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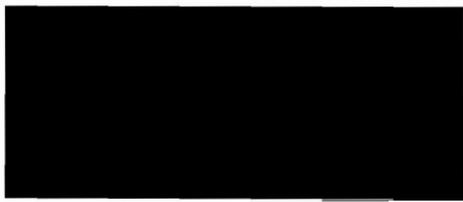


FILE: [Redacted] Office: CHICAGO Date: **SEP 26 2008**
MSC 06 097 24072

IN RE: Applicant: [Redacted]

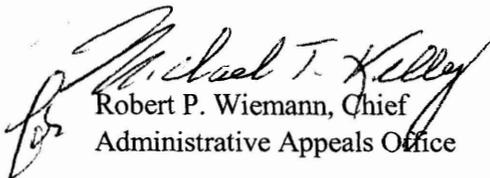
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. 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, Chicago, Illinois. 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 5, 2006. The applicant was interviewed on July 17, 2006. The record contains affidavits and other information in support of the application. Upon review of the totality of the evidence, the director denied the application on or about September 22, 2006. The director determined that the applicant had not established that he had resided continuously in the United States during the required statutory period. The director stated that during the course of the applicant's July 17, 2006 interview, the applicant stated under oath that he had departed the United States in February 1984 had returned to the United States in August of 2002.

On appeal, counsel for the applicant asserts that the director made a material mistake when determining that the applicant stated that he had left the United States in February 1984 and had not returned to the United States until August 2002. Counsel notes that she was at the applicant's interview and that the applicant did not make this statement. Counsel emphasizes that the applicant stated at the interview that he had left the United States in February of 1984 and returned on August 1, 1984. Counsel notes that the applicant provided this same information on the Form I-687, when he indicated that he left the United States in February 1984 and returned in August 1984. On appeal, counsel submits documentation, including evidence of the applicant's advanced parole in 1988 and 1994, to demonstrate that the applicant had not been residing outside of the United States from 1984 to 2002.

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 applicant attempted to file the application. 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 or attempting to file the application. 8 C.F.R. § 245a.2(b)(1).

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)(1), "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 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 of filing no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all

absences has not exceeded one hundred eighty (180) days during the requisite period, unless the applicant can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed. 8 C.F.R. § 245a.2(h)(1)(i).

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).

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. *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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to establish his entry into the United States prior to January 1, 1982 and continuous unlawful residence since such date through the date he attempted to file the application.

The Form I-687 submitted on January 5, 2006 lists the applicant's absences from the United States during the pertinent time period as: (1) February 1984 to August 1984 for the birth of his son; and (2) November 1986 to December 1986 to visit his family. The AAO finds the applicant's absence from February 1984 to August 1984 listed on the Form I-687 and confirmed by the applicant at his July 17, 2006 interview, and on appeal, exceeded the single absence exception of 45 days to continuous unlawful presence as set out in 8 C.F.R. § 245a.2(h)(1)(i). In addition, the applicant also indicated that he was not physically present in the United States in November 1986 until sometime in December 1986; thus the applicant also

failed to comply with the regulation 8 C.F.R. § 245a.2(b)(1), that is physical presence in the United States from November 6, 1986 until the date of filing or attempting to file the application during the original legalization application period of May 5, 1987 to May 4, 1988. See the CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10. The AAO has considered whether the applicant's attendance of the birth of his child is an emergent reason excusing his delay in returning to the United States before the passage of 45 days. It is not. Giving birth to a child outside the United States is not considered to be an emergent reason for any delay in returning. In *Ruginski v. INS*, 942 F.2d 13 (1ST Cir. 1991), the court upheld the determination by the Immigration and Naturalization Service that a person who gave birth abroad and remained beyond the 45 days was not qualified for temporary resident status under section 245A of the Act. Moreover, the AAO finds that the applicant's 1984 departure¹ and 1986 departure² resulted in aggregate absences exceeding 180 days during the requisite period. The applicant's acknowledged absences from the United States breaks his claimed continuous residence in the United States. For this reason, the applicant is not eligible for temporary resident status under section 245A of the Act.

Furthermore, the AAO has reviewed the affidavits submitted on the applicant's behalf from:

Each of these affidavits lacks detailed information substantiating when and how the affiants met the applicant and detailed information of specific and ongoing events and circumstances surrounding their relationship and subsequent interactions with the applicant. These affidavits are not probative. As stated in *Matter of E-M-* when evaluating the evidence the "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 80. In this matter, the applicant has not provided affidavits that establish the applicant's entry into the United States prior to January 1, 1982 and continuous unlawful residence in the United States for the requisite time period. The general nature of information that characterizes these documents lacks sufficient indicia to establish the reliability of their claims.

The AAO has reviewed: a January 10, 1990 affidavit written by [REDACTED] former owner of an Indian restaurant certifying that the applicant worked at the restaurant from January 1984 to July 1986 as an assistant manager; and a January 12, 1990 affidavit written by [REDACTED], manager of a T&J Amoco certifying that the applicant has been working as an assistant manager since August 1987. The AAO does not find these documents regarding the applicant's claimed employment probative, as they do not comply with the criteria found at 8 C.F.R. § 245a.2(d)(3)(i) which requires that the employer include the applicant's address at the time of employment, periods of layoff, duties with the company, and whether the information was taken from official company records, and where the records are located and whether the Service may have access to the records.

¹ Assuming the applicant left the United States on the last day of February and returned on the first day of August 1984, he would have spent at least 153 continuous days outside the United States.

² The applicant's testimony that he was not in the United States in November 1986 until sometime in December indicates that the applicant was outside the United States for at least another 30 days.

The AAO has also reviewed rental receipts issued to the applicant in February, April, and November 1980 for apartment # [REDACTED]; however, the receipts do not indicate an address and the applicant does not include an apartment # [REDACTED] associated with his claimed address in 1980 as depicted on the Form I-687. The AAO has further reviewed two letters in the file written by: (1) [REDACTED] manager of a mail center informing the applicant that his mail box is full, dated August 15, 1984; and (2) [REDACTED] indicating that [REDACTED] had been treated by him in the 1980s but that the medical records were not available because he had moved offices. Neither of these letters provides sufficient information substantiating that the letter writer had knowledge of the applicant's residence in the United States for the requisite time period. The AAO observes that even if the applicant maintained a mail box at a mail center, doing so is not evidence of residence. The letter written by the doctor misspells the applicant's name and the failure to maintain medical records because of moving locations is not credible.

The AAO has reviewed the documentation submitted and finds that the documentation submitted lacks probative value in establishing the applicant's continuous unlawful residence in the United States for the requisite time period. These deficient affidavits and documents comprise the only evidence of the applicant's residence in the United States from prior to January 1, 1982 through the requisite time period. The statements and affidavits lack credibility and probative value for the reasons noted. The absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of his claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the lack of credible supporting documentation, it is concluded that the applicant 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*. Furthermore, the applicant's admitted absences break his claimed continuous residence. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. The appeal will be dismissed.

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