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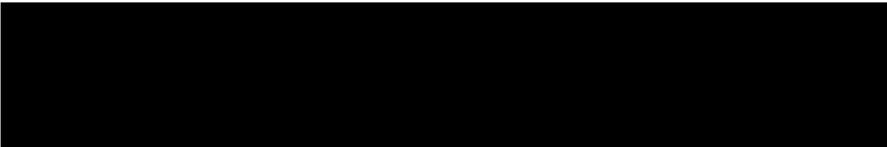
IN RE:

Applicant:



APPLICATION: Application for Status as a Temporary Resident pursuant to Section 210 of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case 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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status as a special agricultural worker was denied by the Director, Western Service Center, and the matter came before the Legalization Appeals Unit (LAU (now the Administrative Appeals Office or AAO)) on appeal. The AAO dismissed the appeal on October 26, 1998. Following litigation, the United States Court of Appeals for the Ninth Circuit remanded the case to the AAO on August 21, 2006. *Ana Bertha Huerta-Anguiano v. Alberto R. Gonzales*, No. 04-72124 (9th Cir., 2006). The matter is again before the AAO and the appeal will be dismissed.

The director denied the application because the applicant failed to establish the performance of at least 90 man days of qualifying agricultural employment during the eligibility period. This decision was based on adverse information acquired by the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS) relating to the applicant's claim of employment for [REDACTED] at [REDACTED].

On appeal, the applicant reaffirmed her claim of employment for [REDACTED] at the farm of [REDACTED]. The applicant submitted documentation in support of her appeal.

In order to be eligible for temporary resident status as a special agricultural worker, an alien must have engaged in qualifying agricultural employment for at least 90 man days during the twelve month period ending May 1, 1986, and must be otherwise admissible under section 210(c) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1160(c), and not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a). An applicant has the burden of proving the above by a preponderance of the evidence. 8 C.F.R. § 210.3(b).

On the Form I-700, Application for Temporary Resident Status as a Special Agricultural Worker, application, the applicant claimed 90 man-days thinning and picking peaches, plums, nectarines, grapes, oranges, lemons, and olives for [REDACTED] at the [REDACTED]'s farm in Tulare County, California, from May 1985 to September 1985.

In support of this claim, the applicant submitted a corresponding Form I-705 affidavit and a separate employment letter both signed by [REDACTED], who claimed to be a farm labor contractor. On the Form I-705 affidavit, [REDACTED] indicated that the applicant worked with peaches, plums, nectarines, grapes, oranges, lemons, and olives at the [REDACTED] farm. [REDACTED] noted that the applicant had been paid by check. Although [REDACTED] also stated that the applicant had been employed in the same manner and place from May 1, 1986 to September 25, 1986, any employment occurring after May 1, 1986 is considered non-qualifying pursuant to 8 C.F.R. § 210.3(a).

On February 9, 1992, the director issued a notice informing the applicant of the intent to deny her Form I-700 application because the Service had acquired information that contradicted her claim of agricultural employment. Specifically, the director stated that [REDACTED] had been contacted and stated that he had never hired [REDACTED] or any other individual as a farm labor contractor. [REDACTED] declared that [REDACTED] had worked as a foreman on his farm during 1985 and 1986, but [REDACTED] did not have access to payroll records. The director incorrectly noted that [REDACTED] indicated in the supporting documents that the applicant had been paid in cash. In addition, the director declared that the signature of [REDACTED] contained in the

applicant's supporting documentation did not match a signature exemplar provided by [REDACTED]. However, the record contains no evidence to demonstrate that a forensic examination was conducted to establish that the signatures of [REDACTED]s contained in the applicant's supporting documents were not genuine. The applicant was granted thirty days to respond to the notice.

In response, the applicant submitted a personal statement in which she reiterated her claim of qualifying agricultural employment for [REDACTED] at the [REDACTED] farm. The applicant stated that it was her belief that [REDACTED] was a farm labor contractor who hired laborers for [REDACTED] farm rather than a foreman. The applicant declared that no payroll records existed because she had been paid cash for her work at this enterprise and that both [REDACTED] and [REDACTED] knew that the farm laborers were paid in this manner. However, the applicant's testimony that she had been paid cash for work performed at the [REDACTED] farm directly contradicted [REDACTED]' testimony on the Form I-705 affidavit that the applicant had been paid by check for agricultural work performed at this enterprise. Such a contradiction brings the applicant's credibility as well as her claim of qualifying agricultural employment into question.

