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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: FORT SMITH Date: OCT 0 8 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.

IN 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 applicant's temporary resident status was terminated by the Director, Fort Smith, Arkansas. The matter is now before the Administrative Appeals Office 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 she 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 had been absent from the country for more than forty-five days on six different occasions during the requisite period. Therefore, the director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and section 245A of the Immigration and Nationality Act (Act) and terminated the applicant's temporary residence.

On appeal, counsel claims that USCIS sent the applicant a new notice on June 29, 2009 after previously issuing the notice of intent to terminate on June 22, 2009, which led the applicant and counsel to believe that the applicant's temporary residence would not be terminated. Counsel contends that this misleading notice prevented the applicant from submitting a meaningful response to the notice of intent to terminate.

The status of an alien lawfully admitted for temporary residence may be terminated at any time if it determined that the alien was ineligible for temporary residence under section 245A of the Act. 8 C.F.R. § 245a.2(u)(1)(i).

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).

"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.

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).

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.

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).

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.

The applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to USCIS on December 17, 2004. At part #32 of the Form I-687

application, where applicants were asked to list all absences from the United States dating back to January 1, 1982, the preparer indicated that the applicant had been absent from this country when he travelled to Mexico to visit from December 1982 to March 1983 (a minimum of 59 days from the last day of December 1982 to the first day of March 1983), from December 1983 to April 1984 (a minimum of 91 days from the last day of December 1983 to the first day of April 1984 including February 29, 1984), from December 1984 to April 1985 (a minimum of 90 days from the last day of December 1984 to the first day of April 1985), from December 1985 to March 1986 (a minimum of 59 days from the last day of December 1985 to the first day of March 1986), from December 1986 to March 1987 (a minimum of 59 days from the last day of December 1986 to the first day of March 1987), and from December 1987 to April 1988 (a minimum of 91 days from the last day of December 1987 to the first day of April 1988 including February 29, 1988).

The applicant acknowledged singular absences of at least 59 days, 91 days, 90 days, 59 days, 59 days and 91 days and an aggregate of 449 days of absences in the required period in his testimony at part #32 of the Form I-687 application. The applicant's six absences from the United States each clearly exceeded the 45-day limit for a single absence from this country as well as the 180-day limit for the aggregate of all absences during the requisite period as set forth in 8 C.F.R. § 245a.2(h)(1)f.

The record reflects that the applicant was granted temporary resident status on August 22, 2008. Subsequently upon review, the director determined that the applicant's testimony relating to his six separate absences from this country between December 1982 and April 1988 at part #32 of the Form I-687 application rendered him ineligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and section 245A of the Act. Therefore, the director terminated the applicant's temporary resident status on November 4, 2009.

On appeal, counsel claims that USCIS sent the applicant a new notice on June 29, 2009 after previously issuing the notice of intent to terminate on June 22, 2009, which led the applicant and counsel to believe that the applicant's temporary residence would not be terminated. Counsel contends that this misleading notice prevented the applicant from submitting a meaningful response to the notice of intent to terminate. However, counsel fails to include a copy of the USCIS notice that was purportedly issued on June 29, 2009. Further a review of both the administrative and electronic records reveals no evidence to reflect that USCIS issued a notice to either the applicant or counsel on June 29, 2009, moreover a notice indicating that the applicant's temporary residence would not be terminated. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The applicant acknowledged that he exceeded the 45-day limit for a single absence from this country on six separate occasions as well as the 180-day limit for the aggregate of all absences during the requisite period as set forth in 8 C.F.R. § 245a.2(h)(1) at part #32 of the Form I-687 application. Therefore, the applicant has not established eligibility for temporary residence under the terms of the CSS/Newman Settlement Agreements and section 245A of the Act. As the applicant has not overcome the grounds for termination of status, the appeal must be dismissed.

Beyond the director's decision, the next issue to be examined is whether was physically present in the United States from November 6, 1986 until the date of filing the application as require under 8 C.F.R. § 245a.2(b)(1).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center [or other office] does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The applicant's testified that he was absent from the United States for a minimum of 59 days from December 1986 to March 1987 and a minimum of 91 days from December 1987 to April 1988 at part #32 of the Form I-687 application. The applicant's testimony establishes that he was not continuously physically present in the United States since November 6, 1986. A legalization applicant must show continuous physical presence in the United States after November 6, 1986 through May 4, 1988. 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 two absences from the United States from December 1986 to March 1987 and again from December 1987 to April 1988 were not brief in that the applicant himself testified that he was absent from this country for more than 45 days on these occasions.[1]

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[1] 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. § 1255a(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 aggregate absences from the United States during the period from November 6, 1986 to May 4, 1988.

Consequently, the applicant has not established his eligibility for temporary residence under the terms of the CSS/Newman Settlement Agreements and section 245A of the Act on this basis as well.

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