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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: OFFICE: NATIONAL BENEFITS CENTER
MAR 30 2012

FILE: [REDACTED]
[REDACTED]

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.

Thank you,


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, or *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, National Benefits Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On December 21, 2005, the applicant filed an application for status as a temporary resident (Form I-687). On May 2, 2007, the director of the Newark office erroneously denied the I-687 application, finding that the applicant abandoned the application, pursuant to 8 C.F.R. § 103.2(b)(13), by failing to appear for a scheduled interview on April 18, 2007.¹ Because the director erred in denying the application based on abandonment, on April 4, 2011, the director of the National Benefits Center issued a notice advising the applicant of the right to appeal the decision to the Administrative Appeals Office (AAO). The decision is now before the AAO on appeal. The director's decision will therefore be withdrawn, and the AAO will consider the claim *de novo*, evaluating the sufficiency of the evidence in the record, according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6).²

On February 27, 2012, the AAO notified the applicant of the intent to deny the application based on deficiencies in the record. The applicant responded within the 21-day period granted and submitted a statement and additional evidence.

On appeal, the applicant asserts that he has submitted sufficient evidence to establish his eligibility for temporary resident status. The applicant submits a statement and additional evidence in support of his appeal. Upon review of the record the AAO finds the applicant has failed to establish eligibility for temporary resident status.

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 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 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. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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) 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).

Even if the director has some doubt as to the truth, if the applicant 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. 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. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA).

At the time of completing his I-687 application the applicant listed residences in the United States during the requisite period. Also, the applicant listed absences from the United States during the requisite period, specifically, from March 1987 to April 1987, and from February 1988 to March 1988.

The applicant submitted as proof of his asserted date of entry into the United States and continuous residence in the United States during the requisite period, witness statements from [REDACTED] and [REDACTED]. In response to the NOID, the applicant submitted affidavits from [REDACTED] attesting to having known the applicant to have resided in the United States since 1982. The witness statements are general in nature, and state that the witnesses have knowledge of the applicant's residence in the United States during the requisite period. The statements of the witnesses lack sufficient detail, because they fail to provide concrete information specific to the applicant which would demonstrate that the witnesses have a sufficient basis for reliable knowledge about the applicant's residence in the United States during the requisite period.

The witness statements provided lack sufficient details and cannot be afforded weight. This lack of detail in the evidence provided is material to the applicant's claim in that it has a direct bearing on his residence in the United States for the duration of the requisite period. As stated above, 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. *Matter of Ho, supra*. This lack of sufficient detail undermines the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

In addition, the record reflects that during the requisite period the applicant had a single absence of over 45 days from the United States. The applicant indicated on his Form I-687 that he departed the United States, for Brazil, in March 1987 and returned to the United States in April 1987. Evidence of record, however, contradicts the applicant's claim that he returned to the United States in April 1987. It is noted that the applicant's passport [REDACTED] was issued in Brazil on April 3, 1987, and he was issued a non-immigrant visa at the U.S. Embassy in Rio de Janeiro on June 24, 1987. This evidence indicates that the applicant had a single absence of over 45 days from the United States from at least April 3, 1987 through June 24, 1987.

The applicant asserts that his prolonged absence was due to an emergent reason, namely that he needed to remain in Brazil to care for his sick mother. However, the applicant does not provide documentation in support of his assertion. This absence exceeds the 45 days allowed for a single absence, and disrupts the applicant's continuous residence.

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. 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). There is no evidence of record to indicate that the prolonged absence was necessitated by an emergent reason.

The applicant's absence from the United States from at least April 3, 1987 to June 24, 1987, a period of at least 81 days, is clearly a break in any period of continuous residence he may have established. As the record lacks evidence there was an "emergent reason" for his failure to return to the United States in a timely manner, he has failed to establish by a preponderance of the evidence that he 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*. Therefore, the applicant is ineligible for temporary resident status under section 245A of the Act on this basis.

It is also noted that on March 12, 1988, the applicant was admitted to the United States as a B-2 non-immigrant visitor, with authorization to stay until March 30, 1988. Therefore, the applicant did not reside continuously in an unlawful status throughout the requisite period.

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant failed to establish his continuous unlawful residence in the United States throughout the requisite period. Thus, the record does not establish that the applicant entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from that date through the date he attempted to file a Form I-687 during the original one-year application period that


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ended on May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A(a)(2) the Act.

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