



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

MSC 04 308 10008

Office: New York

Date:

JUL 10 2007

IN RE:

Applicant:

[REDACTED]

PETITION: 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. All documents have been returned to the office that originally decided your case. 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.

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, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director determined that the applicant had failed to submit sufficient evidence to demonstrate 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 between May 5, 1987 to May 4, 1988. The district director further determined that the applicant admitted that he had been absent from this country from May 5, 1984 to August 25, 1984, and, therefore, exceeded the forty-five (45) day limit for a single absence from the United States during this period, as set forth in 8 C.F.R. § 245a.2(h)(1). Therefore, the district 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 denied the application.

On appeal, counsel reiterates the applicant's claim of residence in this country for the requisite period and states that the applicant submitted sufficient evidence to support such claim. Counsel acknowledges that the applicant had been absent from the United States from May 5, 1984 to August 25, 1984, but claims that his return to this country had been delayed by an emergent reason.

An applicant for temporary residence 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. *See* section 245A(a)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(2) and 8 C.F.R. § 245a.2(b).

An alien applying for adjustment to temporary resident status must establish that he or she has been continuously physically present in the United States since November 6, 1986. *See* section 245A(a)(3) of the Act and 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.

"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.

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. *See* 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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to establish continuous residence 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 from May 5, 1987 to May 4, 1988. Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on August 3, 2004. At part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant listed [REDACTED] in New York, New York from November 1981 to July 1982, [REDACTED] in Astoria, New York from July 1982 to May 1984, [REDACTED] from August 1984 to December 1988. Furthermore, at part #32 of the Form I-687 application where applicants were asked to list all absences from this country dating back to January 1, 1982, the applicant listed a trip to Ecuador to "visit family" from May 1984 to August 1984. The applicant's absence of approximately four months from the United States in that period between May of 1984 and August of 1984 clearly exceeded the 45-day limit for a single absence from this country during the requisite period as set forth in 8 C.F.R. § 245a.2(h)(1). In addition, at part #33 of the Form I-687 application where applicants were asked to list all employment in the United States since January 1, 1982, the applicant listed "various employers (construction/demolition)" in New York, New Jersey, and Long Island from December 1981 to May 1984, [REDACTED] in New York, New York from October 1984 to April 1985, and [REDACTED] Tavern Restaurant in Astoria, New York from April 1985 to December 1988.

In support of his claim of continuous residence in the United States since prior to January 1, 1982, the applicant submitted an affidavit that is signed by [REDACTED] [REDACTED] declared that he first met the applicant in 1986 while the applicant was working at [REDACTED] Restaurant in Astoria, New York. [REDACTED] noted that the applicant was a good salad maker and he always made a personal request for the applicant to prepare a special salad. However, [REDACTED] failed to attest to the applicant's residence in the United States from prior to January 1, 1982 up to 1986.

The applicant provided an affidavit signed by [REDACTED] who stated that he first met the applicant at the zoo in a park in Flushing, New York in the summer of 1982. [REDACTED] asserted that he and the applicant subsequently became close friends who maintained contact by phone and visiting with each other on weekends and holidays. [REDACTED] indicated that he and the applicant were neighbors in an apartment building in Woodside, New York from 1996 to 2000. Although [REDACTED] testified to the applicant's residence in the United States since the summer of 1982, he failed to provide any relevant and verifiable testimony, such as the applicant's address(es) of residence in this country, to corroborate the applicant's claim of residence in the United States for the requisite period. In addition, [REDACTED] failed to attest to the applicant's residence in the United States since prior to January 1, 1982 through the summer of 1982.

The applicant included an affidavit that is signed by [REDACTED] [REDACTED] declared he first met the applicant at [REDACTED] Restaurant in New York, New York on an unspecified date in 1982. [REDACTED] indicated that the applicant worked at this establishment for three days in 1982.

and that he and the applicant subsequently became good friends. However, as noted above the applicant listed "various employers (construction/demolition)" from December 1981 to May 1984 at part #33 of the Form I-687 application where applicants were asked to list all employment in the United States since January 1, 1982, without indicating that he worked for any restaurant including [REDACTED] Restaurant in 1982. [REDACTED] testimony that the applicant worked for this enterprise for three days in 1982 conflicted with applicant's testimony that he worked in construction and demolition in that period from December 1981 to May 1984. Furthermore, [REDACTED] failed to provide any direct and specific information to support the applicant's claim of residence in this country in that period from 1982 to May 4, 1988, the date of the termination of the original legalization application period. Additionally, [REDACTED] failed to attest to the applicant's residence in the United States from prior to January 1, 1982 up to the unspecified date they met in 1982.

The applicant submitted an affidavit signed by [REDACTED] who stated that he had known the applicant his entire life as they had attended primary school together in Ecuador. [REDACTED] noted that the applicant came to the United States on or about November 26, 1981 and lived with him at his former apartment at [REDACTED] in New York, New York. [REDACTED] asserted that the applicant lived with him for about a year before moving to Astoria, New York to be in closer proximity to his place of work. While the address provided by [REDACTED] matches the address listed by the applicant as his residence from November 1981 to July 1982, [REDACTED] failed to provide any pertinent and verifiable testimony relating to the applicant's residence in this country after July 1982 other than the name of the neighborhood to which the applicant moved.

