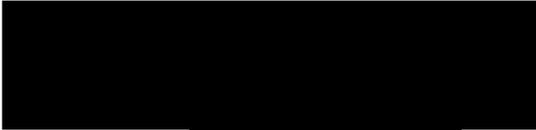




U.S. Citizenship
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FILE: [Redacted]
MSC-05-238-13923

Office: NEWARK

Date: **AUG 29 2007**

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:



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 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 District Director, Newark, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined 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 Citizenship and Immigration Services or CIS) in the original legalization application period of May 5, 1987 to May 4, 1988. Therefore, the director determined that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and denied the application.

On appeal, counsel for the applicant asserts that the applicant is eligible for temporary resident status based on his credible testimony. Counsel further asserts that the director's decision is in violation of the CSS Settlement Agreement because the applicant was not afforded a notice of intent to deny the application.

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 Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(2).

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. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

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. 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 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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he resided in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application with the Service in the original legalization application period of May 5, 1987 to May 4, 1988. Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant filed a Form I-687, Application for Status as a Temporary Resident, and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, with CIS on May 26, 2005. The applicant provided in this application that he has resided in the United States from November 1981 until December 1988. However, the applicant failed to submit any documentation to corroborate his claim of continuous residence in the United States during this period.

On June 14, 2006, the director issued a decision to deny the application. This decision, in part, provides:

You failed to prove that you are eligible to file an I-687 under the LULAC class settlement agreement. You failed to provide that you resided unlawfully in the United States continuously since before January 1, 1982 through May 4, 1988. Therefore, your I-687, Application for Status as a Temporary Resident, filed on May 26, 2005, must be, and hereby is, denied.

On appeal, counsel for the applicant asserts that, “[w]hile it is conceded that applicant has the burden of establishing eligibility for Temporary Residence under the Immigration and Nationality Act, appellant respectfully submits that said burden was satisfied by the testimony of the appellant/applicant before the Officer on December 19, 2005 on oath.” Counsel’s assertion that the applicant has satisfied his burden of proof in this proceeding through his testimony alone is not supported by the regulations. The regulation at 8 C.F.R. § 245a.2(d)(5) provides that an applicant has the burden of proving by a preponderance of the evidence his eligibility for temporary resident status under Section 245A of the Act. To meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence pursuant to 8 C.F.R. § 245a.2(d)(3). The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of documentation that may be provided to establish proof of continuous residence in the United States during the requisite period. This list includes: past employment records; utility bills; school records; hospital or medical records; attestations by churches, unions or other organizations; money order receipts; passport entries; birth certificates of children; bank books; letters or correspondence involving the applicant; social security card; selective service card; automobile receipts and registration; deeds, mortgages or contracts; tax receipts; and insurance policies, receipts, or letters. An applicant may also submit “any other relevant document.” 8 C.F.R. § 245a.2(d)(3)(vi)(L). The applicant failed to provide any documents to corroborate his claim of continuous residence in the United States.

Counsel also asserts that, “[i]n support of the testimony under oath, appellant sought to tender affidavits of witnesses to corroborate his testimony but was subtly rejected by the Officer under the pretext that appellant should await a Notice of Request for Additional Evidence which never came.” Although counsel maintains that the applicant was refused his attempt to provide corroborating affidavits during his Form I-687 interview, counsel fails to explain the reason these affidavits have not been presented on appeal. Counsel filed the Notice of Appeal on July 14, 2006, indicating that a brief would be filed within thirty (30) calendar days. Counsel had the opportunity to submit additional evidence in conjunction with his brief, but failed to provide such documentation.

Furthermore, counsel asserts that the director’s notice of denial is in violation of the CSS Settlement Agreement:

The sole reason adduced for denial of appellant’s application is lack of documentary evidence to establish class membership and this is contrary to the terms of settlement submitted and approved by the Court . . . Department of Homeland Security (DHS) failed to comply with a cardinal term of the Settlement which requires it to provide the appellant with an opportunity to remedy any deficiency in the application. Service of a Notice of intention to deny would have also provided the applicant with more than sufficient opportunity to submit affidavits and other relevant documents in support of his application.

Counsel's assertion that the director was required to issue a Notice of Intent to Deny (NOID) pursuant to paragraph 7 of the CSS Settlement Agreement is not supported by the record. According to the settlement agreement, the director shall issue a NOID before denying an application for class membership. Here, the director adjudicated the Form I-687 application on the merits. The director's decision provides, "[y]ou failed to prove that you are eligible to file an I-687 under the LULAC class settlement agreement. *You failed to provide that you resided unlawfully in the United States continuously since before January 1, 1982 through May 4, 1988*" (emphasis added). The director listed several examples of the applicant's failure to provide evidence of his continuous residence in the United States during the requisite period. The applicant's burden of proving by a preponderance of the evidence his continuous residence in the United States during the requisite period is a requirement distinct from the establishment of class membership. *See* 8 C.F.R. § 245a.2(d)(5). The director's decision explains that:

You claim to have entered the United States for the first time in November 1981, when you were seven (7) years old and remained in the United States until December 1988, when you were fourteen (14) years old. However, you could provide no evidence that you ever attended school in the United States; You could provide no proof th[at] your father was ever physically present in the United States; You submitted no proof to substantiate your claim that you were continuously physically present in the United States, except for brief, casual, and innocent departures from November 06, 1986, until the date you (or your parent or spouse) were turned away by the INS when you (or your parent or spouse) tried to apply for legalization.

The director found in adjudicating the merits of the application that the applicant did not meet the eligibility requirements for temporary residency. The director's decision is based on the applicant's failure to provide evidence of his continuous residence in the United States during the requisite period. As a result, the director is found not to have denied the application based on class membership. Therefore, the director was not required to issue a NOID prior to denying the application.

The applicant's failure to provide any evidence to establish his continuous residence in the United States during the requisite period renders a finding that the applicant has failed to satisfy his burden of proof, as required by 8 C.F.R. § 245a.2(d)(5). The applicant has not submitted any evidence to establish that his claim is "probably true" pursuant to *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). Given the applicant's failure to provide any documentation in support of his application, 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 the date he attempted to file a Form I-687 application 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.