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



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

MAR 18 2009

FILE:

[REDACTED]

Office: NATIONAL BENEFITS CENTER

Date:

XRV 88 509 05212

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, 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.

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 held in abeyance pending the outcome of federal litigation in *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9<sup>th</sup> Cir. 1999).

The director denied the Form I-687 application because the applicant had broken his continuous residence during the requisite period when he was deported from the United States in May, 1985. On appeal, counsel for the applicant asserts that the applicant's deportation from the United States on or about May 10, 1985 does not break the continuous residence requirement under the terms of the settlement agreements, as the applicant was granted leave to depart voluntarily. Counsel states that the applicant was not deported and did not leave under threat of deportation proceedings.

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)(1) 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 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).

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).

On appeal, counsel acknowledges that the applicant was returned to Guatemala from the United States in 1985. Counsel states that the applicant was not placed in deportation or removal proceedings and thus did not leave the United States under threat of deportation. In a letter submitted in support of the Waiver of Grounds of Excludability (Form I-690) the applicant explained that the order of deportation was generated by his attempt to reenter the United States from Canada in 1985 with a false green card. The applicant admitted that he purchased the green card in order to secure employment in the United States. The record, however, indicates that the applicant was excluded and removed from the United States on May 10, 1985 out of Miami.

Nonetheless, counsel argues that the applicant was granted voluntary departure in lieu of deportation and that he was unaware that if he failed to depart voluntarily, he would be subject to removal proceedings before an immigration judge. The AAO finds this argument to be without merit. The Board of Immigration Appeals (BIA), whose precedent decisions are binding on all administrative immigration adjudications, has ruled that a grant of voluntary departure under threat of deportation proceedings is considered to effect a break in continuous residence. *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002).

Furthermore, in a recent decision directly applicable to the matter presently before the AAO, the Ninth Circuit Court of Appeals has ruled that Congress provided no waiver of inadmissibility for legalization applicants who cannot establish continuous unlawful residence because they left the United States under an order of deportation. Applicants for legalization who departed the United States under an order of deportation are construed to have "broken" the continuous residence requirement under the terms of the settlement agreements and there is no waiver for such a departure. *See Pedroza-Padilla, v. Gonzales*, 486 F.3d 1362 (9<sup>th</sup> Cir. 2007); 8 U.S.C. § 245A(g)(2)(B)(i); 8 C.F.R. § 245a.2(h)(i).

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.