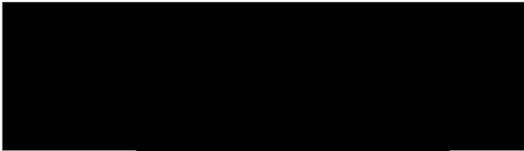




U.S. Citizenship  
and Immigration  
Services

L<sub>1</sub>



FILE: [Redacted]

Office: LOS ANGELES

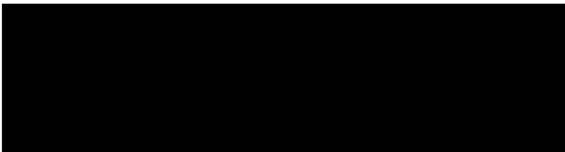
Date: DEC 01 2009

MSC 05 091 19654

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.

IN 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.

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
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 terminated by the Director, Los Angeles, California. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director terminated the applicant's temporary resident status because the applicant failed to establish continuous unlawful residence in the United States during the requisite period.

On appeal, counsel asserts “[w]hile the incorrect information regarding [the applicant’s] previous applications were prepared by individuals who may have been motivated by the opportunity to make a quick buck call for a *Lozada* action, that issue is for another day.” Counsel maintains that the applicant’s statements and clarifications are true and correct and must be given credibility since they explain the inaccuracies of the information entered on the applications and affidavits filed on behalf of the applicant. Counsel asserts that the applicant’s 50-day absence from the United States in 1983 does not interfere with his continuous residence as it was brief, casual and innocent.

The status of an alien lawfully admitted for temporary residence may be terminated at any time if it determined that the alien was ineligible for temporary residence under section 245A of the Act. 8 C.F.R. § 245a.2(u)(1)(i).

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)(1).

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).

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.

Even if the director has some doubt as to the truth, if the petitioner 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 record reflects that the applicant was granted temporary resident status on October 13, 2005. On January 16, 2008, the director issued a Notice of Intent to Terminate, which advised the applicant of his intent to terminate the applicant’s temporary status. On his initial Form I-687 application, and his affidavit to determine class membership filed in April 1990, the applicant claimed to have departed the United States one time during the requisite period; June 2, 1987 to July 19, 1987. The applicant indicated that he entered the United States without inspection in 1981 and returned in 1987 with a visa. The applicant reasserted the veracity of these entries in a declaration dated March 19, 2001, and in an affidavit from [REDACTED] dated May 3, 1990.

At the time he filed his LIFE application,<sup>1</sup> the applicant submitted a letter dated May 16, 2002, from former counsel, who indicated that the applicant was informed that he could not apply for legalization “because he left the US on two occasions: February 5, 1983 for 50 days and on June 20, 1987 for 29 days, a total of seventy nine (79) days.” [REDACTED] in her affidavit, dated April 17, 1990, indicated that the applicant was outside of the United States from June 20, 1987 for two weeks. In declarations dated May 15, 2002, and December 26, 2004, the applicant indicated that he entered the United States without inspection on July 19, 1987 by crossing the border in Nogales, Arizona.

The director advised the applicant that the documents submitted with his LIFE application contradicted the information he provided at the time he was granted work authorization pursuant to this *LULAC* case in 1990. At the time of his current interview on January 7, 2008, the applicant indicated that he had never entered the United States with a visa. Service records, however, reflect that the applicant entered the United States on February 24, 1990 with a B-2 visa. The director noted that the applicant applied as a class member on April 12, 1990.

The director determined that the applicant’s testimony and the evidence submitted could not be considered credible.

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<sup>1</sup> The LIFE application was denied by the director on November 2, 2004. The applicant's appeal from the denial of this application was rejected by the director on November 2, 2004, as it was untimely filed.

The applicant, in response, addressed the inconsistencies outlined in the director's notice. In regards to his entries and departures, the applicant asserted that he first entered the United States without inspection in May 1981; departed the United States in 1983 for approximately seven weeks to Canada and reentered in New York without inspection; departed the United States in 1987 for approximately four weeks and reentered without inspection through the Nogales, Arizona border; the preparer of his LULAC application in 1990 only asked the reason why he had not filed his application during the amnesty period; and the preparer did not ask him about any other departures and, therefore, his 1983 departure was not listed on his application. The applicant asserted, in pertinent part:

In preparing Form I-687 I stated that I came to LAX in July 1987 which is true. I flew from Phoenix, Arizona to LAX after entering the United States without inspection in Arizona. My declaration dated April 12, 1990, at question 12, about my 1987 entry, says "I left thru LAX (Los Angeles, CA)" which is correct. If I had had a visa, I would have provided that information on Form I-687 on page 2 which is blank at questions 22-29. The affidavit from [REDACTED] dated May 3, 1990 states that I came to LAX in July 1987 which again is accurate because I did arrive at LAX, of which [REDACTED] was aware but I was arriving from Arizona, not from abroad.

