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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
MSC-06-098-13208

Office: NEW YORK

Date: OCT 15 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:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. The file has 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, New York, denied the application for temporary resident status filed 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). 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, on January 6, 2004 (together, the I-687 Application). 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. She specifically noted that, “[g]iven the absence of a clear indication of entry prior to January 1, 1982, and the inconsistency between previous testimony on record and your I-687, the Service has reason to doubt that the events actually took place the way in which you have described them.” These inconsistencies were detailed in a Notice of Intent to Deny (NOID) issued on July 25, 2006, in which the director noted inconsistent dates of residence and dates of travel reported by the applicant in prior testimony and applications. The director denied the application on June 4, 2007, finding that the applicant had not resolved those inconsistencies and 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.

In rebuttal to the NOID and on appeal, the applicant asserts, through counsel, that he has demonstrated statutory eligibility for temporary residence through the submission of documents, including affidavits and envelopes with postmarks dating from 1981 and throughout the relevant period. Counsel claims that the Service (Immigration and Naturalization Service, now U.S. Citizenship and Immigration Services or CIS) failed to give proper weight to the documents submitted. Regarding the inconsistencies set forth in the NOID, counsel lists the applicant’s travel dates during the requisite period in 1984 and 1985 and explains perceived inconsistencies surrounding the applicant’s prior testimony.

The AAO notes that there does not appear to be a significant difference between the description by CIS and the description by the applicant of his residence in the United States or travels during the requisite period. According to CIS, as stated in the NOID, the applicant entered the United States without inspection in June 1981.<sup>1</sup> The applicant claims that he entered at that time, but on a B-2 Non-Immigrant Visa, and the record reflects that this is correct (see page 5 below, item #1). CIS also referred to “inconsistencies and contradictions” and concluded that “statements you have previously made and are a part of your Service record lead the Service to believe that during the statutory period you were coming and going out of the U.S., as you imported African art work.” The applicant does not dispute this, but rather confirms the director’s conclusion, referring to evidence that he was present during the statutory period and traveled for business for significant periods outside of the United States during that period.

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<sup>1</sup> The director contradicts this finding in her Notice of Decision, stating that there is “the absence of a clear indication of entry prior to January 1, 1982.” The evidence, including Service records, however, indicates that the applicant entered in 1981.

Upon a *de novo* review of all of the evidence in the record, the AAO finds that the applicant entered the United States before January 1, 1982 and was present on various dates during the statutory period, as indicated by both CIS and the applicant.<sup>2</sup> However, for the reasons noted below, the AAO also agrees with the director's conclusion that the applicant has not established by a preponderance of the evidence that he is eligible for the benefit sought.

Upon review, the AAO finds that the applicant's admitted absence of over 45 days, from July to December 1985, as well as aggregate absences of over 180 days noted in Service records, constitute a clear break in any continuous residence the applicant may have established during the requisite period. Moreover, the applicant indicated that the reason for his travels and absences was for routine business purposes; he did not allege that his return to the United States had been delayed due to emergent circumstances.

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).

Under the CSS/Newman Settlement Agreements, for purposes of establishing residence and physical 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 applicant attempted to file a completed Form I-687 Application and fee or was caused not to timely file. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

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 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. 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

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<sup>2</sup> 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).

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, *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. *See* 8 C.F.R. § 245a.2(d)(6).

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 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.

The applicant shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status,<sup>3</sup> no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between January 1, 1982, through the date the application is considered filed, 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)(1).

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."

In this case, the AAO has reviewed the evidence, including past applications and supporting testimony and documents. Although there are inconsistencies in the record, the AAO finds that the issue in this proceeding is not whether the applicant has proven that he was present during the requisite period, as this is not a controversy in the case, or whether the applicant has reasonably explained the inconsistencies and contradictions noted by the director. Instead, there are uncontested facts in the record, and contemporaneous documents and government records that clearly establish the applicant's periods of residence and periods of absence from the United States. There is no need to look beyond such proof of residence. The issue before the AAO is instead whether the applicant's absences from the United States

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<sup>3</sup> Under the CSS/Newman Settlement Agreements, this refers to the time the applicant attempted to file or was caused not to timely file the application.

during the requisite period break any residency he may have established. It is these absences during the requisite period which will be addressed here.<sup>4</sup>

The following relevant evidence, comprised of government documents and the applicant's testimony, is included in the record:

1. A copy of a Consular Cash Receipt from the U.S. Department of State showing that the applicant was issued a Non-Immigrant Visa in Kinshasa on May 26, 1981.

2. Interview notes from an interview conducted by the Service on December 1, 1985, when the applicant sought admission as a visitor for business and an extension of four months on his visa. At that time the applicant stated that he had been coming to the United States on business since 1981, and requested that he again be granted six months to remain in the United States. The Service noted the following in a memo to the file after the interview:

Review of his old passport showed he had been in the USA for over 6 months in 81, 9 months in 82-83, 8 months in 83-84, and 5 months in 84-85 – the address on the I-94 is that of a brother, . . . – His check book on Citibank, his NY State Driver license . . . issued Dec 13, 82, and his own business card give his address as 99-04 57<sup>th</sup> Avenue, Corona NY – same as that of . . . , a cousin – His business activity consists in buying African art in Africa and shipping it to his relatives – both art dealers here.

