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U.S. Citizenship
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FILE:

[REDACTED]

Office: NEW YORK

Date:

JUN 03 2009

MSC 06 054 11349

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.

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 Director, New York. The decision is now before the Administrative Appeals Office 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, and a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet. The director denied the application because the applicant did not establish that he continuously resided in the United States for the duration of the requisite period. In so finding the director noted that at his interview, the applicant said that he departed from the United States in 1983 for Brazil and did not return until March 1986 which broke the continuity of his continuous residence. The director also noted that the applicant had shown no emergent reasons for the length of his absence.

On appeal, counsel acknowledges the applicant returned to Brazil in late 1983 and did not return to the United States until March 1986. Counsel explains that there were emergency reasons for the applicant's return to Brazil including the applicant's mother and younger brother's deepening depression resulting from the death of the applicant's father in 1979 and the unanticipated need for his extended departure in the U.S. because of the attempted murder of his sister in 1984. Counsel asserts that the director's decision is arbitrary and in contradiction to law and the evidence submitted.

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).

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 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 the evidence for relevance, probative value, and credibility, within the context of the totality of the evidence, to determine whether the facts to be proven are 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, 431 (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.

The pertinent evidence in the record is described below.

1. Notarized statements from [REDACTED] and [REDACTED] who state that the applicant has resided in the United States from 1982 until October 17, 2005.
2. A notarized statement from [REDACTED] who states that the applicant has resided in the United States since 1986.
3. A letter from [REDACTED], the applicant’s family doctor in Brazil dated May 7, 2007 indicating the applicant returned to Brazil in late 1983 and did not return to the United States until March 1986. [REDACTED] states that when the applicant returned to Brazil from the United States, his intention was to be there for a short period just to help his mother and his younger brother who were suffering depression caused by the death of his father in 1979. The doctor then explains the applicant’s sister was hospitalized from February 12, 1984 to February 1984 after a violent assault upon her and that the applicant needed to extend his visit to wait for her recovery. [REDACTED] states that the applicant not to be able to return to the United States until his brother, sister and mother were well and in good conditions.

On appeal, counsel asserts that the director’s decision is arbitrary and in contradiction to law and the evidence submitted. Counsel did not offer any evidence in support of his assertion. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

On his Form I-687, the applicant stated that he resided in Mount Vernon, New York, at two addresses from October 1980 to November 1986. However, on appeal and at his interview he indicated that he went to Brazil in 1983 to visit family and came back to the United States in 1986. The notarized statements from [REDACTED] and [REDACTED] (Item # 1 above) will be given no weight because the record reflects the applicant resided abroad from at least late 1983 until March 1986.

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).

On his Form I-687, filed on November 23, 2005, he states that his only absence from the United States after his first entry in October 1980 during the requisite period was a family visit in November 1986 to March 1987. The applicant's admitted absence from the United States from November 1986 to March 1987, a period of more than 45 days, is clearly a break in any period of continuous residence he may have established. Additionally, the record shows the applicant's current claim that he was also abroad from late 1983 through March 1986. The difference between the applicant's statement on his Form I-687 and his current assertions cast doubt on his claim that he resided continuously in the United States during the requisite period.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, the applicant must resolve any inconsistencies in the record with competent, independent, objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). These inconsistencies cast doubt not only on the evidence containing the conflicts, but on all of the applicant's evidence and all of his assertions.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate entry into the United States prior to January 1, 1982, and continuous residence during the requisite period. The applicant's asserted residential and absence histories on his Form I-687 are accompanied by inconsistent evidence.

In the *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), an emergent reason is defined as one that comes "unexpectedly into being." In *Matter of C-*, the applicant had intended to stay in Mexico for only 30 days. The applicant's return to the United States was delayed because she did not receive the money that her husband had sent to her to pay for her return trip to the United States. Thus, in *Matter of C-*, there were circumstances beyond the control of the applicant which prevented the applicant from returning to the United States. These were found to be "emergent

reasons” and the applicant was found to have maintained continuous residence in the United States. In this case, [REDACTED] (Item # 3) explains the applicant arrived in Brazil in late 1983 and his intention was to be there for a short period just to help his mother and his younger brother. As explained by the doctor, the assault on his sister was an emergent event that caused him not to return to the United States. However, while this emergent event in February 1984 may have justified the applicant exceeding the 180 day absence limit during the requisite period, this explanation of circumstances does not justify his documented absence from late 1983 to March 1986, a span exceeding three years, especially when this absence is added to his November 1986 to March 1987 trip abroad, a journey that also exceeded 45 days in duration for which the applicant has provided no emergent reason excusing his belated return.

The evidence must be evaluated not by the quantity of evidence alone but by its quality. 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 its amenability to verification. Given the absence of credible supporting documentation, the applicant has failed to meet his burden of proof and failed to establish continuous residence in an unlawful status in the United States during the requisite period. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act. The application was correctly denied on this basis, which has not been overcome on appeal. Consequently, the director's decision to deny the application is affirmed.

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