The applicant asserted that [REDACTED] in her affidavit, miscalculated the number of days he was outside of the United States, but she correctly stated his departure dates. In regards to his LIFE application, the applicant asserted that his counsel did not inquire about his entries subsequent to 1987. In regards to his January 7, 2008 interview, the applicant indicated that he did not mention his February 1990 lawful entry because he thought the interviewing officer was referring only to the qualifying period of 1981 through 1988.

The director determined that the applicant failed to address his previous claims to have entered the United States with a tourist visa. As previously noted, [REDACTED] in his affidavit, specifically stated that the applicant had arrived using a tourist visa and that the passport and visa had been lost. Likewise, on his current Form I-687 application signed September 3, 2004, the applicant indicated that his last entry (July 19, 1987) during the requisite period was with a visa. The director noted that the applicant submitted no credible evidence to support his new declaration. Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an 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. *Matter of Ho*, 19 I. & N. Dec. 582 (BIA 1988). The director also determined that the applicant's absence in 1983 exceeded the 45-day limit for a single absence and, therefore, the applicant had failed to establish continuous residence in the United States.

On appeal, counsel asserts that although the applications were signed under penalty of perjury, the mistakes contained in the documents are clearly through the carelessness and the ineffective assistance of preparers. Counsel asserts that the applicant's Form I-687 application in 1990 was

prepared by a Spanish translator who would have no reason to translate Spanish to the applicant as he was an Indian national.

Counsel's assertion is without merit as it was the applicant who obtained the services of the preparer. If there was a language barrier, the applicant could have obtained services from another preparer. There is no remedy available for an applicant who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its 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). The fact remains the applicant signed the Form I-687 application under penalty of perjury.

In regards to the visa claim on the Form I-687 application filed in 2004, counsel asserts that it is once again the fault of preparers who use less than the due care required in preparing such application. Counsel's assertion has no merit as the Form I-687 application does not reflect that anyone other than the applicant completed the application, as no information is listed in items 44 of the application; item 44 of the application requests the name, address and signature of the person preparing the form. It is noted that the LIFE application also does not reflect that anyone other than the applicant completed the application

The fact remains that the applicant, in affixing his signature on each application, certified that the information he provided was *true* and *correct*.

Counsel asserts that the affidavit from [REDACTED] incorrectly stated that the applicant left the United States on June 2, 1987 and reentered the United States with a visa. As conflicting statements have been provided, it is reasonable to expect an explanation from the affiant in order to resolve the contradiction. However, no statement from [REDACTED] has been submitted to corroborate the counsel's statement. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, based upon the foregoing, 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*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

In regards to the applicant's 1983 absence, on appeal, counsel asserts in pertinent part:

Here, [the applicant's] departure is considered brief since it only exceeded the statutory requirement in 8 CRF 245a.2(h) by a mere 48 hours. In addition, the purpose of [the applicant's] absence was only to visit his wife, and not to abandon his intentions of remaining in the United States. If [the applicant] would have intended

to permanently leave the United States, [the applicant] would have spent the Fifty (50) days in India, his home country, and [the applicant's] wife would not have attempted to get a visa to enter the United States.

Counsel erred in applying the brief, casual and innocent definition for the applicant's 1983 absence as it occurred prior to November 6, 1986 and the regulation at 8 C.F.R. § 245a.2(6)(h) does not require it for continuous residence. If an absence occurred prior to November 6, 1986 and exceeds 45 days, the absence will be examined utilizing the standard set forth in 8 C.F.R. § 245a.2(6)(h)(i).

"*Continuous residence*" is defined in the regulation at 8 C.F.R. § 245a.2(6)(h)(1), as follows:

*Continuous residence.* An applicant shall be regarded as having resided continuously in the United States if, at the time of filing the application:

- (i) 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 for temporary resident status is filed, unless the alien can establish that due to *emergent reasons*, his or her return to the United States could not be accomplished within the time period allowed. [Emphasis added.]

Although emergent reason 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 other words, the reason must be unexpected at the time of departure from the United States and of sufficient magnitude that it made the applicant's return to the United States more than inconvenient, but **virtually impossible**. However, in the instant case, that was not the situation. There is no evidence to indicate that an emergent reason delayed the applicant's return to the United States within the required 45-day period. Moreover, this absence was not due to any "emergent reason" – *i.e.*, one that was unforeseen at the time of his departure – because visiting his wife in Canada was the specific reason for the applicant's absence from the United States. The applicant's prolonged absence would appear to have been a matter of personal choice, not a situation that was forced upon him by unexpected events.

The applicant's 48-day stay in Canada in 1983 interrupted his "continuous residence" in the United States. Therefore, the applicant has failed to establish that he resided in the United States in an continuous unlawful status from before January 1, 1982 through the date he attempted file his application.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she has *continuously* resided in an unlawful status in the United States from prior to January 1, 1982 through the date of filing, 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). Due to the absence, the applicant did not continuously reside in the

United States for the requisite period. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.

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