The applicant provided an affidavit that is signed by [REDACTED]. [REDACTED] indicated that she was the applicant's sister and declared that the applicant and his wife came to this country on November 26, 1981 when they crossed the border from Mexico. [REDACTED] stated that the applicant and his wife went to live in apartment number [REDACTED] at [REDACTED] in New York, New York and that the applicant had been residing in the State of New York since 1981. Although the address provided by [REDACTED] corresponds to the address listed by the applicant as his residence from November 1981 to July 1982, [REDACTED] failed to provide any relevant verifiable information relating to the applicant's residence in the United States after July 1982 other than to assert that he had lived in New York State since. In addition, [REDACTED] testimony that the applicant and his wife resided at the address on [REDACTED] is suspect in that [REDACTED], the affiant discussed in the preceding paragraph, testified that the applicant lived in his apartment at this same address with no mention that the applicant's wife also lived at his residence. Moreover, the probative value of the testimony contained in the affidavit signed by [REDACTED] is further limited as [REDACTED] has acknowledged that she is the applicant's sister, an immediate family member who must be viewed as having an interest in the outcome of proceedings rather than an independent and disinterested third party.

The applicant included an affidavit signed by [REDACTED] who declared that he first met the applicant in 1983 at [REDACTED] Restaurant in New York, New York. [REDACTED] indicated that he was working at this restaurant at that time and that he and the applicant became good friends who maintained constant contact. [REDACTED] asserted that he and the applicant subsequently

worked together at [REDACTED] Tavern Restaurant in Astoria, New York in 1986. However, other than providing the name of the applicant's employer from April 1985 to December 1988, [REDACTED] he failed to provide any relevant and verifiable testimony to corroborate the applicant's claim of residence in the United States for the requisite period. Additionally, [REDACTED] failed to attest to the applicant's residence in the United States from prior to January 1, 1982 up to the unspecified date they met in 1983.

The record shows that the applicant was subsequently interviewed relating to his Form I-687 application at CIS' District Office in New York, New York on March 1, 2006. The notes of the interviewing officer reveal that the applicant testified under oath that he had been absent from the United States for 112 days when he traveled to Ecuador from May 5, 1984 to August 25, 1984. The notes of the interviewing officer reflect that the applicant failed to provide any indication that any unforeseen circumstances had delayed his return to the United States on the occasion of this absence.

In the notice of intent to deny issued on March 3, 2006, the district director noted that the applicant admitted at his interview that he had been absent from this country from May 5, 1984 to August 25, 1984, and, therefore, exceeded the forty-five (45) day limit for a single absence from the United States during this period, as set forth in 8 C.F.R. § 245a.2(h)(1). The district director concluded that this absence had interrupted the applicant's claimed residence in the United States since prior to January 1, 1982. The applicant was granted thirty days to respond to the notice and submit additional evidence in support of his claim of residence in this country since prior to January 1, 1982.

In response, counsel and the applicant submitted statements in which both parties acknowledged that the applicant had been absent from this country from May 5, 1984 to August 25, 1984 but both counsel and the applicant asserted that he originally intended to return to this country by May 31, 1984 to return to work. Counsel and the applicant contended that his return to the United States had been delayed by an emergent reason, specifically complications arising during the course of the pregnancy of the applicant's wife. Both parties claim that the applicant was forced to remain in Ecuador to care for his wife and family as his wife's doctor had ordered complete bed rest for her to ensure her well being and the health of her unborn child.

The applicant submitted the identification documents (cedula and hospital identity card) of [REDACTED], as well as a Spanish language affidavit signed by the same individual and corresponding certified English translation. The affiant stated that he was the doctor for the applicant's family since 1984 and he had attended to the pregnancy of the applicant's wife in that same year. [REDACTED] declared that the applicant's wife had suffered complications of a severe nature on two separate occasions during the first trimester of this pregnancy. [REDACTED] noted that he recommended that the applicant's wife subsequent treatment include absolute rest.

The applicant included the identification document (cedula) of his wife as well as a Spanish language affidavit signed by the same individual and corresponding certified English translation. The applicant's wife declared that the applicant had returned to Ecuador on May 5, 1984 in order to visit his family and that she became pregnant with her son, [REDACTED] within a few days of his return. The applicant's wife stated that she felt very sick and experienced difficulties in the first three months of her pregnancy and that her husband was forced to stay by her side to provide care and attention. The applicant's wife claimed that this delayed the return of her husband to the United States.

The applicant provided the identification document (cedula) of [REDACTED] as well as a Spanish language affidavit signed by the same individual and corresponding certified English translation. [REDACTED] stated that he had personal knowledge that the applicant returned to Ecuador in the month of May in 1984, as he was the teacher of one of the applicant's children. The affiant declared that the applicant subsequently came to parent meetings at the school because his wife was in a delicate state of health during this same period. [REDACTED] indicated that applicant's return to the United States was delayed because he had to provide care and attention to his wife and family.

