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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**

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES

Date: **JAN 28 2010**

MSC 06 070 13604
[MSC 08 292 11663 – Appeal]

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. 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.

A handwritten signature in black ink, appearing to read "Perry Rhew".

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. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application on June 9, 2008, because (a) the applicant had abandoned his application, and (b) the applicant failed to establish he had continuously resided in the United States in an unlawful status, and had been physically present in the United States, throughout the requisite time periods.

The applicant, through counsel, filed an appeal from the director's decision on July 8, 2008. On appeal, counsel submits a brief. On appeal, counsel asserts that the director erred in denying the application because the applicant did not abandon his application and the applicant was not issued a Notice of Intent to Deny (NOID) the application prior to issuance of the denial decision.

The AAO maintains plenary power to review this matter 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 federal courts have long recognized the AAO's de novo review authority. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The decision of the director to deny the application due to abandonment will be withdrawn. The decision of the director to deny the application due to the applicant's failure to establish he had continuously resided in the United States in an unlawful status, and had been physically present in the United States, throughout the requisite time periods will stand. Counsel's argument that the applicant was not provided adequate notice of the director's intent to deny the application has no merit as the record reflects the applicant has previously been granted an opportunity to address this issue to which counsel has previously responded.

An applicant for temporary residence 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).

An alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, 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 is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be

accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

An alien must also establish continuous physical presence in the United States since November 6, 1986. Section 245A(a)(3)(A) of the Act. However, such 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.

At issue in this preceding is whether the applicant has submitted sufficient credible evidence to meet his burden of establishing continuous unlawful residence and physical presence in the United States throughout the requisite time periods. Here, the applicant has failed to meet this burden.

The record indicates that on or near July 9, 1993, the applicant applied for class membership in a legalization class-action lawsuit and filed Form I-687, Application for Status as a Temporary Resident. On April 29, 2002, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

The record contains several statements and affidavits relating to the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988. The record also contains documentation of the applicant's testimony and various other applications in which he indicated that he was outside the United States from approximately March 1987 through some date in 1989. For instance, the record includes:

1. The transcript of the applicant's March 7, 1997 Executive Office for Immigration Review (EOIR) hearing before Immigration Judge [REDACTED] in which the applicant testified that he first entered the United States during January 1982, that he departed the United States on March 20, 1987 and that he did not return to the United States again until December 1989. Later in the hearing the applicant was asked to confirm that he departed the United States during March 1987, and that he remained outside the United States until December 1989. He did confirm this.
2. The Immigration and Naturalization Service (INS, now Citizenship and Immigration Services, CIS) officer notes from the applicant's June 24, 1996 asylum interview which indicate that the applicant testified that he first entered the United States during January 1981, that he departed the United States during March 1987, and that he remained outside the United States until December 1989.
3. The Form EOIR-40, Application for Suspension of Deportation, filed February 14, 1997, in which the applicant stated at item #19 that he first entered the United States on January 1, 1982. In addition, he stated at item #25, where he was to list all departures from the United States regardless of how brief, that he first departed the United States on March 18, 1987 and that he did not return to the United States

again until July 16, 1989. At item #16, where he was to list his residences during the past 10 years, he stated that from January 10, 1981 through March 18, 1987, he resided at [REDACTED]; that from March 20, 1987 through July 10, 1989, he resided at [REDACTED] and that from July 16, 1989 through December 10, 1989, he resided at [REDACTED]

4. The Form I-589, Application for Asylum and Withholding of Deportation, filed May 20, 1996, in which the applicant indicated on his declaration attached to that application that on or about January 10, 1981, he entered the United States; that on March 18, 1987, he exited the United States to return to Mexico and marry; and that he initially planned to remain working in Mexico, but that he instead returned to the United States on December 16, 1989.

There is no contemporaneous evidence in the record directly relevant to the applicant's claim that he resided continuously in the United States during the period of March 20, 1987, through May 4, 1988.

On May 13, 2003, the director issued the Form I-72, Request for Evidence, in which the director asked the applicant to furnish proof of his continuous presence in the United States during the statutory period. On August 7, 2003, counsel for the applicant provided a response. The response included certain documents that relate to events that occurred after May 4, 1988, and as such are not relevant to the applicant's claim that he resided in the United States throughout the statutory period. Counsel also provided a copy of a Western Union money transfer receipt. This receipt documents that the applicant wired money from Los Angeles to Mexico. Counsel stated in her cover letter that this receipt was issued on an unspecified date in 1988. The receipt includes a date line which includes a handwritten date, but the year listed in this date is not legible. This office would underscore that the money transfer receipt form was itself not copyrighted by Western Union until 1990. Thus, this receipt may not be taken as contemporaneous evidence that the applicant was in the United States during the statutory period. Counsel also submitted a copy of an MP&G Tune-Up invoice, which according to counsel, relates to car repairs which the applicant received on August 22, 1987. However, the handwritten date on the receipt appears to reflect that these services were performed on September 9, 1987. Moreover, the name on the receipt is not legible, and as such there is no indication that this receipt relates to the applicant. Thus, this copy of a car repair invoice shall not be considered contemporaneous evidence that the applicant resided in the United States during the statutory period. Counsel also submitted a copy of the front and back of an envelope which bears the applicant's name and return address. This envelope appears to have been posted in Los Angeles on March 27, 1985.

