

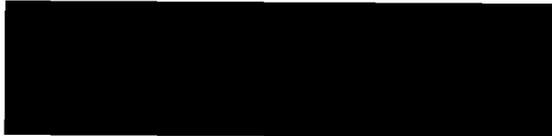
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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DATE:

AUG 09 2011

OFFICE: LOS ANGELES

FILE:



IN RE:

Applicant:



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:



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, Los Angeles. The decision 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). The director determined that the applicant failed to establish entry into the United States prior to January 1, 1982, and continuous residence in the United States during the requisite period. Specifically, the director noted that the applicant's absence from the United States in 1984 exceeded the 45-day allowance in a single absence.

On appeal, the applicant asserts that he never received the Notice of Intent to Deny. The record reflects that on October 24, 2006, the director of the Los Angeles office erroneously denied the I-687 application, finding the applicant abandoned the application, pursuant to 8 C.F.R. § 103.2(b)(13), by failing to appear for a scheduled interview on October 13, 2006.¹ Because the director erred in denying the application based on abandonment, on October 28, 2006, the director vacated the decision and reopened the case. On July 9, 2007, the director denied the applicant based on the applicant's absence from the United States from May 1984 to July 1984. On appeal, the applicant submits a declaration confirming his absence from the United States from May to July 1987. The decision is now before the AAO on appeal. The AAO has reviewed all of the evidence and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.²

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).

Continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless return could not be accomplished due to emergent reasons.

¹ On December 14, 2009, the United States District Court for the Eastern District of California ruled that United States Citizenship and Immigration Services (USCIS) may not apply its abandonment regulation, 8 C.F.R. § 103.2(b)(13), in adjudicating legalization applications filed by CSS class members. See, *CSS v. Michael Chertoff*, Case 2:86-cv-01343-LKK-JFM.

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

8 C.F.R. § 245a.2(h)(1)(i). “Emergent reasons” has been defined as “coming unexpectedly into being.” *Matter of C*, 19 I&N Dec. 808 (Comm. 1988).

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 established he has continuously resided in an unlawful status from before January 1, 1982, through the requisite period. The documentation that

the applicant submits in support of his claim to have arrived in the United States before January 1982 and resided in an unlawful status during the requisite period consists of numerous affidavits, W-2 forms, pay stubs, bank statements, and other documents during the requisite period. Based on the evidence, the applicant resided in the United States during portions of the requisite period; however, his residence was not continuous.

In the Notice of Decision, the director determined that the applicant was absent from the United States from May 1984 through July 1984. The record contains a declaration from the applicant in which he states that he departed the United States on May 2, 1984, and returned on July 26, 1984 with a non-immigrant visa. The applicant stated that he departed the United States because his mother was in the hospital. The record also contains a copy of the applicant's passport with the visitor's visa. The passport reflects that the applicant entered the Philippines on May 2, 1984, and returned to the United States on July 26, 1984. This absence of 55 days exceeds the 45 days permitted in a single absence. Thus, the applicant's absence interrupted his continuous residence in the United States.

Continuous unlawful residence is interrupted if an absence from the United States is more than 45 days on any one trip, unless return could not be accomplished due to emergent reasons. 8 C.F.R. § 245a.2(h)(1)(i). "Emergent reasons" has been defined as "coming unexpectedly into being." *Matter of C*, 19 I&N Dec. 808 (Comm. 1988). Here, the record does not reflect that the applicant's return could not be accomplished due to emergent reasons. The record contains a declaration from Laura Dizon, the applicant's mother, who states that the applicant was asked to return to the Philippines after she suffered from a near fatal heart attack. Based on her declaration, as well as his own declaration, the applicant was aware of his mother's medical condition prior to his departure from the United States and it did not come unexpectedly into being. Given this the applicant has failed to continuously reside in the United States throughout the requisite period.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he continuously resided in an unlawful status in the United States from before January 1, 1982 through 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.