



U.S. Citizenship
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FILE: [REDACTED] Office: CHICAGO Date: **APR 08 2008**
MSC 04 317 10210

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: SELF-REPRESENTED

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

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director determined that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. Specifically, the director noted that the applicant failed to submit evidence to establish continuous and physical presence in the United States from January 1, 1983 to January 31, 1984. Accordingly, the director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, the applicant provides three additional affidavits attesting to the applicant's continuous residence in the United States during the time period in question.

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). 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).

Under the CSS/Newman Settlement Agreements, for purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b)(1), "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 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).

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, 431 (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.

In the present matter, the director analyzed the documentation submitted in support of the applicant's claim and concluded that insufficient documentation had been submitted to establish his continuous physical presence. The director based this finding primarily on information provided in the applicant's 2004 social security statement, which showed that with the exception of 1983 and 1984, the applicant earned income from 1979 to 2003. Accordingly, the director determined that the applicant failed to establish his continuous presence in the United States during those two years. While the director's observation is accurate, the record also shows that the applicant has provided information in No. 32 of his Form I-687 which shows that he was absent from the United States from January 1, 1984 to August 1985. As such, the continuity of the applicant's residence in the United States is undermined by a combination of two contributing factors: 1) the social security statement showing no income earned in 1983 and 1984; and 2) the applicant's own admission on Form I-687 that he was absent from the United States from January 1984 to August 1985, a period of approximately 18 months.

With regard to the first contributing factor, the record contains a notarized employment letter dated February 15, 1991 from Wisconsin Tool And Stamping Company. The letter was signed by the company's personnel manager, who provided the applicant's name and social security number and stated that the applicant was employed by this company from August 1980 through September 1983 and again from August 1985 continuing through the date of the letter. On appeal, the applicant submits three affidavits, two of which indicate that the applicant took a leave absence from this company in September 1983, thereby indicating that he was employed until the leave of absence. However, neither the employment letter nor the two affidavits are consistent with the information provided in the applicant's social security statement. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the present matter, the record lacks

documentation to resolve the considerable inconsistency between the contemporaneous and non-contemporaneous documentation submitted by the applicant.

With regard to the second contributing factor, i.e., the applicant's prolonged absence, the regulation at 8 C.F.R. § 245a.1(c) states that an alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States 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 is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation.

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to 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 present matter, the applicant provided a translated medical certificate dated September 15, 1990 indicating that the applicant's wife was under a doctor's care from January 22, 1984 to June 15, 1984 due to a surgical procedure. The certificate states that the applicant attended to his wife during her recovery.

On appeal, the applicant provides affidavits from [REDACTED] and [REDACTED] and [REDACTED]. Affiants [REDACTED] and [REDACTED] whose affidavit is dated October 22, 2005, stated that the applicant rented an apartment in their building from August 1979 to October 1998. The affiants stated that the applicant continued renting the apartment even during his absence. [REDACTED] affidavit, dated October 14, 2005, and [REDACTED]'s affidavit, dated October 16, 2005, are nearly identical in their content. Both affiants claimed that the applicant was their co-worker at Wisconsin Tools and Stamping Company and that he took a leave of absence from the job from 1983 until the middle of 1985. Both affiants also claimed to know the applicant since 1979, but neither specifically stated how he or she met the applicant, as the applicant's employment with the company did not commence until 1980. Regardless, both affiants reiterated the general time period of the applicant's claimed absence and all three affiants agreed that there was an absence.

The applicant's statements and the medical documentation submitted suggest that the applicant left the United States in order to care for his spouse. However, the documentation establishes that the applicant's spouse had a medical need for such care until June 1984. The applicant claims that he did not return to the United States until August 1985, more than one year later. While the applicant submitted documentation to explain why he remained outside of the United States until June 1984, this documentation does not explain why he remained outside of the United States until August 1985. Furthermore, the fact that the applicant had a valid basis for his departure from the United States does not excuse the absence. Rather, the applicant must first establish that the absence was prolonged by an emergent reason that suddenly came into being. In the present matter, the record suggests that the applicant was aware at the time of his departure that he would remain outside of the United States for as long as it took him to complete the purpose of his trip, that is, for an indefinite period.

The applicant could have reasonably anticipated that an absence for such a purpose would have likely been an extended one. In the absence of clear evidence that the applicant intended to return within 45 days, it cannot be concluded that an emergent reason "which came suddenly into being" delayed the applicant's return to the United States beyond the 45-day period.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she has *continuously* resided in an unlawful status in the United States from prior to January 1, 1982 through the date of filing, is admissible to the United States under the provisions of section 245A of the Act, 8 U.S.C. § 1255a, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). In the present matter, the applicant's inability to establish that he resided in the United States in 1983 and 1984 as well as his prolonged period of absence from the United States contribute the AAO's overall finding that the applicant did not continuously reside in the United States for the requisite period.

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