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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 05 228 11076

Office: LOS ANGELES

Date:

NOV 09 2009

IN RE:

Applicant:

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. 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.

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 denied by the Director, Los Angeles, California, 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 (Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director determined 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. 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.

On appeal, the applicant asserts that at the time of his interview there was “a misunderstanding in my statement” as he was absent for only seven days in September 1987; he never stayed for two months. The applicant asserts that each time he departed the United States during the requisite period he was absent for only seven to ten days. The applicant asserts that the letter from Mrs. [REDACTED] confirms his residence in the United States since December 1980.

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). An alien shall not be considered to have failed to maintain continuous physical presence by virtue of brief, casual and innocent absences. Section 245A(a)(3)(B) of the Act.

“*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.]

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 Los Angeles office on November 14, 2006, under oath and in the presence of an officer of U.S. Citizenship and Immigration Services (USCIS). In his sworn statement, the applicant asserted that he briefly departed the United States for Mexico in November 1982 and reentered with his passport, departed in 1985 and 1987, and reentered with his border crossing card. The applicant asserted, "I tried to apply [sic] for amnesty program in November of '87, but I was turn away because I went to Mexico for an emergency 2 months before I apply."

In her Notice of Decision, the director noted that, due to the applicant's absence from the United States for two months in 1987, he had failed to establish continuous residence in the United States.

On appeal, the applicant recants his statement and indicates that he was only absent from the United States for seven days in 1987. The applicant asserts, "I left my pregnant wife and my 18 month son in California, so I return back to them in those 7 days."

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). Furthermore, in the absence of exceptional circumstances, a challenge to the voluntariness of an admission or confession will not be entertained when first made on appeal. *Matter of Stapleton*, 15 I. & N. Dec. 469 (BIA 1975).

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, no credible evidence was provided to indicate that an emergent reason delayed the applicant's return to the United States within the 45 day period. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 two-month stay in Mexico during the requisite period exceeded the 45-day period allowable for a single absence, and 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 applicant is, therefore, ineligible for temporary resident status under section 245A of the Act.

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 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).

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulation provides relevant definition at 8 C.F.R. 245a.2(c)(1).

The FBI report dated November 3, 2006, reflects the following arrests in the state of California:

1. On October 31, 1998, by the Sheriff's Office in Riverside for driving under the influence, a violation of section 23152(a) VC, and driving with .08 percent or more alcohol in the blood, a violation of section 23152(b) VC.
2. On August 17, 2002, by the Pomona Police Department for driving under the influence, a violation of section 23152(a) VC, and driving with .08 percent or more alcohol in the blood, a violation of section 23152(b) VC.

On November 15, 2006, the applicant was issued a Form I-72, which requested him to submit original or certified court documents for *all* arrests. The applicant, in response, submitted a court disposition from the Superior Court of Los Angeles County, California, for number two above, which reflects that on September 30, 2002, the applicant was convicted of violating section 23152(a) VC in

The applicant did not provide the requested court disposition for number one above. As such, the applicant has failed to establish he is admissible due to his failure to provide the court disposition for the arrest in 1998 necessary for the adjudication of the application.

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