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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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FILE: [REDACTED]
MSC 06 101 18874

Office: LOS ANGELES

Date: **OCT 16 2009**

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: Self-represented

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 (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 her 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, "I have recently found out that some of the information written on my applications above mentioned are in inconsistency with the factual information I provided to each one of these immigration providers when they prepared my applications." The applicant asserts that her three-month absence from the United States was due to an emergent reason.

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.]

At the time of her interview on February 12, 2007, the applicant indicated that she was absent from the United States for three months from April 1986 to July 1986. The record reflects that the applicant's daughter was born in Ecuador on April 11, 1986.

The director determined that due to the applicant's absence from the United States from April 1986 to July 1986, she had failed to establish continuous residence in the United States. Accordingly, on March 21, 2007, the director denied the application.

The applicant, on appeal, asserts, in pertinent part, "I recall to have given the officer a detailed information regarding the reason why I was absent from the United States during three months in 1986." The applicant states, "I was almost in my ninth month of pregnancy when I started to feel very bad and I decided with my husband to go to Mexico to be examined by a Doctor." The applicant states she was informed by the doctor that she would need a cesarean delivery as her child was in a delicate position. The applicant states she decided to return to Ecuador on April 5, 1986, to give birth to her child and to be near her family. The applicant provides letters with English translations from [REDACTED] of Nueva Clinica Internacional and [REDACTED] in Ecuador. [REDACTED] indicated that on April 11, 1986, the clinic performed a cesarean section at 36 weeks of pregnancy on the applicant. [REDACTED] indicated that the applicant was "presenting fetal problems and for that reason she was recommended complete bed rest for three months."

Based on the doctor's letters, the applicant's prolonged absence during 1986 was due to an emergent reason that came suddenly into being and delayed the applicant's return to the United States.

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).

On appeal, the applicant asserts that her Form I-687 application was prepared by "the Hermandad Mexicana, and that based on the review I made one day before the above mentioned interview I found inconsistencies with respect to dates and trips I made out of the United States specially during the qualifying years." On her initial and current Form I-687 applications, the applicant only claimed to have been absent from the United States from June 2, 1987 to June 28, 1997. The applicant amended her Form I-687 applications to indicate she was absent during January 1985, May 1985, April 1986 to June 1986, and during June 1987.

The applicant's amended absence during 1985 has no merit as at the time of her LIFE interview on April 10, 2006,¹ the applicant, admitted, under oath, in a sworn statement that she was married in her native country, Ecuador, on January 20, 1985, and remained in Ecuador for two months. The applicant also admitted to have resided in Mexico during the requisite period with her husband for six months and she reentered the United States in July or August 1985.

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).

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 45-day period. Moreover, this absence was not due to any "emergent reason" – *i.e.*, one that was unforeseen at the time of her departure – because getting married in Ecuador 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 her by unexpected events.

The applicant's absence in 1985 in Ecuador interrupted her "continuous residence" in the United States. Therefore, the applicant has failed to establish that she resided in the United States in a continuous unlawful status from before January 1, 1982 through the date she attempted to file her 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.

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

¹ The applicant filed a Form I-485, Application for Permanent Resident Status, under the Legal Immigration Family Equity (LIFE) Act on June 5, 2003. The application was denied by the Director, Los Angeles, California on October 25, 2006. The subsequent appeal was rejected on June 25, 2007.