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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:



Office: DALLAS

Date:

SEP 09 2009

MSC 05 328 11083

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.

for 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 denied by the Director, Dallas, Texas, 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 and that the absence was not brief, casual or innocent.

On appeal, counsel asserts that the applicant does not dispute her absence from the United States; however, because of an unexpected medical development after the delivery of her child, the applicant was forced to remain in Mexico.

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 applicant, on her Form I-687 application, listed her absences during the requisite period as follows: January 31, 1986 to February 15, 1986 to get married; March 10, 1987 to April 30, 1987 to have a child; and June 8, 1987 to July 2, 1987 to visit her mother who was ill.

The applicant submitted a letter with English translation from [REDACTED], located in Morelia, Michoacan, Mexico, who indicated that he attended the applicant during childbirth on April 6, 1987, and that due to post-partum hemorrhaging, the applicant was anemic. The doctor indicated that he prohibited the applicant from traveling to the United States and ordered rest for the applicant for three to four weeks prior to traveling. The applicant also submitted a photocopy of her son's birth certificate which listed his date of birth as April 6, 1987, in Huetamo, Michoacan, Mexico.

On December 14, 2006, the applicant was advised in writing of the director's intent to deny the application. In his notice of intent, the director indicated that the applicant's absence exceeded the 45-day limit for a single absence, and it had not been established that her failure to return within 45-day period was due to an emergent reason. The applicant was advised that this absence was not brief, casual, or innocent and, therefore, constituted a break in her continuous physical presence during the requisite period.

Counsel, in response, asserted that the applicant could have returned to the United States within the allotted time, but because of an unexpected medical development after her delivery, she was forced to remain in Mexico. Counsel asserted that acting on a doctor's order due to a medical condition is certainly an emergent reason which the regulation (8 C.F.R. § 245a 1(c)(1)(i)) envisioned. Counsel asserted that the applicant's departure was innocent, casual, and brief as defined under the *Flueti*¹ doctrine.

The director, in denying the application, noted that the letter from [REDACTED] was unverifiable. The director further noted, in pertinent part:

You stated during the interview that you planned to give birth to your child in Mexico and departed for that reason. You further stated that you departed the United States thirty days prior to the birth of your child and planned to stay in Mexico for a while so that your mother could help with the baby. Additionally, you stated that you planned to return thirty days after the birth of your child which would be a total of sixty days rather than the forty five days you are claiming. The argument that there may have been complications with the birth does not change the reason you initially [sic] departed.

On appeal, counsel asserts that he was present at the time of the applicant's interview, and the applicant "never stated that she planned on departing for 60 days! If this was her intention why would she have returned in 50 days, especially given her medical condition. She stated in her interview that she planned on returning to the United States one week after giving birth." The

¹ *Rosenberg v. Fleuti*, 374 U.S. 499 (1963).

regulation excludes the use of brief casual and innocent absence if an applicant departed the United States on or after November 6, 1986 and reentered prior to May 1, 1987. 8 C.F.R. § 245a.6(l). As noted above, the applicant reentered the United States on April 30, 1987.

However, the applicant's absence must be examined utilizing the standard set forth in 8 C.F.R. § 245a.2(6)(h)(1)(i), which provides 45-day limit for a single absence from the United States, unless the alien can establish that due to *emergent reasons*, her return to the United States could not be accomplished within the time period allowed.

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. Based on the letter from [REDACTED] the applicant's prolonged absence was in fact due to an emergent reason that came suddenly into being and delayed the applicant's return to the United States.

Accordingly, the director's finding in this matter is withdrawn.

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 alien applying for adjustment of status 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. See 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 including affidavits is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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.

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.

On her initial Form I-687 application, the applicant claimed addresses of residence in the United States from 1979. However, on her current Form I-687 application, the applicant only listed residence in the United States from July 1987. The applicant in affixing her signature on the Form I-687 certified that the information she provided was *true* and *correct*. While this may be an innocent mistake on behalf of the applicant, the fact remains that the address the applicant claimed to have resided at from July 1987 (to January 1989) on the current application does not coincide with the address of residence claimed on her initial application and supporting documentation.

Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Given the inconsistencies in the record, 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.