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U.S. Citizenship
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Services

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FILE:



Office: NEW YORK

Date:

APR 02 2008

MSC 06 131 14333

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. 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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. The appeal will be dismissed.

The district director denied the application because the applicant failed to demonstrate credibly that he entered the United States before January 1, 1982, and thereafter resided in a continuous unlawful status.

On appeal, counsel asserted that the evidence submitted demonstrates the applicant's eligibility.

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 was 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 confirm 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).

For purposes of establishing residence 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 resided continuously in the United States from January 1, 1982 until he or she filed his or her application, was continuously physically present in the United States from November 6, 1986 until the date of filing the application, 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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 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 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.

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant's employment must provide the applicant's address at the time of employment, identify the exact period of employment, show periods of layoff, state the applicant's duties, declare whether the information was taken from company records, and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

The applicant submitted the instant Form I-687 on October 31, 2005. The record contains:

- a receipt dated April 4, 1986,
- a previous Form I-687 signed by the applicant on October 21, 1987,
- an Affidavit of Residence dated October 4, 1988,
- a Form for Determination of Class Membership in *CSS v. Meese* that the applicant signed on January 13, 1989,
- a Legalization Front-Desking Questionnaire that the applicant signed on November 2, 2000,
- a G-325A Biographic Information form that the applicant signed on December 1, 2002,
- an affidavit dated December 12, 2005 from [REDACTED]
- a letter dated January 9, 2006 from [REDACTED] of Sacramento, California, and
- notes from the applicant's March 14, 2006 interview.

The record contains no other evidence pertinent to the applicant's continuous residence in the United States during the salient period.

The April 4, 1986 appears to indicate that the applicant bought a pair of shoes on that date in Sacramento, California.

On the Form I-687 application, dated October 21, 1987, the applicant stated that he lived at [REDACTED] in Oakland California, from December 1980 to February 1986. This office believes that the applicant may have intended to state that he lived at [REDACTED] in Oakland, which is in the East Oakland section of the city. The applicant stated that, from March 1986 to "Present," (October 21, 1987) he lived at [REDACTED] in the Bronx. The applicant also claimed on that application that he worked for the McArthur Nursing Home at 309 McArthur Boulevard in Oakland, California from January 1981 to February 1986, and for the Geneva Employment Agency in New York City from March of 1986 to "Present." (October 21, 1987)

The applicant also stated on the October 21, 1987 application that he left the United States during September 1987 and returned during the same month, and that his last entry into the United States was on September 12, 1987.

On the instant Form I-687 application, dated October 1, 2005, the applicant stated that he lived at [REDACTED] in Sacramento, California, but did not provide the dates he lived at that address. This office believes that the applicant may have meant to state that he lived at [REDACTED] in Fairfield, California, although Fairfield is about 40 miles from Sacramento. The applicant stated that he lived at [REDACTED] in Sacramento, but did not provide dates. The applicant stated that he subsequently lived at [REDACTED] in Sacramento, but did not provide dates. Finally, the applicant stated that from August 2005 to "Present" (October 1, 2005) he lived at [REDACTED] in Queens, New York.

The Affidavit of Residence is a form affidavit, with spaces for the applicant's name, the affiant's name, their mutual address, and the dates of habitation there. In it, the affiant, [REDACTED], stated that she had resided at [REDACTED] in the Bronx with the applicant from March 1986 to "Present" (October 4, 1988). The affiant attested, in a preprinted portion of the affidavit, that, "The rent receipts and household bills are in my name and the applicant contributes toward the payment of the rent and household bills."

On the class membership form the applicant indicated that he first entered the United States, without inspection, on December 4, 1980; that last departed the United States September 1, 1987, to meet a friend; and that he returned to the United States on September 12, 1987, by car, without inspection.

Finally, the applicant stated that he tried to file an application for legalization on or before May 4, 1988, that a Qualified Designated Entity (QDE) informed him that he was ineligible and did not process his claim.

On the Front-Desking Questionnaire the applicant stated that during October 1987 he attempted to file a legalization application at a QDE in the Bronx, but that they told him he was ineligible and dissuaded him from filing. The applicant stated that he subsequently sought information from an INS service center, with the same result.

The December 12, 2005 affidavit of _____ states that the affiant met the applicant during the fall of 1987 and has remained in touch with him since. Although the document is dated December 12, 2005 it was attested to by a notary on February 6, 2006.

At his March 4, 2006 interview the applicant stated that after entering the United States during December 1980 he lived in Nogales, Arizona and Fairfield, California for four years, but did not state the period during which he claimed to have lived at each.

In her January 9, 2006 letter _____ stated that her late husband introduced her to the applicant in 1985, that he lived at their house doing household duties, and that the applicant left their house to live elsewhere in Sacramento during 1989. Thus, _____ attests that, from 1985 to 1989, the applicant lived at her home in Sacramento, California, and that he continued to live in Sacramento after that.

Various versions of the applicant's employment and residential histories conflict. Specifically, on his original Form I-687 application, which the applicant tried to submit on or after October 21, 1987, the applicant stated that he lived in Oakland, California from December 1980 to February 1986, and in the Bronx from March 1986 through at least October 21, 1987. That version of the applicant's residential history conflicts with that in the letter from _____, that the applicant lived in her home in Sacramento, California from 1985 to 1989, and continued to live in Sacramento thereafter.

