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FILE: [Redacted]
MSC-06-091-10399

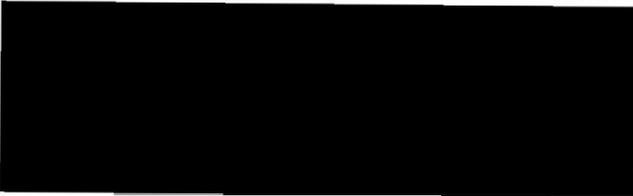
Office: BOSTON

Date: **SEP 29 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. If your appeal was dismissed or rejected, your file has 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 if your case was remanded for further action, you will be contacted.

for *Michael T. Kelly*
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, Boston. 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 during the applicant's August 30, 2006 interview, the applicant stated that he left the United States for Mexico in November 1987 and returned in March 1988. The director found that the applicant was absent from the United States for over 45 days during the period from January 1, 1982 to May 4, 1988. 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, counsel states that the applicant's Form I-687 was completed by an "unscrupulous immigration advisor" and that the applicant did not visit Mexico from November 1987 to March 1988. Counsel also states that the applicant did not read the application before signing it and was surprised to learn of the visit to Mexico during the interview. Finally, counsel adds that the applicant decided that an affirmation of what was stated in the application was better than to appear to have lied on the application. On appeal, counsel submits a statement from the applicant, a letter from the applicant's sister, and an affidavit.

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 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 his I-687 Application that he entered the United States in January 1981 and that he resided in the United States during the requisite period. At part #32 of the I-687 Application, which requires applicants to list all absences from the United States, the applicant indicated that he visited Mexico from November 1987 to March 1988, a total of more than 45 days.

On appeal, counsel states that the applicant's Form I-687 was completed by an "unscrupulous immigration advisor" and that the applicant did not visit Mexico from November 1987 to March 1988. Counsel also states that the applicant did not read the application before signing it and was surprised to learn of the visit to Mexico during the interview. Finally, counsel adds that the applicant decided that an affirmation of what was stated in the application was better than to appear to have lied on the application. In his statement, the applicant states that he "blindly affirmed" the application and that he "made no trip outside [of the United States]" entering in January 1981. Although the applicant states that he was not assisted by an attorney but by an immigration consultant, there is no remedy available for an applicant who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on his behalf. See 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. Cf. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

Counsel submitted a letter from Maria de Los Angeles Bautista, the applicant's sister who lives in Mexico. The declarant states that the applicant has been in the United States since 1981 and has never returned to Mexico. The declarant personally denies "any family visit [from] November 1987 to April 1988." The declarant was in Mexico from November 1987 to April 1988, therefore, the declarant is unable to provide specific information about the applicant's residence and whereabouts in the United States from November 1987 to April 1988 as well as during the requisite period. Given these deficiencies, this letter has minimal probative value in supporting the applicant's claims that he was in the United States from November 1987 to April 1988 or that he entered the United States prior to January 1, 1982 and resided in the United States for the entire requisite period.

Counsel also submitted an affidavit from Theresa Lascola dated January 2007. The affiant states that the applicant was "present for [her] son's birthday party on February 11, 1988." Although the affiant states that while she "can report [] that [the applicant] was physically present in Boston in February 1988," the applicant also states that "beyond that, [she] cannot report anything except to note that [the applicant] has remained a friend through the intervening years and is a good member of the community." The affiant does not provide information regarding the applicant's whereabouts from November 1987 to February 10, 1988. The AAO notes that the period from November 1987, when the applicant stated he left for Mexico, until February 11, 1988, the date of the affiant's son's birthday party exceeds the 45 day maximum of time that may be spent outside the United States without breaking continuous residence. Given these deficiencies, this affidavit has minimal

probative value in supporting the applicant's claims that he was in the United States from November 1987 to March 1988.

Although the applicant claims on appeal that he never left the United States after his first entry, the information on appeal is inconsistent with the information previously provided by the applicant in the Form I-687 and during his interview on August 30, 2006. Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, the applicant has not submitted sufficient evidence 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*. 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.