The applicant submitted another affidavit signed by his sister [REDACTED] who confirmed that he returned to Ecuador on May 5, 1984 to visit his family. [REDACTED] noted that the applicant's wife became pregnant shortly after his return and that she suffered complications during her pregnancy. [REDACTED] asserted that the applicant delayed his return to the United States until he sure that his wife and yet to be born baby were out of danger. However, as has been previously noted, the probative value of the testimony contained in this or any other affidavit signed by [REDACTED] is limited in that [REDACTED] has acknowledged that she is the applicant's sister, an immediate family member who must be viewed as having an interest in the outcome of proceedings rather than an independent and disinterested third party.

The district director determined that the applicant had failed to submit sufficient evidence to demonstrate 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 in the original legalization application period between May 5, 1987 to May 4, 1988. The district director further determined that the applicant admitted that he had been absent from this country from May 5, 1984 to August 25, 1984, and, therefore, exceeded the forty-five (45) day limit for a single absence from the United States during this period, as set forth in 8 C.F.R. § 245a.2(h)(1). Therefore, the district 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 denied the application on May 5, 2006.

On appeal, counsel once again acknowledges that the applicant had been absent from this country from May 5, 1984 to August 25, 1984 but asserts that he originally intended to return to this country by May 31, 1984 to return to work. Counsel contends that the applicant's return to the United States had been delayed by an emergent reason, specifically complications arising during the course of the

pregnancy of the applicant's wife. Counsel claims that the applicant was forced to remain in Ecuador to care for his wife and family as his wife's doctor had ordered complete bed rest for her to ensure her well being and the health of her unborn child.

Although the district director concluded that there appeared to a discrepancy in the time line of the pregnancy of the applicant's wife in the notice of denial, the notice does not contain a substantive and specific reason for such a finding. The record contains a photocopy of the Spanish language birth certificate of his son, [REDACTED] and corresponding certified English translation. This document reflects that the applicant son was born on February 12, 1985. As generally accepted as fact, the full term period of gestation for a human baby from conception to birth is nine months. Therefore, it is evident that a baby born on February 12, 1985 would have been conceived nine months prior to such date, on or about May 12, 1984. Consequently, the general time line presented by the applicant for the pregnancy of his wife must be considered as logical and reasonable regarding the dates of the conception and birth of his son. While not dealt with in the district director's decision, there must, nevertheless, be a further determination as to whether the applicant's prolonged absence from the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988) holds that emergent means "coming unexpectedly into being."

In the response to the notice of intent to deny, the applicant submitted four affidavits as well as his own statement and that of counsel in which all parties assert that the applicant's wife became pregnant shortly after his return to Ecuador on May 5, 1984. All of the parties contend that the applicant's wife suffered complications during the first trimester of her pregnancy. As the applicant's wife became pregnant on or about May 12, 1984, the first trimester of her pregnancy included that period from May 12, 1984 to August 12, 1984. However, the applicant, counsel, and the affiants have all failed to specify the exact date that the applicant's wife suffered such complications. Furthermore, the record does not contain any corroborative evidence such as medical or hospital records to demonstrate the specific date that the applicant's wife initially began having these complications. In addition, the applicant listed the purpose of this trip as "visit family" at part #32 of the Form I-687 application without indicating that his return to this country was delayed for any reason. Therefore, it cannot be concluded that complications suffered by the applicant's wife during the first trimester of her pregnancy occurred prior to the forty-fifth day of the applicant's absence on June 19, 1984. Without specific and direct evidence demonstrating the date the applicant's wife suffered complications, the applicant cannot be considered to have established that an emergent reason delayed his return to the United States on the occasion of his absence from the United States from May 5, 1984 to August 12, 1984 within the meaning of *Matter of C-*, *Id.* 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 reiterates the applicant's claim of residence in this country for the requisite period and states that he submitted sufficient evidence to support such claim even if such evidence consisted solely of affidavits. However, the fact that the applicant has submitted only affidavits in support of his claim of residence does not affect the credibility of his claim, instead it is the lack of sufficiently detailed and verifiable testimony relating to the applicant's residence for the entire requisite period from prior to January 1, 1982 to the termination of the legalization application period on May 4, 1988 in these affidavits that lessens the credibility of the applicant's claim of residence. The credibility of the applicant's claimed residence is further undermined by those previously discussed conflicts between the applicant's testimony and the testimony contained in the affidavits of [REDACTED] and [REDACTED].

The absence of sufficiently detailed supporting documentation and the existence of conflicting testimony that contradicts elements of the applicant's claim of residence seriously undermines the credibility of the supporting documents, as well as the credibility of the applicant's claim of residence in this country for the period in question. Pursuant to 8 C.F.R. § 245a.2(d)(3), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. The applicant has failed to submit sufficient credible documentation to meet his burden of proof in establishing that he has resided in the United States since prior to January 1, 1982 to May 4, 1988 by a preponderance of the evidence as required under both 8 C.F.R. § 245a.2(d)(3) and *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

Given the applicant's reliance upon supporting documents with minimal probative value, 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 May 4, 1988 as required under section 245A(a)(2) of the Act. 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.