice of intent to deny, which explains any perceived deficiency in the applicant's class member application and provide the applicant 30 days to submit additional written evidence or information to remedy the perceived deficiency. CSS Settlement Agreement paragraph 7 at page 4; Newman Settlement Agreement paragraph 7 at page 7. Once the applicant has had an opportunity to respond to any such notice, if the applicant has not overcome the director's finding then the director must issue a written decision to deny an application for class membership to both counsel and the applicant, with a copy to class counsel. CSS Settlement Agreement paragraph 8 at page 5; Newman Settlement Agreement paragraph 8 at page 7. The notice shall explain the reason for the denial of the application, and notify the applicant of his or her right to seek review of such denial by a special master. *Id.*

The director issued a Notice of Intent to Deny (NOID) to the applicant on November 18, 2005. In this NOID, the director stated that though the applicant initially testified that he had attempted to file for legalization during the original filing period but was rejected when he attempted to do so in May 1987 at the building on Sansome Street in San Francisco, he later testified that this information was not correct. He stated that he did not attempt to file because he was afraid. The director stated that the declarations submitted in support of the application provided compelling knowledge of the applicant's presence in the United States from 1981 to the present. However, the director stated that

the applicant failed to provide sufficient evidence that he was rejected when he attempted to file for legalization during the original filing period. The director stated that the applicant failed to meet his burden of establishing that he attempted to file for legalization during the original filing period. The director did not state that the perceived deficiencies in the application indicated that the applicant was not a class member. The director granted the applicant 30 days within which to submit additional evidence in support of his application.

In response to the director's NOID, the applicant submitted a letter dated January 3, 2006 in which he states that though the director's NOID is dated November 18, 2005, this NOID was not delivered to the applicant until the date of his letter. He requests the he be granted 30 days within which to submit additional evidence in support of his application. The record shows that the applicant then submitted the following:

1. A declaration from the applicant that is dated January 23, 2006. In this declaration, the applicant states that he is submitting four documents attesting to his attempting to file for legalization and begin rejected by an immigration officer.
2. A declaration from [REDACTED] that is dated January 9, 2006. The declarant states that he personally drove the applicant to apply for legalization in May 1997. He states that an officer turned him away at that time, stating that they were not accepting documents at that time.
3. A declaration from [REDACTED] dated January 10, 2006. The declarant states that the applicant wanted to apply for legalization in 1997 but she could not take him to the office for health reasons.
4. A declaration from [REDACTED] dated January 15, 2006. The declarant states that he is a friend of the applicant's. He states that he was unable to drive the applicant to the immigration office in May 1997. He states that the applicant had documents to submit at that time.
5. A declaration from [REDACTED] that is dated January 20, 2006. The declarant states that she was unable to drive the applicant to the immigration office in May 1987 because she was working.

The director denied the application for temporary residence on September 5, 2006. In denying the application, the director stated that the applicant provided declarations in which individuals provide compelling knowledge of the applicant's presence in the United States from 1981 until the present. However, the director went on to state that the applicant failed to provide consistent testimony regarding his attempt to file for legalization during the original filing period. Here, the director noted that the applicant first testified that he attempted to apply for legalization in May 1987 and was turned away and then later testified that he did not attempt to apply for legalization at that time because he was afraid to do so. The director also noted that in response to the NOID,

the applicant submitted declarations from individuals who testified that the applicant attempted to apply for legalization in May 1997, which was after the filing period ended. The director then stated that this caused the applicant to fail to fulfill the requirements of the Immigration and Nationality Act (Act) Section 245A.

On appeal, the applicant asserts that he did attempt to apply for legalization in 1987, as he originally stated. He asserts that he was turned away by an immigration officer and was afraid to return to the immigration office after that time. He states that the CIS officer who interviewed him pursuant to his Form I-687 application erred in stating that the applicant claimed never to have appeared at an immigration office. He states that his friends and acquaintances who indicated that he attempted to apply for legalization in 1997 did so because of a communication error.

The AAO has reviewed the evidence in the applicant's record that is relevant to his claim of having resided continuously in the United States for the duration of the requisite period. The director has stated that the applicant provided compelling evidence that he maintained continuous residence in the United States for the duration of the requisite period. The applicant has not appealed this finding.

The director erred in saying that Section 245A of the Act required the applicant to provide evidence that he attempted to file for legalization during the original filing period. In fact, the Act does not have such a requirement. Therefore, the director's statement that failure to provide evidence that he attempted to file for legalization during the original filing period caused him to fail to be eligible to adjust to temporary resident status pursuant to Section 245A of the Act is in error. However, the director's error is harmless because 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).

Pursuant to 8 C.F.R. § 245a.2(p), the AAO has jurisdiction over the denial of an application for Temporary Resident Status under section 245A of the Immigration and Nationality Act. Therefore, the AAO withdraws the portion of this decision that states that the applicant's inability to meet his burden of proving that he attempted to file for legalization during the original filing period caused his case to be denied pursuant to Act § 245A. However, it appears that the director's decision was actually made because he found that the applicant failed to meet his burden of establishing class membership in the CSS/Newman Settlement Agreements. The AAO does not have jurisdiction over reviewing this part of the director's decision. Therefore,

the director's instruction for the applicant to appeal the decision to the AAO is in error and is withdrawn.

The CSS/Newman Settlement Agreements stipulate that an applicant should be notified of his or her right to seek review of the denial of his class membership application by a special master. This applicant was not notified of this right by the director. The Settlement Agreements also stipulate that CIS is to send a copy of a decision to deny an application for class membership to the applicant, to his or her attorney or record and to Class Counsel. Therefore the AAO returns this decision to provide the applicant with the opportunity to appeal the director's decision regarding his failure to establish class membership to the special master and to allow CIS to notify Class Counsel of the applicant's denial on this basis. The CSS Settlement Agreement specifies that Class Counsel for the purposes of the Settlement Agreement is: [REDACTED] and [REDACTED] Center for Human Rights and Constitutional Law, [REDACTED]

ORDER: The director's decision is withdrawn in part and returned to provide the applicant with a final decision that informs him of his right to appeal his decision to the Special Master.