

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY



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

U.S. Citizenship  
and Immigration  
Services



44

FILE: [REDACTED]  
MSC 06 059 11872

Office: NEW YORK

Date: SEP 03 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. The file has been returned to the National Benefits Center. 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, 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, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant had not established that she resided in the United States in a continuous unlawful status from before January 1, 1982 through the date of attempted filing during the original one-year application period that ended on May 4, 1988. The director noted that the applicant had been absent from the United States for over 180 days, from March 1985 to July 1989, and had failed to establish that her return had been delayed due to an emergent reason. The director, therefore, 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.

On appeal, the applicant asserts that she had a brief absence in 1985 that did not disrupt her continuous residence. The applicant also states the attorney who prepared her applicant erred in indicating on her Form I-687 application, at Question # 32, that she had a prolonged absence from the United States. The applicant does not submit additional evidence on appeal.

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).

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).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be

determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

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).

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, "[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.

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 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.

The applicant, a native of Brazil who claims to have resided in the United States since November 1981, filed her application for temporary resident status under section 245A of the Act (Form I-687), together with a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet, on November 28, 2005. At part # 32 of the Form I-687 Application, which requires applicants to list all absences from the United States, the applicant indicated an absence, when she visited relatives in Brazil from March 1985 to July 1989, thereby indicating that she had a single absence of over 45 days, and an aggregate of over 180 days for all absences.

On appeal, the applicant asserts preparer error. Specifically, the applicant states that her attorney erred in indicating that she had been absent from the United States from March 1985 to 1987, to her

detriment; that, although she had departed the United States in March 1985, she returned, through Mexico, in May 1985. In effect, the applicant contends that the information in the Form I-687 application, indicating a prolonged absence from March 1985 to July 1989, should be disregarded in determining her LIFE Act eligibility.

The applicant alleges ineffective assistance of prior representative. However, the applicant does not submit any of the required documentation to support an appeal based on ineffective assistance of representative.

Any appeal or motion based upon a claim of ineffective assistance of representative requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with the representative with respect to the actions to be taken and what representations the representative did or did not make to the respondent in this regard, (2) that the representative whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of representative's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Furthermore, CIS is not responsible for action, or inaction, of the applicant's representative.

At this late stage, the applicant cannot avoid the record she has created. As noted above, the applicant's Form I-687 reveals that the applicant has had a prolonged absence of over three years from March 1985. The content of the Form I-687 application is an indelible part of the record. As such, parts of its content cannot be purged from the record. The AAO will, therefore, examine the entire record and make its determination of the applicant's eligibility based on the entire record as constituted.

As discussed above, the evidence of record indicates that the applicant had a single absence of over three (3) years, from March 1985. Also, there is no evidence of record to indicate the applicant's absence was due to an emergent reason. The applicant did not provide any evidence that her prolonged absence was due to an emergent reason. It is also noted that the applicant does not provide evidence, apart from her own statement, that her absence was from March 1985 to May 1985, and she does not provide a date in March 1985 when she departed the United States; a date in May 1985 when she returned to the United States; and, a reason for her departure to Brazil in March 1985. 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. Clearly, the applicant's departure to Brazil in March 1985, until July 1989, represents a break in her continuous residence during the requisite period.

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 emergent reasons. 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). There is evidence to indicate that the applicant's prolonged absence was necessitated by an emergent reason.

The applicant's absence from the United States from March 1985, until July 1987, a period of more than 45 days for a single absence, and 180 days aggregate for all absences, is clearly a break in any period of continuous residence she may have established. As she has not provided any evidence other than her own attestation that her friend's illness was the "emergent reason" for her failure to return to the United States in a timely manner, she 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.