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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, D.C. 20529-2090

U.S. Citizenship
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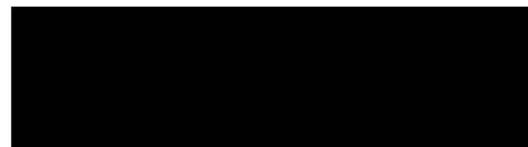
Office: NEW YORK

Date: JUN 11 2009

IN RE: Applicant: [REDACTED]

PETITION: 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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

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, New York, and 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 (the Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements. This decision was based on the director's determination that the applicant had exceeded the forty-five (45) day limit for a single absence from the United States during the requisite period.

On appeal, the applicant asserts that he went to Pakistan in 1985 and entered the United States on May 19, 1985, with a C-1 visa. The applicant acknowledges that he admitted at the time of his interview to have "made a visit to Pakistan from February or March of 1985 for about 90 days. Although I did say that, but it was an estimated figure, not the exact, because it was done before a long time ago."

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).

"Residing continuously" is defined in the regulation at 8 C.F.R. § 245a.1(c)(1), as follows:

Continuous residence. An alien shall be regarded as having resided continuously in the United States if:

- (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.]

The director's determination that the applicant had been absent from the United States for over 45 days was based on the applicant's own testimony in a sworn signed statement taken at the time of his interview at the New York office on January 17, 2006. In his sworn statement, the applicant asserted that he departed the United States for Pakistan in February or March 1985 for 90 days and reentered the United States on May 19, 1985 with a C-1 visa.

The record contains a copy of the applicant's passport, which reflects that the applicant was issued a C-1 visa in Karachi, Pakistan on May 16, 1985 valid through June 16, 1985. The applicant lawfully entered the United States on May 19, 1985.

On May 2, 2007, the applicant was advised in writing of the director's intent to deny the application. In her notice of intent, the director indicated that, due to the applicant's 90-day absence from the United States, he had failed to establish continuous residence in the United States.

The applicant, in response asserted that he departed the United States in February, March, or April and returned with a C-1 visa. The applicant submitted copies of his passport along with a Social Security printout which reflects his earning since 1990, and evidence to establish his residence during the requisite period. The applicant requested that his application be reconsidered.

An inference cannot be drawn that the information or documentation submitted is now accurate simply because the applicant recants his admission. Even in cases where the burden of proof is upon the government, such as in deportation proceedings, a previous sworn statement voluntarily made by an alien is admissible, and is not in violation of due process or fair hearing. *Matter of Pang*, 11 I&N Dec. 213 (BIA 1965).

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. There is no evidence to indicate that an emergent reason delayed the applicant's return to the United States within 45 days. Moreover, this absence was not due to any "emergent reason" – *i.e.*, one that was unforeseen at the time of his departure. 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 90-day stay in Pakistan during the requisite period interrupted his "continuous residence" in the United States. Therefore, the applicant has failed to establish that he resided in the United States in a continuous unlawful status from before January 1, 1982 through the date he attempted to file his application.

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 (9th 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).

The record reflects that on his initial Form I-687 application signed April 4, 1990, the applicant, indicated that he was absent from the United States from April 22, 1984 to May 1985. At the time of his *LULAC* interview on May 13, 1998, the applicant indicated that he departed the United States from San Francisco via Swiss Airlines in 1983 or 1984 and returned to the United States in 1985.

This information further undermines the credibility of the applicant's claim to have continuously resided in the United States during the period in question.

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.

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