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FILE: 
MSC 06-081-13687

Office: LOS ANGELES

Date: **MAY 23 2008**

IN RE: Applicant: 

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:



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, Los Angeles. 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 (together comprising the I-687 Application). The director noted that the applicant had been absent from the United States for over 45 days and had failed to establish that her return had been delayed due to an emergent reason. The director, therefore, concluded that the applicant had not resided continuously in the United States for the requisite period and was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, the applicant asserts that she was not absent from the United States for more than 45 days in any instance and that the district director erred in concluding that she was not eligible for the benefit sought.

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 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."

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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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, "[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 applicant 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 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.

In this case, the applicant claimed on her I-687 Application that she entered the United States in April 1981 and that she has resided in the United States since that time. At Part #32 of the I-687 Application, which requires applicants to list all absences from the United States, the applicant indicated that she visited family in Mexico on five separate occasions subsequent to her initial entry: June 30, 1982 until August 22, 1982 (53 days); May 9, 1985 until May 30, 1985 (21 days); August

30, 1985 until September 14, 1985 (15 days); September 1987 until October 1987 and for some time in October 1989. The last two trips were for an indeterminate amount of time.

Following her interview, the applicant was issued a Form I-72 requesting evidence in support of her claims. In response, the applicant submitted the birth certificates of her three children to substantiate the dates and length of her first three departures outside of the United States. The first child, [REDACTED] was born July 2, 1982. Her birth certificate was registered on August 20, 1982. The document indicates that the applicant was present to register the child's birth certificate with Mexican authorities. This is consistent with the applicant's testimony that she left the United States June 30, 1982 and returned August 22, 1982. She was therefore, admittedly, outside of the United States for more than the 45 days allowed under 8 C.F.R. § 245a.2(h).

Similarly, the second child, [REDACTED] was born May 18, 1985. Her birth certificate indicates that both of her parents registered her birth with Mexican authorities on September 10, 1985. From the time of birth until the time of registration, it was 115 days.

Finally, the third child was born on September 13, 1987. His birth certificate was registered by both parents on October 6, 1989. This departure was for more than two years.

Thus, the written and oral testimony that the applicant provided under oath is inconsistent with the time frame on the children's birth certificates. 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. at 591-92. In an attempt to explain the inconsistency noted by the director, on appeal, the applicant attests that her family registered her children's birth certificates and that she was not present. Her arguments are not persuasive. Each birth certificate specifically states that both parents were present on the dates of registration.

It is also noted that the applicant submitted additional evidence in support of her legalization application. Specifically, she submitted affidavits from [REDACTED], and [REDACTED]. Two of the affiants claim to have met the applicant in 1981 and one claim that he met the applicant in 1986. The affiants did not indicate that they had any direct, personal knowledge of the applicant's continuous residence in this country for the duration of the requisite period, nor did they offer any specific information regarding how frequently and under what circumstances they saw the applicant during the relevant period. Given the lack of specificity in their testimony these affidavits will be given no weight.

The applicant also submitted a notarized declaration from [REDACTED] who indicated that he was the manager of the Westminster Car Wash located at 6695 Westminster Blvd., Westminster, California. He attested that the applicant was employed by the Car Wash for the entire period from May, 1981 until September, 1988. This declaration does not comport with the requirements of declarations from employers found at 8 C.F.R. § 245a.2 (d)(3). Specifically, it does not contain the applicant's address at the time of employment, a list of her duties, or any explanation as to whether the employment records are

available. It is not accompanied by any contemporaneous evidence of the applicant's employment such as pay check stubs, payroll records or tax documents. Thus, it will be given no weight.

As stated above, continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless return could not be accomplished due to emergent reasons. 8 C.F.R. § 245a.2(h)(1)(i). "Emergent reasons" has been defined as "coming unexpectedly into being." *Matter of C*, 19 I&N Dec. 808 (Comm. 1988). Since the applicant is found to have departed the United States on three separate occasions, each in excess of 45 days and totaling more than 180 days, she is not eligible for the benefit sought.

The applicant has failed to establish by a preponderance of the evidence that she 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 on this basis.

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