The applicant also claimed, on his October 21, 1987 application, that he worked for the McArthur Nursing Home at 309 McArthur Boulevard in Oakland, California, and for the Geneva Employment Agency in New York City from March of 1986 to "Present." (October 21, 1987) This version of events conflicts with M _____'s assertion that the applicant lived and worked in her house in Sacramento from 1985 to 1989 and continued to live in Sacramento thereafter.

The Affidavit of Residence indicates that the applicant resided at _____ in the Bronx from March 1986 to "Present" (October 4, 1988). This history conflicts with M _____'s assertion that the applicant lived and worked in her house in Sacramento from 1985 to 1989 and continued to live in Sacramento thereafter.

On the Front-Desking Questionnaire the applicant stated that during October 1987 he attempted to file a legalization application at a QDE in the Bronx. Although his subsequent claim of residence in Sacramento from 1985 to at least 1989 does not flatly contradict that assertion, it renders it unlikely.

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. Further, the applicant must

resolve any inconsistencies in the record with competent, independent, objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

In a Notice of Intent to Deny (NOID), dated March 14, 2006, the director found that the applicant had provided insufficient evidence to demonstrate his continuous unlawful residence in the United States since January 1, 1982. The director also noted that, at his interview, the applicant referred to [REDACTED] as “he,” thus indicating that he may not know her.¹ The director indicated that CIS intended, therefore, to find the applicant ineligible for temporary resident status pursuant to Section 245A of the Act. The applicant was accorded 30 days to respond to that notice. The director did not then note the conflicting employment and residential histories.

In response, the applicant’s previous counsel submitted a brief dated April 12, 2006. In that letter previous counsel stated, “The applicant testimony was detailed, consistent, and believable to support a plausible claim of eligibility.” [Errors in the original.] Counsel also stated, apparently in the alternative, “Moreover, inconsistencies found in the applicant’s written application and testimony were very minor and they do not lead to question of credibility.” [Errors in the original.] Counsel did not explain the applicant’s reference to [REDACTED] as “he,” but characterized it as immaterial.

In the Notice of Decision, dated July 26, 2006, the director denied the application based on the reasons stated in the NOID, that is, that the applicant had failed to credibly demonstrate continuous unlawful residence in the United States from prior to January 1, 1982, through the date he filed or attempted to file his original Form I-687. Again, the director did not then note the discrepancies between the various employment and residential histories claimed by the applicant.

On appeal, the applicant’s current counsel² stated that, given the passage of time, the evidence submitted by the applicant should be sufficient to establish his eligibility. Counsel also stated that [REDACTED]’ husband told her, in 1985, that he had met the applicant in 1981. Counsel provided no evidence in support of that assertion.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. This office will not consider counsel’s assertion that [REDACTED] knows that the applicant was present in the United States prior to her meeting him.

¹ [REDACTED] provided a copy of her husband’s Certificate of Ordination, which, along with other evidence in the record, demonstrates that [REDACTED] is a woman.

² Counsel submitted a Form G-28 Notice of Entry of Appearance, properly executed by the applicant, with the appeal. On that form the applicant acknowledged counsel as his attorney of record.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate continuous unlawful residence in the United States from prior to January 1, 1982, through December 31, 1987.

The applicant submitted no evidence pertinent to his presence in the United States from December 1980, when he claims to have entered the United States, to the unspecified date during 1985 when the applicant allegedly met [REDACTED]. The applicant's own assertions are the only indication in the record that the applicant lived in the United States during that period. As was noted above, pursuant to 8 C.F.R. § 245a.2(d)(6), an applicant's own testimony is insufficient to satisfy the burden of proof in this matter. The applicant's failure to provide any evidence that he was present in the United States prior to 1985 would be sufficient reason, in itself, to find that the applicant has not demonstrated that he entered the United States prior to January 1, 1982 and continuously resided in the United States through the date he filed his initial legalization application.

But further, [REDACTED] letter conflicts with the residential history in the October 4, 1988 Affidavit of Residence, conflicts with the applicant's own statement of his employment and residential history that he reported on the Form I-687 that he signed on October 21, 1987, and appears to conflict with the applicant's statement, made on the Front-Desking Questionnaire, that the applicant submitted or attempted to submit that Form I-687 in the Bronx during October 1987. Further, the applicant's reference to [REDACTED] as "he" appears to indicate that he has never met her.

[REDACTED] letter states that she housed and employed the beneficiary for approximately four years. The applicant is using that letter to demonstrate his eligibility. Contrary to counsel's assertion, whether the applicant has met the affiant is relevant to a material issue in this matter.

The discrepancies listed are neither minor nor few. They destroy the credibility of all of the evidence submitted in support of the application. In light of the multiple serious discrepancies between the applicant's various claims of employment and residence and the evidence, that evidence cannot credibly support the applicant's claim of continuous residence in the United States during the required period.

The applicant failed to sustain his burden of establishing continuous unlawful residence in the United States from prior to January 1, 1982, through October 1987 as required by section 245A(a)(2) of the Act. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act. The application was correctly denied on that basis, which has not been overcome on appeal.

In legalization proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed.

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