



U.S. Citizenship
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Services

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[REDACTED]

FILE:

MSC 05-225-11163

Office: LOS ANGELES

Date: **SEP 23 2008**

IN RE:

Applicant: [REDACTED]

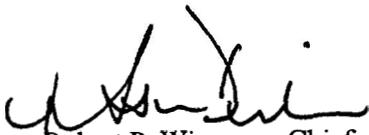
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. 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, 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. 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. The director noted that the applicant stated under oath during his interview with immigration officers that he had been absent from the United States for approximately two months, from December of 1987 to February of 1988 and, therefore, he had exceeded the forty-five (45) day limit for a single absence from the United States. The director determined that therefore, the applicant had not established that he had resided continuously in the United States, and therefore, was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, counsel for the applicant asserts that the applicant was never asked during his immigration interview the specific dates of his absence from the United States, thus creating the confusion. Counsel further asserts that the applicant was absent from the United States from December 26, 1987 to February 6, 1988, and that therefore, his absence did not interrupt his continuous residence.

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).

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) 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. See 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 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).

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, 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 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 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 forty-five (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 , 810 (Comm. 1988), holds that emergent means "coming unexpectedly into being."

At issue in this proceeding is whether the applicant has submitted sufficient evidence to establish his continuous residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

In denying the application, the director noted that based upon the applicant's absence from the United States, he had failed to meet his burden of proof by a preponderance of the evidence that he resided continuously in the country for the requisite period.

On appeal, counsel asserts that the applicant has never been absent for more than 45 days during a single trip. The applicant submits the following attestations on appeal:

- Affidavits from [REDACTED] who state that they are citizens of India and that they have known the applicant since the applicant was born. They also state that the applicant visited India in December of 1987, and that they were told by the applicant's mother that the applicant returned to the United States in the first week of February 1988. Here, the affiant's statements are not based upon their first hand knowledge of the whereabouts or circumstances of the applicant's residency during the requisite period. Therefore, the affidavits can be afforded only minimal weight in establishing that the applicant resided in the United States during the requisite period.
- An affidavit from [REDACTED] who states that she is a citizen of India and that the applicant is her son. She also states that she has personal knowledge that the applicant visited her in India on December 26, 1987 and returned to the United States on February

6, 1988. Although the affiant claims to have knowledge of the applicant's trip to India in December of 1987, she has failed to demonstrate the frequency with which she saw and communicated with the applicant during his stay in the United States.

- An affidavit from [REDACTED] who states that he has lived in the United States since 1984. The affiant states that he has known the applicant since 1979 when they first met in New Delhi, India. He further states that he moved to the United States in 1985, and that is when he met the applicant and again became good friends. He also states that he has personal knowledge of the applicant's trip to India from the United States on December 26, 1987, and his return on February 6, 1988, because he dropped the applicant off at the bus station when he left in 1987. Here, the affiant's statements contradict each other in that he states that he entered the United States in both 1984 and 1985. This inconsistency calls into question the affiant's ability to confirm that the applicant resided in the United States during the requisite period. The affiant has failed to specify the frequency with which he saw and communicated with the applicant during the requisite period.
- An affidavit from [REDACTED] in which he states that he has lived in the United States since 1988 and that he met the applicant at a Sikh Temple in 1988. The affiant also states that during a conversation, the applicant told him that he entered the United States in 1981 and after being in the country for approximately six years he traveled to India and stayed for about six weeks. Here, the statements of the affiant are not based upon his first hand knowledge of the whereabouts or circumstances of the applicant's residency during the requisite period. Therefore, his statement cannot be afforded any weight in establishing that the applicant left the United States for six weeks.
- An affidavit from [REDACTED] in which he states that he has lived in the United States since 1982 and that he has known the applicant since 1987. He also states that he has personal knowledge of the applicant's absence from the United States from 1987 to 1988. The affiant fails to specify the frequency with which he saw and communicated with the applicant during the requisite period. He also fails to specify the dates during which the applicant was absent from the United States. Because this affidavit is lacking in detail, it can be afforded only minimal weight in establishing the applicant's claimed presence in the United States.

In the instant case, the applicant has failed to overcome the basis of the director's denial. While the applicant asserts on appeal that he was absent from the United States for only 41 days, he has failed to explain the inconsistencies and contradictions in his testimony and on his I-687 application regarding his absences from the United States during the requisite period. In the absence of records of the applicant's travel or other independent documentation pertaining to his claimed absence, statements made by the affiants listed above have minimal probative value. Therefore, it cannot be concluded that the applicant resided continuously in the United States for the requisite period.

It is noted by the AAO that the record of proceeding shows that the applicant's wife resided in India and that he has two sons born in India on May 11, 1986 and September 19, 1989. The applicant has failed to address his apparent absences from the United States that resulted in his fathering his two children.

The applicant has the burden of proving by a preponderance of evidence that he has *continuously* resided in an unlawful status in the United States from prior to January 1, 1982 through the requisite period, 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). Based upon the applicant's admitted absence of over 45 days and his failure to adequately address the inconsistencies in the record regarding his absences, the AAO concludes that he did not continuously reside in the United States for the requisite period.

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