The applicant also noted that she was unable to obtain any further supporting documents from [REDACTED] because he had passed away. The applicant submitted a copy of a Certificate of Death from the State of California reflecting that [REDACTED] died as a result of a heart attack on November 17, 1989.

The applicant also submitted five signed affidavits. All five affiants attested that an unnamed individual was an employee of [REDACTED] and had performed agricultural work at the [REDACTED] ranch. However, these five affidavits have no probative value as none of the affiants either identified the individual that performed such work or provided the dates such work was performed.

The director concluded the applicant had not overcome the derogatory evidence and denied the application on March 20, 1992.

On appeal, the applicant stated that she worked along with others in her crew for farm labor contractor [REDACTED]s at a ranch owned by [REDACTED]. The applicant declared that she was paid cash to thin peaches, nectarines, and plums as well as harvest and pack grapes. The applicant indicated that she was including five affidavits from coworkers who worked for [REDACTED] and to attest to her qualifying agricultural employment.

The applicant submitted five coworker affidavits that were signed by [REDACTED], [REDACTED], and [REDACTED], respectively. All five affiants stated that they and the applicant had been employed by farm labor contractor [REDACTED] to perform various field tasks such as thinning peaches, plums, and nectarines as well as harvesting grapes, olives, and other fruits during 1985 and 1986. All five affiants declared that this field work was performed at the farms of [REDACTED] and others. However, the testimony of these five affiants that agricultural work they and the applicant engaged in for [REDACTED] was performed at the farms of [REDACTED] and others directly contradicted both the applicant's and [REDACTED] testimony that such work was performed solely at the [REDACTED] farm.

The AAO determined that the applicant had failed to overcome the derogatory information relating to her claim of agricultural employment for [REDACTED] at the [REDACTED]'s farm and dismissed the appeal on October 26, 1998.

Following litigation, the United States Court of Appeals for the Ninth Circuit remanded the case to the AAO on August 21, 2006. [REDACTED] No. [REDACTED] (9th Cir., 2006). The Ninth Circuit Court determined that the AAO had abused its discretion when it refused to consider the affidavits submitted in support of the applicant's claim of agricultural employment and by failing to provide the applicant the opportunity to rebut evidence contained in a memorandum summarizing an interview with farm owner [REDACTED]

The record contains copies of a memorandum reflecting that a Service officer telephonically contacted [REDACTED], the owner of the farm where the applicant purportedly worked for farm labor contractor, [REDACTED], on January 11, 1991. [REDACTED] stated that [REDACTED] had worked as a foreman on his farm from approximately 1979 to 1989 on a full-time basis with only about two months of vacation per year. While [REDACTED] declared that [REDACTED] did on occasion provide labor during peak seasons, [REDACTED] indicated that [REDACTED] did so as his foreman rather than a farm labor contractor and that all workers were placed on the farm payroll and paid by check. [REDACTED] further indicated that grapes, olives, and plums were grown on his farm but that nectarines, peaches, and lemons were crops that were not grown on his farm. The applicant, on her Form I-700 application, and [REDACTED] on the Form I-705 affidavit, both listed nectarines, peaches, and lemons as crops that the applicant had worked with at the [REDACTED] farm. The fact that the owner of the farm, [REDACTED] where the applicant purportedly worked from May 1985 to September 1985 specifically stated that nectarines, peaches, and lemons were not grown on his farm diminishes the credibility of the applicant's claim of qualifying agricultural employment and the supporting documentation provided by Joe Quair Banuelos.

In addition, a review of the record reveals that the applicant was assigned a separate Administrative file or A-file, [REDACTED], when she filed a Form I-589, Application for Asylum and Withholding of Removal, on September 14, 2000. The record for [REDACTED] has been consolidated into the current record of proceedings and all documents are now housed in [REDACTED]. The record shows that the applicant subsequently appeared for the requisite interview relating to her Form I-589 asylum application at the Service's San Francisco, California Asylum Office on October 24, 2000. The notes of the interviewing officer reflect that the applicant provided sworn testimony that she first entered the United States from Mexico when she was nineteen years of age in 1988 in order to obtain work. Therefore, based upon the applicant's own testimony under oath it would have been impossible for her to have performed qualifying agricultural employment in the United States from May 1, 1985 to May 1, 1986, as she acknowledged that she did not enter this country until 1988.