During the interview, the following notes were taken as part of the question and answer exchange:

Q. You were here in June 3, 1981, and you left Dec 10, 81 – From Sept 12, 82 to May 83 and from Sept 83 to at least Apr 11, 84. You returned here Nov 25, 84, until May 1st, 85 – You now are requesting 4 more months – What do you do during all that time –

3. Correspondence with the Liberian Consulate. A letter dated August 23, 1988 from an Assistant District Counsel with the Service's New York District to the Liberian Consulate in New York, states, in pertinent part,

The [applicant] is a Liberian national who arrived in the United States on or about January 1985 [sic].<sup>5</sup> Because there was some issue as to his admissibility . . . he was referred to the

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<sup>4</sup> The record includes various applications submitted by the applicant, including two asylum applications (Form I-589, dated January 14, 1991 and October 1, 1992); an application to adjust status to permanent resident as the spouse of a Diversity Visa lottery winner (Form I-485, filed September 24, 2003); an application for Temporary Resident Status (Form I-821, dated September 9, 1991); and two Biographic Information forms (Form G-325A, dated January 14, 1991 and October 1, 1992). Although the information provided on these forms is contradictory in some respects, the inconsistencies regarding dates of entry and travel during the statutory period have been resolved, as both the applicant's testimony on appeal and CIS records regarding entries and travel dates are consistent and are determinative in this case.

<sup>5</sup> This date appears to be an error. The prior date of arrival was December 1, 1985.

Executive Office For Immigration Review, Office of the Immigration Judge, for a hearing. His passport was retained by the Immigration and Naturalization Service as evidence.

Unfortunately, his file containing this passport has been temporarily misplaced. [The applicant] has advised me that he wishes to depart the United States. It would be greatly appreciated if you could issue him a traveling document so that he may depart as planned.

The Liberian Consul's letter, refusing to issue a travel document without the applicant's passport, is also in the record, as well as a copy of a Form I-275, Notice of Visa Cancellation, to the American Consul in Monrovia, Liberia, dated September 19, 1988 (after the passport had been located). The Form I-275 notes that the applicant had withdrawn his application for admission, his passport had been issued in Monrovia on July 31, 1985, and that he had been issued a B-1/B-2 Visa on August 8, 1985 in Monrovia. A copy of the applicant's I-94 Arrival Record showed that the applicant was paroled until September 22, 1988 and departed on September 19, 1988.

The documents described above are contemporaneous evidence of the applicant's residence in the United States and absences from the United States during the statutory period. On appeal, the applicant does not offer any evidence to the contrary, and, in fact, details his entries into and absences from the United States generally consistent with this evidence, stating that he entered for the first time in 1981 with a visitor visa and traveled out of the United States in 1984 and 1985. Although he does not note all of his travel and does not mention his travel in 1988, Service records are clear in this respect, and the AAO notes that the applicant's departure from the United States in September of 1988 falls outside the statutory period. The AAO concludes from this evidence that the applicant resided in the United States for parts of the years 1981 through the end of 1985 and remained in the United States from his entry in December 1985 through the date his application for temporary residence was considered filed.

Any absence of over 45 days during the requisite period, or an aggregate of all absences of over 180 days between January 1, 1982, through the date the application is considered filed represents a break in residency, 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 residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h)(1).

In this case, a review of the applicant's passport on December 1, 1985, as described in item # 2 above, shows that the applicant first entered the United States on June 3, 1981 and remained until December 10, 1981 and that he was present in the United States from 1982 through December 1, 1985 for 22 months. Additional Service records, described in item # 3 above show that the applicant remained in the United States until September 19, 1988. It follows that he was absent for the remaining time during the requisite period, a total of 26 months. As this period is more than 180 days, the applicant's residence during the statutory period was broken. Moreover, government records and the applicant's statements in rebuttal to the director's NOID show that the applicant was in Liberia from July to December 1985, an absence of over 45 days, also comprising a break in the applicant's residence. It is clear from the Service's interview notes and the applicant's own testimony that he was traveling back and forth to the United States on

business during the statutory period, and that it was not “emergent reasons” that determined his travel schedule.

In summary, the applicant has admitted that he was absent from the United States for more than 45 days on at least one occasion; objective contemporaneous documents, including Service records, confirm that absence as well as aggregate absences amounting to over 180 days; the evidence shows that the applicant’s travels were for business, and there is no indication in the record that any delays in returning to the United States were based on emergent reasons. In light of this evidence, any continuous unlawful residence that the applicant may have had in the United States during the requisite period has been broken. Due to his absences, the applicant has failed to demonstrate continuous unlawful residence in the United States for the requisite period. The applicant is therefore ineligible for temporary resident status under section 245A of the Act on that basis.

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