On March 22, 2005, the director issued a NOID the Form I-485 stating that the applicant had failed to demonstrate continuous presence in the United States during the statutory period. In the NOID, the director indicated that she intended to deny the application because the applicant had stated on his asylum application that he had departed the United States on March 18, 1987, and did not return until December 16, 1989, and that he remained in Mexico for such a long period because his

intention was to live permanently in Mexico. The director indicated that at his EOIR hearing the applicant also provided testimony which further confirmed these statements. Thus, the director concluded that the applicant had not established he had resided continuously in the United States throughout the statutory period and had not established that he had remained in Mexico for more than 45 days during the statutory period due to emergent reasons.

The applicant did not submit a rebuttal to the NOID. On May 10, 2005, the director denied the Form I-485 based on the reasons set out in the NOID.

On appeal, counsel asserted that the individual who prepared the applicant's asylum application did not read the information on that form to the applicant. In addition, counsel indicated that the full transcripts from the EOIR hearing should make clear that the applicant was nervous at that hearing and was not clear on what dates he departed and returned to the United States. Counsel also asserted that the applicant provided documentation to demonstrate that there had been a fire at his home in Los Angeles on June 21, 1988, and as a consequence, contemporaneous evidence of continuous residence had been destroyed. Thus, counsel indicated that Citizenship and Immigration Services (CIS) should contact the individuals who wrote the various affidavits and statements submitted into the record to verify the contents of those documents, and should view that as sufficient to demonstrate that the applicant resided continuously in the United States throughout the statutory period. Finally, counsel asserted that during 1994 in response to the applicant's application for class membership, the INS officer indicated that the applicant had provided sufficient documentation of continuous residence in the United States from 1985 onwards, and that CIS may not now contradict that finding, but should instead view this earlier finding as further evidence of the applicant's continuous residence in the United States.

This office would underscore that the applicant testified and *reconfirmed* during his March 7, 1997 EOIR hearing that he was outside the United States from approximately March 20, 1987, through December 1989. He also testified before an Asylum Officer on June 24, 1996, that he exited the United States during March 1987 and did not reenter this country until December 16, 1989. In addition, he testified that his initial intent was to live permanently in Mexico, but threats to himself and to his family prompted him to leave Mexico in 1989. That is, the record indicates that he did not remain in Mexico over 45 days due to emergent reasons which compelled him to stay. The information which the applicant provided at various places on the Form EOIR-40 and on the declaration attached to his Form I-589 further corroborates these various points in his EOIR hearing testimony, his asylum written declaration and his asylum interview testimony. Yet, on the Form I-687 the applicant stated that May 3, 1987, through May 23, 1987 is the only period during which he was outside the United States subsequent to his entry in 1981, and prior to signing that form on June 10, 1993. The record further reflects that the applicant married in Mexico during April 1987.

These discrepancies cast serious doubt on all the evidence in the record. This in turn casts serious doubt on the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982, through the date he filed his Form I-687. Such inconsistencies in the record may only be overcome through independent, objective evidence of the applicant's claim that he

resided continuously in the United States during the statutory period, despite any claim by counsel that the applicant should not be expected to produce such evidence because of a fire that occurred during 1988.¹

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. It is incumbent upon the 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).

The applicant did submit copies of envelopes postmarked 1982, 1983, 1984 and 1985 which list the sender's name as [REDACTED]" and [REDACTED]" at an address in Los Angeles different than those which the applicant lists for himself on the Form I-687. The applicant also submitted what appears to be a State of California Department of Motor Vehicles receipt dated May 16, 1985, which lists his name. Even if the AAO were to find such documentation established that he resided in the United States for some portion of the statutory period prior to March 20, 1987, such evidence which list dates prior to March 20, 1987 would not overcome the contradictory information in the record regarding the applicant's claim that he resided in the United States during March 20, 1987, through May 4, 1988.

The applicant has failed to provide contemporaneous evidence that might be considered independent, objective evidence of his having resided continuously in the United States from March 20, 1987, through the date of filing his Form I-687, and that he was continuously present in the United States during this period.

The AAO also finds that the various statements and affidavits in the record which purport to substantiate the applicant's continuous residence in the United States just before and during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous

¹ This office notes incidentally that the record contains a copy of what appears to be a Los Angeles Fire Department (LAFD) abstract summarizing a fire that the LAFD brought under control on June 21, 1988 at [REDACTED]. This abstract does not make reference to the applicant's name and [REDACTED] is the address which the applicant listed for himself on [REDACTED] in Los Angeles on the Form I-687, not [REDACTED]. Thus, this document may not be considered evidence that a fire occurred at the applicant's home. The record also includes what appears to be copies of microfiche that do make reference to [REDACTED] and to work being done at that address to repair fire damage for an owner named [REDACTED]. It is not clear from the copies when the fire damage may have occurred and the extent of the damage. Also, the only work that appears to have been ordered and documented on this microfiche is the installation of smoke detectors for a charge of \$26.00. Thus, these copies of microfiche also may not be considered evidence that a fire occurred at the applicant's home.

residence in the United States in an unlawful status from March 20, 1987, through the date he filed his Form I-687.

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). The applicant has failed to meet this burden.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 245a.2(d)(5) of the Act.

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