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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-06-101-18964

Office: CHICAGO

Date:

OCT 23 2009

IN RE:

Applicant:

APPLICATION:

Application for Temporary Resident Status under 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. 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.

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, or *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 of the Chicago office 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 (LULAC) Class Membership Worksheet. The director denied the application finding that the applicant had been absent from the United States for a period in excess of 180 days and had failed to establish that her return had been delayed due to an emergent reason. Therefore, the director concluded that the applicant had not resided continuously in the United States for the requisite period and was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, counsel for the applicant asserts that the applicant's absence was prolonged due to an emergent reason, and that the applicant's absence, therefore, did not interrupt the applicant's continuous residence. Counsel has submitted an additional statement from the applicant on appeal. Counsel also asserts that the evidence which the applicant previously submitted establishes by a preponderance of the evidence that she continuously resided in the United States in an unlawful status for the duration of the requisite time period.¹

The AAO has reviewed all of the evidence and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.²

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 On appeal, counsel refers to notarized affidavits and statements previously submitted from friends, family members, and employers substantiating the applicant's claim of physical presence in the United States from 1982 to 1986. The record of proceedings contains statements from employers regarding the applicant's presence during the requisite statutory period. However, the record of proceedings does not contain any statements from friends or family members regarding the applicant's presence during the requisite statutory period.

² 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 long been recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

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 periods, 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).

Continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless return could not be accomplished due to an “emergent reason”. 8 C.F.R. § 245a.2(h)(1)(i). “Emergent reasons” has been defined as “coming unexpectedly into being.” *Matter of C*, 19 I&N Dec. 808 (Comm. 1988).

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, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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 each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *See* 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant’s whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

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 or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (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 or petition. 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. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA).

In this case, at the time of completing her I-687 application, the applicant stated that she last entered the United States on July 11, 1987. At part 35 of the application she was asked to list her absences from the United States, and she listed her only absence from the United States during the requisite period as being from November 1983 until July 1987, to go to Poland to take care of her sick father. On November 15, 1990, the applicant completed a class member worksheet wherein she stated that she was absent from the United States from October 23, 1983 until July 11, 1987. The applicant has produced a copy of the passport with which she returned to the United States. The passport contains a single-entry visitor's visa issued in Warsaw on March 17, 1987, and an entry stamp showing a date of entry into the United States on July 11, 1987. The entry stamp and the applicant's testimony reveal that the applicant had an absence from the United States of at least 1,348 days during the requisite period, from approximately November 1, 1983 until July 11, 1987.

The record contains a discharge report from the Medical Academy of Bialystok stating that the applicant's father was hospitalized in that facility from July 5, 1983 until July 8, 1983.³ This letter does not confirm the applicant's assertion that her father's illness was an emergent reason, coming unexpectedly into being during the applicant's 1983 trip to Poland, which prevented the applicant's timely return to the United States. Rather, the letter indicates that the applicant's father was discharged from the medical facility several months before the applicant left the United States in November 1983. The applicant did not provide any further evidence that her father suffered a sudden change in his health that would have caused her to delay her return. As noted above, to meet her burden of proof, the applicant must provide evidence of eligibility apart from her own testimony, and in this case she has failed to do so.

Furthermore, on appeal, the applicant states that the reason she was unable to return earlier as planned was that she was repeatedly denied a re-entry visa. The record does not establish that the applicant's inability to obtain a tourist visa to reenter the United States was an emergent reason that caused her to delay her return. In addition, the applicant states that upon obtaining her re-entry visa she immediately returned to the United States. However, the testimony of the applicant is

³ The applicant submitted an additional document from the Medical Academy of Bialystok, dated July 12, 1990, which states that the applicant's father was hospitalized in that facility two additional times, in 1981 and 1988, respectively, when the applicant states she was in the United States.

inconsistent with the evidence in the record. The record reveals that the applicant was issued a visitor's visa in Warsaw on March 17, 1987, but did not use that visa to enter the United States until July 11, 1987, approximately 116 days later. The record does not establish that an "emergent reason" caused the applicant to delay her return to the United States after issuance of the visitor's visa. Nor does the record establish that the applicant's inability to obtain a visitor's visa from November 1, 1983 until March 17, 1987 constitutes an emergent reason.

The applicant's admitted absence from the United States from at least November 1, 1983 to July 11, 1987, a period of more than 180 days, is clearly a break in any period of continuous residence she may have established. The applicant has not provided sufficient evidence, other than her own testimony, to support her contention that it was her father's poor health and her inability to obtain a visa that were "emergent reasons" for her failure to return to the United States in a timely manner. For these reasons, the applicant has failed to establish by a preponderance of the evidence that she has continuously resided in an unlawful status in the United States for the requisite period, as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E-M-*, *supra*. 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.