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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: [REDACTED]
MSC 05 211 11090

Office: NEW YORK

Date: MAR 23 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:

SELF-REPRESENTED

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.

A handwritten signature in blue 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, 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 demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that he attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now United States Citizenship and Immigration Services or USCIS) in the original legalization application period between May 5, 1987 to May 4, 1988. This determination was based upon the applicant's admission that he was out of the United States from August 1983 to March 1984 in testimony he provided both on the Form I-687 application and in a signed sworn statement dated January 24, 2007. Therefore, the director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to section 245A of the Immigration and Nationality Act (Act) and the terms of the CSS/Newman Settlement Agreements and denied the application.

On appeal, the applicant contends that he made a mistake when he stated he had been absent from this country from August 1983 to March 1984 in signed sworn statement he provided on January 24, 2007. The applicant claims that he actually been absent from this country from the second week of February 1984 to March 1984. The applicant reiterates his claim of residence in this country for the required period and asserts that he submitted sufficient evidence in support of such claim.

Although a Notice of Entry of Appearance as Attorney of Representative (Form G-28) has been submitted, the individual who provided this document is no longer authorized under either 8 C.F.R. §§ 292.1 or 292.2 to represent the applicant. Therefore, this decision will be furnished only to the applicant.

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) and 8 C.F.R. § 245a.2(b).

An alien applying for adjustment to temporary resident status must 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 and 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the alien attempted to file a

completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. *See* Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

“Continuous unlawful residence” is defined at 8 C.F.R. § 245a.2(h)(1), as follows:

An applicant for *temporary resident status* shall be regarded as having resided continuously in the United States if no single absence from the United States if, at the time of filing of the application: no absence 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 was 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.

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 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 (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 has submitted sufficient credible evidence to establish continuous residence in the United States for the requisite period. Here, the applicant has failed to meet this burden.

The record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on June 1, 2005. At part #32 of the Form I-687 application where applicants were asked to list all absences from the United States since entry, the applicant listed an absence from August 1983 to March 1984 when he traveled to Bangladesh to see his sick mother and another absence from January 1987 to February 1987 when he traveled to Canada to visit a friend. The applicant's absence of approximately seven months from the United States in that period between August of 1983 and March 1984 clearly exceeded the 45-day limit for a single absence from this country during the requisite period as set forth in 8 C.F.R. § 245a.2(h)(1)f.

In support of his claim of continuous residence in this country since prior to January 1, 1982, the applicant submitted affidavits of residence, employment affidavits, postmarked envelopes, photocopied pages of his Bangladeshi passport, employment affidavits, a letter from an attorney, a marriage certificate, and Service documents relating to the approval of a previously filed Form I-130, Petition for Relative Immigrant Visa, based upon his marriage to a United States citizen.

Regardless, the applicant himself subsequently reiterated his prior admission that he was absent from the United States from August 1983 to March 1984. The record shows applicant was interviewed at the New York, New York office of USCIS on January 24, 2007. The record contains a signed sworn statement executed by the applicant and the interviewing officer on this date that states in pertinent part:

I came to America in 1981, the 2nd week of May. I was here for 2 or 3 years and I left in 1983, roughly August. I came back in March of 1984.

The applicant's admission both at part #32 of the Form I-687 application and in his own sworn statement dated January 24, 2007 that he was out of the United States for approximately seven months from August 1983 to March 1984 establishes that he was absent from this country in excess of the forty-five day limit put forth at 8 C.F.R. § 245a.2(h)(1). Moreover, the applicant's admission that he was out of the United States for an extended period negated his claim that he continuously resided in this country for the entire period in question as required by section 245A(a)(2) of the Act and 8 C.F.R. § 245a.2(b).

Although not mentioned by the director in his denial it must be noted that the record contains two separate Forms G-352A, Report of Biographic Information. The first Form G-325A biographic report was included with the applicant's filing of a Form I-589, Request for Asylum

in the United States, on December 17, 1985. On this Form G-325A biographic report, the applicant testified that he resided in Chittagong, Bangladesh from his birth on July 22, 1960 to January 1984. The second Form G-325A was included with the applicant's filing of a Form I-485, Application to Register Permanent Residence or Adjust Status, on November 3, 2000. On this Form G-325A biographic report, the applicant testified that he resided in Chittagong, Bangladesh from July 1960 until March 1984. The applicant's testimony that he resided in Bangladesh until 1984 on the two Form G-325A biographic reports only serves to further diminish his claim that he continuously resided in this country for the entire requisite period.

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 director determined that the applicant admitted that he was out of the United States from August 1983 to March 1984 in testimony he provided both on the Form I-687 application and in a signed sworn statement dated January 24, 2007. The director further determined that the applicant's absence of approximately seven months exceeded the 45-day limit for a single absence from this country during the requisite period as set forth in 8 C.F.R. § 245a.2(h)(1)f. Therefore, the director concluded that the applicant was ineligible to adjust to permanent residence and denied the Form I-687 application on May 29, 2007.

On appeal, the applicant contends that he made a mistake when he stated he had been absent from this country from August 1983 to March 1984 in signed sworn statement he provided on January 24, 2007. The applicant claims that he actually been absent from this country from the second week of February 1984 to March 1984. However, the applicant specifically and unequivocally admitted that he was absent from the United States for a period of at approximately seven months from August 1983 to March 1984 both at part #32 of the Form I-687 application and in the signed sworn statement dated January 24, 2007. The record shows the applicant signed both the Form I-687 application and the sworn statement thereby certifying under the penalty of perjury that the information contained in such documents was true and correct. Further, the applicant has failed to provide any evidence to support his claim that he had only been absent from February 1984 to March 1984, rather than August 1983 to March 1984. "To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony." 8 C.F.R. § 245a.2(d)(6). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The applicant's admission that he was absent from the United States from August 1983 to March 1984 seriously undermines the credibility of his claim of residence in this country for the entire

requisite period. Pursuant to 8 C.F.R. § 245a.2(d)(3), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. The applicant himself failed to provide sufficient credible testimony to meet his burden of proof in establishing that he has resided in the United States since prior to January 1, 1982 by a preponderance of the evidence as required under both 8 C.F.R. § 245a.2(d)(3) and *Matter of E- M-*, 20 I&N Dec. 77 (Comm. 1989).

Given the applicant's own admission that he exceeded the 45-day limit for a single absence from this country during the requisite period as set forth in 8 C.F.R. § 245a.2(h)(1), it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through May 4, 1988 as required under section 245A the Act. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

Although not noted by the director, the record contains an order of the Immigration Judge dated September 28, 1988, granting the applicant voluntary departure until March 30, 1989, with an alternate order of deportation after such date. The record contains no evidence to demonstrate that the applicant complied with grant of voluntary departure by March 30, 1989, and therefore, the alternate order of deportation remains in effect and the applicant is deportable.

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