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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: MEMPHIS Date: MAR 01 2010

MSC 04 294 11049

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.

Elizabeth McCormack

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, 200(CSS/Newman Settlement Agreements), was denied by the Director, Memphis. In a subsequent motion to reopen, the director affirmed his previous decision. The matter 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 Class Membership Worksheet. The director denied the application, finding that the applicant had not provided credible evidence to establish that he had entered the United States prior to January 1, 1982, and thereafter continuously resided in the United States in an unlawful status for the duration of the requisite period. Although the director determined that the applicant had not established that he was eligible for class membership pursuant to the CSS/Newman Settlement Agreements, the director treated the applicant as a class member in adjudicating the Form I-687 application on the merits and found that the applicant had not established continuous residence in the United States for the requisite period.[1] The adjudication of the applicant's appeal as it relates to his claim of continuous residence in the United States since prior to January 1, 1982 shall continue.

On appeal, counsel states that the Service erred by discounting ample available evidence of the applicant's residence in the United States.

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 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

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[1] The applicant is not a class member, as he did not file or attempt to file an application for legalization with the Immigration and Naturalization Service (INS) or a Qualified Designated Entity (QDE) within the initial filing period. *See*, CSS/Newman Settlement Agreements; 8 C.F.R. § 245a.2(a).

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.

At issue in this proceeding is whether the applicant submitted sufficient credible evidence to meet his burden of establishing that he (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 his claim to have arrived in the United States before January 1, 1982 and lived in an unlawful status during the requisite period consists of affidavits of relationship written by friends and family members and other evidence. The AAO will consider all of the evidence relevant to the requisite period to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision.

The applicant claims with reference to the requisite period that he lived in the United States from 1981 until December, 1987, when he went back to Mexico to visit his mother. The applicant claims that he got married in Mexico in May, 1988, and traveled back to the United States in June, 1988.

The copy of the applicant's nonimmigrant visa page contained in the record shows that the applicant was issued a nonimmigrant B-2, tourist visa, from the American Consulate, Monterrey, Mexico, on July 22, 1981. A copy of the admission stamp in the applicant's passport shows that he was admitted into the United States on November 7, 1981 as a B-2, visitor, at New York, New York.

The applicant submitted affidavits from and to establish his initial entry and residence in the United States during the requisite period. The affidavits all contain statements that the affiants either have personally known or been acquainted or resided with the applicant or know that the applicant resided in the United States from the 1980s. All of these affiants state that they reside in Mexico and resided overseas during the requisite period. Some of the affiants claim that they have knowledge of the applicant's residence in the United States because he told them and sent letters and/or money orders, however, the record does not contain any such letters and other evidence of the applicant's correspondence with the affiants. Consequently, the affiants do not have personal knowledge of and they cannot attest to the applicant's continuous residence in the United States in an unlawful status since before January 1, 1982 and throughout the requisite period.

The affidavit of indicates that he met the applicant in 1995. The affidavit of indicates that she resided in California throughout the requisite period, and that the applicant resided in Texas. Neither nor have personal knowledge of the applicant's continuous residence throughout the requisite period.

The remaining evidence consists of copies of two money orders and two receipts. The money orders and the registered mail receipt demonstrate that the applicant was present in the United States on specific dates and does not establish continuous residence throughout the requisite period. The receipt from Dell's Pharmacy does not contain a name and address, and therefore, cannot be identified as belonging to the applicant.

An applicant applying for adjustment of status under this part has the burden of proving by a preponderance of evidence that he or she is eligible for adjustment of status under section 245a of the Act. 8 C.F.R. § 245a.2(d)(5). The insufficiency of the evidence calls into question the credibility of the applicant's claim to have entered the United States illegally before January 1, 1982 and his continuous unlawful residence in the United States throughout the requisite period. The evidence submitted is insufficient to establish the applicant's 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 requisite period.

The AAO also finds that the applicant disrupted any period of required continuous residence and physical presence in the United States during the statutory period of November 6, 1986 to May 4, 1988. In his affidavit, the applicant states that he went to Mexico in December, 1987, for the holidays and

to visit his mother. The applicant claimed that he did not return to the United States until June, 1988. Accordingly, the applicant disrupted his period of required continuous residence and physical presence in the United States during the statutory period of November 6, 1986 to May 4, 1988.

An applicant shall be regarded as having resided continuously in the United States if, at the time of filing the application for temporary resident status, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 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)(1)(i).

On appeal, counsel states that the applicant was front-desked by the American Consulate and had he not been front desked, he would have returned to the United States immediately. The AAO notes that the Form I-687 application must have been filed at the INS or QDE and could not be filed at the United States Consulate in Mexico, and that any attempt to file in Mexico was an error on his part. See 8 C.F.R. § 245a.2(e). Counsel explains that the very act of being turned away in Mexico had the effect of discouraging the applicant from returning to the United States. This explanation does not establish that the applicant's absence from the United States was due to emergent reasons. By his own admission, the applicant has disrupted any period of continuous residence in the United States during the statutory period of January 1, 1982 to May 4, 1988 and has not shown emergent reasons for the length of the absence.

A legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. *See* Section 245A(a)(3)(A) of the Act, 8 U.S.C. § 1255a(a)(3)(A). An absence during this period which is found to be brief, casual and innocent shall not break a legalization applicant's continuous physical presence. Section 245A(a)(3)(B) of the Act, 8 U.S.C. § 1255a(a)(3)(B). *See e.g. Espinoza-Gutierrez v. Smith, INS, et al.*, 94 F.3d 1270 (9th Cir. 1996). The *Espinoza-Gutierrez* court held that a legalization applicant's absence would not represent a break in continuous physical presence if it was found that the absence was brief, casual and innocent as defined by the court in *Rosenburg v. Fleuti*, 374 U.S. 449 (1963) *See also Assa'ad v. U.S. Attorney General, INS*, 332 F.3d 1321 (11th Cir. 2003)(which affirmed the portion of the holding in *Espinoza-Gutierrez* relied upon here, but disagreed with a different aspect of that holding.) The AAO finds that the applicant's absence from the United States in this case was not brief, casual and innocent in that the record indicates: that he was absent from the United States for at least six months.[2] *See Rosenberg, supra* (where the court looked to (1) the duration of the alien's

[2] The regulation implementing the statutory requirement of "continuous unlawful residence" in the United States defines that term as no single absence from the United States exceeding 45 days and absences in the aggregate not exceeding 180 days. See, section 245A(a)(2)(A) of the Act, 8 U.S.C. § 1255(a)(2)(A) and 8 C.F.R. § 245a.1(c)(1)(i). The term "continuous physical presence" suggests that a shorter time frame should be applied to determine the permissible length of single and

absence; (2) the purpose of the absence; and (3) the need for special documentation to make the trip abroad to determine whether the absence was a brief, innocent and casual or meaningfully disruptive of the alien's residence in the United States.)

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he 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.* Further, the applicant disrupted his period of required continuous residence and physical presence in the United States during the statutory period of November 6, 1986 to May 4, 1988. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act

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

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aggregate absences from the United States during the period from November 6, 1986 to May 4, 1988.