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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

L1

[Redacted]

FILE: [Redacted] Office: NEW YORK Date: AUG 10 2010

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:

[Redacted]

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, 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 of the New York office, and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The applicant filed a motion to reopen and reconsider the summary dismissal and the director dismissed the motion. The AAO will reopen the appeal *sua sponte*, and withdraw its previous decision and the director's decision dismissing the motion. The appeal will be considered on the merits. 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 denied the application, finding that the applicant had not established by a preponderance of the evidence that she had continuously resided in the United States in an unlawful status for the duration of the requisite period. Specifically, the director found that the applicant obtained a passport in Nigeria in February 1983, and that she failed to list this absence on her Form I-687. The director also stated that when the applicant obtained the J-2 visa in Nigeria in April, 1985, that she was more likely than not living in Nigeria, as it takes longer than the time she claimed to be there (April 1, 1985 – April 17, 1985)<sup>1</sup> to obtain a J-2 visa and that there are geographical restrictions. The director denied the application.

The AAO summarily dismissed a subsequent appeal, indicating in its decision that the applicant failed to submit a brief or other evidence in support of the appeal. On motion, the applicant submits evidence that a brief and other documentation were timely submitted in support of the appeal. The AAO reopens the application *sua sponte* and withdraws its decision of September 9, 2009 and the director's decision dismissing the motion dated October 5, 2009.

On appeal, the applicant asserts that her husband obtained her passport for her in Nigeria in February 1983 and that she obtained the J-2 visa in April 1985 during her stay in Nigeria. The applicant asserts that she has established her continuous unlawful residence in the United States during the requisite period.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b). The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

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<sup>1</sup> The Form I-687 signed by the applicant on July 27, 1990 states that she was absent from the United States from April 1, 1985 – April 17, 1985. Neither of the subsequent Forms I-687 indicate the specific dates in April that she was absent.

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 245(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 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her 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).

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).

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.* at 80. 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 petitioner 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, 431 (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 issue in this proceeding is whether the applicant (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of her claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of affidavits from friends, copies of leases, receipts, performance ratings, Forms W-2 from 1986 and 1987 and a social security earnings statement indicating that the applicant earned income in the United States in 1986 through the end of the requisite period. Evidence of residence in the United States outside the requisite period will not be considered.

The evidence establishes that: the applicant gave birth to a son in Nigeria on June 8, 1981; the applicant was issued a passport in Calabar, Nigeria on February 7, 1983; the applicant's husband entered the United States on a J-1 visa in June 1983 and was a student in J-1 visa status at Ohio State University from 1983-1990; the applicant and her son entered the United States in J-2 visa status on April 17, 1985. The record establishes that the applicant resided continuously in the United States from April 17, 1985 through the end of the requisite period. The AAO agrees with the director, however, that the evidence does not establish the applicant's residence in the United States since prior to January 1, 1982.

The applicant asserts that she entered the United States through Canada in October, 1981 using a false passport. She was not accompanied by her husband or son. At an interview she stated that she lived with her uncle for approximately one year on [REDACTED]. She then moved in with a friend in the same building until her husband arrived in 1983. For employment, she typed papers for students at the university, did some babysitting, and took care of an elderly lady. She stated that her first real job was housekeeping at a hotel in late 1985 or 1986. She then got a job at Ohio State University as a typist in early 1986. On appeal, she states that her husband obtained her passport for her in February, 1983 as was allowed, and submits correspondence seeking to obtain confirmation from Nigerian officials that her physical presence was not required to obtain a passport.

There are internal inconsistencies in the applicant's statements concerning her residences and employment in the United States from 1981-1985. The applicant did not initially list the Oakland Avenue residence with her uncle from 1981-1983 on the Form I-687 signed under penalty of perjury on July 27, 1990; the address appears to have been added at an interview. On the Form I-687 the applicant signed on May 26, 2002 under penalty of perjury, she did not include any residential address prior to May, 1985, and no employment prior to August 1986 when she began to work for Ohio State University. On the Form I-687 signed by the applicant on July 27, 1990, the applicant listed her first employment in the United States beginning in December 1985 with University Park Hotel, and her first job with Ohio State University beginning in September 1986. On the Form I-687 signed by the applicant on May 26, 2002, the applicant listed no employment prior to August 1986 when she began to work for Ohio State University. The applicant did not list her jobs as a babysitter, home health aide or as a typist for students on either of the noted Forms I-687. The current Form I-687 signed on January 13, 2005 lists no employment prior to August 1986 when she began to work for Ohio State University and lists her United States residence beginning in October 1981 on [REDACTED].



and the fact that the applicant was in Nigeria at a time when she claimed to be in the United States, the AAO finds that the applicant has not established her continuous unlawful residence in the United States since before January 1, 1982.

Beyond the decision of the director, the applicant is inadmissible to the United States and is thus ineligible for adjustment to temporary residence. An applicant for temporary resident status under section 245A of the Act 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).

The record indicates that the applicant willfully misrepresented a material fact when she obtained and entered the United States on a nonimmigrant J-2 visa with the intention of permanently residing in the United States. Her misrepresentation of a material fact renders her inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) and thus ineligible for relief under Section 245A. Section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), permits the Secretary of Homeland Security to waive certain grounds of inadmissibility, including inadmissibility under section 212(a)(6)(C)(i) of the Act, "in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." Although the applicant has filed for a waiver of inadmissibility, the Form I-690 application has not been adjudicated. She is thus currently ineligible for relief on this basis as well.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that she entered the United States before January 1, 1982 and 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.