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U. S. Citizenship and Immigration Services  
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U.S. Citizenship  
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Services

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FILE: [REDACTED]  
MSC-05-334-10875

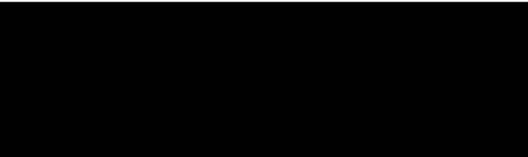
Office: PORTLAND

Date: APR 22 2009

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.

John F. Grissom  
Acting 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, Portland. 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 denied the application, finding 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.

On appeal, the applicant, through counsel, asserts that he has established his unlawful residence for the requisite time period. The AAO has reviewed all of the evidence and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.<sup>1</sup>

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. 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

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<sup>1</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 (9<sup>th</sup> 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).

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, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 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). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

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 (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of a witness statement.

The record contains a witness statement from [REDACTED] dated March 15, 2006. The statement provides that [REDACTED] met the applicant in November 1981 at a family social gathering. It states that the applicant resided with [REDACTED] and her family at [REDACTED] in Pacoima, California until late July 1987. The affidavit states that during this period, the applicant returned to Sri Lanka from August 1986 to November 1986. The AAO finds that [REDACTED]'s statements are not corroborated by the applicant's Form I-687 application. At part #30 of the application, where applicants are requested to list their residences in the United States since entry, the applicant responded that he has resided in Beaverton, Oregon since March 2002. The applicant failed to list any residential addresses during the requisite period. The AAO further finds that [REDACTED] statement does not supply enough details to lend credibility to her claimed relationship with the applicant. For instance, [REDACTED] does not indicate where the applicant was employed, whether he was engaged in any community activities, or attended school. This information is of particular importance since the applicant left blank the parts of his application that request information on his affiliation with any organizations and employment during the requisite period. Moreover, [REDACTED] statement fails to detail the type of living arrangement/agreement her family had with the applicant. To be considered probative and credible, witness statements must do more than simply state that a witness knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. The AAO finds that [REDACTED]'s statement does not indicate that her assertions are probably true. Therefore, it has little probative value.

In denying the application, the director noted that the applicant was absent for a period of three months in 1986. The director further noted that the applicant was absent from July 1987 to May 1988. The director determined that the applicant had not established that his unlawful status was known to the government on January 1, 1982; did not reside continuously in the United States during the requisite period; and did not provide sufficient proof of his residence in the United States during the requisite period.

On appeal, counsel asserts that the director erred by using May 4, 1988 as the ending date for the residence and physical presence requirement in the case. Counsel states that according to the CSS/Newman Settlement Agreements, the proper end date is the date the applicant tried to apply for legalization. Counsel contends that the applicant tried to apply for legalization on or about May 1987; therefore his ten month absence from July 1987 to May 1988 is irrelevant. Counsel submits an affidavit from the applicant and a copy of his marriage certificate.

The applicant's affidavit provides that he entered the United States in November 1981. It states that he departed to Sri Lanka on or about August 1, 1986 and was wed on August 21, 1986. The affidavit provides that he learned in early September 1986 that his wife was pregnant and she had a miscarriage a few weeks later. It states that the applicant remained in Sri Lanka to be with his wife because she was very distraught. The affidavit indicates that the applicant returned to the United States in early November 1986.

Upon review, the AAO finds that the applicant has failed to overcome the basis for denial. The director determined that the applicant failed to provide sufficient proof of residence in the United States. As previously stated, to meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his own testimony and the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. *See* 8 C.F.R. § 245a.2(d). Here, the applicant's corroborating documentation consists of one witness statement that was found to be of little probative value. The applicant's one witness statement does not satisfy the preponderance of the evidence standard.

The AAO further finds that, as stated by the director, the applicant has failed to establish his continuous residence in the United States during the requisite period. While the applicant's absence from July 1987 to May 1988 is not relevant to these proceedings, his absence for three months in 1986 is of significance. The record of the applicant's sworn testimony provides that he was absent from the United States from August 1, 1986 to November 1986. On appeal, counsel furnished an affidavit from the applicant that corroborates this three month absence.

An alien 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 filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

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." As 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."

The applicant has explained that he departed the United States on August 1, 1986 for travel to Sri Lanka. He states that he learned in early September 1986 that his wife was pregnant. The applicant contends that his wife had a miscarriage a few weeks later. The applicant claims that he remained in Sri Lanka to remain with his wife who was distraught. He states that he returned to the United States in early November 1986. However, the explanation put forth by the applicant does not show that his untimely return was due to an emergent reason. The applicant stated that he departed the United States on August 1, 1986, learned in early September 1986 that his wife was pregnant, and then she had a miscarriage a few weeks later. This timeline shows that the applicant's wife would have had her miscarriage after the applicant was in Sri Lanka for at least 45 days. In the absence of evidence that the applicant intended to return within 45 days, it cannot be concluded that an

emergent reason delayed the applicant's return to the United States beyond the 45-day period. Therefore, it cannot be concluded that he resided continuously in the United States for the requisite period. The applicant is found to be ineligible for temporary resident status on this basis as well.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and 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.