The adverse information noted above seriously impairs the credibility of the applicant's claim to have worked 90 man-days thinning and picking peaches, plums, nectarines, grapes, oranges, lemons, and olives for [REDACTED] at the [REDACTED]'s farm in Tulare County, California, from May 1985 to September 1985. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by

independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

In compliance with the Ninth Circuit Court's remand order, the AAO hereby issued a notice dated August 30, 2006, advising the applicant of CIS' intent to dismiss the appeal based upon adverse evidence cited above relating to her claim of qualifying agricultural employment. The parties were offered the opportunity to rebut such adverse evidence and granted thirty days to respond to the notice.

In response, counsel submits a statement in which he infers that the AAO has failed to take into account the difficulty in obtaining evidence to support her claim of agricultural employment because of the passage of a considerable and significant amount of time since such events occurred. Counsel contends that such difficulties are compounded by the fact that both [REDACTED] and [REDACTED] had died. While it is acknowledged that it may be difficult to obtain supporting documentation relating to the applicant's claim of qualifying agricultural employment at this date, the passage of time and the deaths of [REDACTED] and [REDACTED] are insufficient to explain the contradictions and conflicts between the applicant's own testimony, the testimony contained in her supporting documents, and adverse information provided by [REDACTED].

Counsel asserts that the evidence contained in the record does not support the finding that [REDACTED] stated that he did not grow nectarines, peaches and lemons on his farm. Counsel insists the copy of the memorandum relating to the January 11, 1991 telephone conversation between a Service officer and [REDACTED] that he had been provided contained no indication that [REDACTED] made this statement because such copy had been redacted and was so poor in quality. However, counsel failed to provide any independent evidence to corroborate his claim that his copy of this memorandum was illegible. Further, the record contains a clean and readable copy of the memorandum relating to the January 11, 1991 telephone conversation between a Service officer and [REDACTED]. This memorandum reflects that the Service officer asked [REDACTED] the following question during the conversation: "According to Service information, you grow grapes, olives, and plums. Do you also grow nectarines, peaches, and lemons?" [REDACTED] replied by stating, "I do not."

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).

Counsel contends that the AAO failed to provide copies of the notes of the Service officer who conducted the applicant's asylum interview on October 24, 2000 as required under 8 C.F.R. § 103.2(b)(16). However, the pertinent regulation at 8 C.F.R. § 103.2(b)(16) states the following:

Inspection of evidence. An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

(ii) Determination of statutory eligibility. A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner, except as provided in paragraph (b)(16)(iv) of this section.

(iii) Discretionary determination. Where an application may be granted or denied in the exercise of discretion, the decision to exercise discretion favorably or unfavorably may be based in whole or in part on classified information not contained in the record and not made available to the applicant, provided the regional commissioner has determined that such information is relevant and is classified under Executive Order No. 12356 (47 FR 14874; April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security.

(iv) Classified information. An applicant or petitioner shall not be provided any information contained in the record or outside the record which is classified under Executive Order No. 12356 (47 FR 14874; April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security, unless the classifying authority has agreed in writing to such disclosure. Whenever he/she believes he/she can do so consistently with safeguarding both the information and its source, the regional commissioner should direct that the applicant or petitioner be given notice of the general nature of the information and an opportunity to offer opposing evidence. The regional commissioner's authorization to use such classified information shall be made a part of the record. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

Clearly, the language of the regulation does not mandate that the Service or its successor CIS provide an applicant or petitioner with a copy of a document containing derogatory information used to deny an application or petition. Rather, the regulation requires that an applicant or petitioner be advised of such derogatory information and offered an opportunity to rebut the information and present information in his or her own behalf before the decision is rendered. This is the procedure that has been utilized in the instant case as the AAO issued a notice to both counsel and the applicant

specifically informing both parties of the derogatory information provided by [REDACTED] as well as that contained in the notes of the Service officer who conducted the applicant's asylum interview on October 24, 2000. Counsel's response to the notice and the arguments raised therein are thoroughly addressed in this decision. Further, photocopies of the memorandum relating to the January 11, 1991 telephone conversation between a Service officer and [REDACTED] and the notes of the Service officer who conducted the applicant's asylum interview on October 24, 2000 shall be furnished to both the applicant and counsel with this decision.

Counsel argues that the applicant's testimony before the Immigration Judge in removal proceedings on March 5, 2002 was more reliable than her testimony at her asylum interview on October 24, 2000. Although the applicant did testify that she first entered this country in 1985 when she was seventeen years old in removal proceedings on March 5, 2002, a review of the complete transcript of this hearing as well as other hearings conducted on November 29, 2000, February 14, 2001, April 18, 2001, and September 13, 2002 that were a part of the same removal proceedings, reveals that the applicant failed to offer any direct testimony that she engaged in agricultural employment during the qualifying period. The fact that the applicant has offered contradictory testimony relating to the date she first entered the United States in two separate instances only serves to undermine her credibility regardless of whether such testimony in one instance was provided in a hearing before an Immigration Judge in removal proceedings.

Counsel asserts that the applicant had submitted sufficient documentation to establish her eligibility and meet her burden of proof by showing that the claimed employment occurred under the standard set forth in 8 C.F.R. § 210.3(b). The question of whether the applicant has met her initial burden of proof is not at issue, but rather the issue is whether the applicant has met her secondary burden of proof in overcoming the adverse information provided by [REDACTED] and the testimony the applicant provided at her asylum interview on October 24, 2000. Upon a showing that the claimed employment occurred through a just and reasonable inference of the evidence submitted, the burden shifts to CIS to disprove the applicant's evidence by showing that the inference drawn from the evidence is not reasonable. 8 C.F.R. § 210.3(b). Upon a showing that the inference from the applicant's evidence is not reasonable, the burden of proof then shifts back to the applicant to overcome the adverse information.

In summary, the applicant, on her Form I-700 application, and [REDACTED], on the Form I-705 affidavit, both listed nectarines, peaches, and lemons as crops that the applicant had worked with at the [REDACTED] farm. [REDACTED], the owner of the farm where the applicant purportedly worked from May 1985 to September 1985, specifically stated that nectarines, peaches, and lemons were not grown on his farm.

[REDACTED] testified that he paid the applicant by check for work performed on the [REDACTED] farm in the Form I-705 affidavit. In response to the notice of intent to deny issued on February 9, 1992, the applicant contradicted [REDACTED]'s testimony by claiming that she was paid in cash by [REDACTED] for such agricultural work.

The applicant submitted five coworker affidavits in which all five affiants testified that they and the applicant had been employed by farm labor contractor [REDACTED] to perform various field tasks such as thinning peaches, plums, and nectarines as well as harvesting grapes, olives, and other fruits

██████████ during 1985 and 1986. All five affiants declared that this field work was performed at the farms of ██████████ and others. However, the testimony of these five affiants that agricultural work they and the applicant engaged in for ██████████ was performed at the farms of ██████████ and others directly contradicted both the applicant's and ██████████ testimony that such work was performed solely at the ██████████ farm.

The notes of the interviewing officer who conducted the applicant's asylum interview on October 24, 2000 reflect that she testified under oath that she first entered the United States from Mexico when she was nineteen years of age in 1988 in order to obtain work.

The adverse information provided by ██████████ relating to crops grown on his farm, the conflicting testimony contained in the applicant's supporting documents, and the testimony provided by applicant at her asylum interview on October 24, 2000 all serve to negate any inference from the original evidence that the claimed agricultural employment for ██████████ at the ██████████ farm occurred. Consequently, the burden of proof shifted back to the applicant, who subsequently failed to submit sufficient credible evidence to meet her secondary burden of proof of overcoming such derogatory evidence. Therefore, the documentary evidence submitted by the applicant relating to her application for special agricultural worker status cannot be considered as having any probative value or evidentiary weight.

Generally, 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. § 210.3(b)(1). Evidence submitted by an applicant will have its sufficiency judged according to its probative value and credibility. 8 C.F.R. § 210.3(b)(2). Personal testimony by an applicant which is not corroborated, in whole or in part, by other credible evidence (including testimony by persons other than the applicant) will not serve to meet an applicant's burden of proof. 8 C.F.R. § 210.3(b)(3).

There is no mandatory type of documentation required with respect to the applicant's burden of proof; however, the documentation must be credible. All documents submitted must have an appearance of reliability, i.e., if the documents appear to have been forged, or otherwise deceitfully created or obtained, the documents are not credible. *United Farm Workers (AFL CIO) v. INS*, Civil No. S 87 1064 JFM (E.D. Cal. June 15, 1989).

The applicant has failed to establish credibly the performance of at least 90 man-days of qualifying agricultural employment during the twelve-month statutory period ending May 1, 1986. Consequently, the applicant is ineligible for adjustment to temporary resident status as a special agricultural worker.

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