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U.S. Citizenship
and Immigration
Services

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FILE: MSC-04-335-11182

Office: NEW YORK

Date: **AUG 04 2008**

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. 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. If your appeal was sustained or remanded for further action, you will be contacted.

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 decision 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. The director further determined that the applicant failed to establish his class membership under the CSS/Newman Settlement Agreements. 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 asserts that during the interview he was nervous and misstated the duration of his absence from the United States during the requisite period.

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 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 clarify 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).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term “until the date of filing” in 8 C.F.R. § 245a.2(b) 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 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.* at 80. 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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The record shows that the applicant submitted a Form I-687 Application and Supplement to Citizenship and Immigration Services on August 30, 2004. At part #30 of the Form I-687 application where applicants are asked to list all residences in the United States since first entry, the applicant showed that during the requisite period he resided in New York, New York from 1981 until 1990. At part #33, he showed his first employment in the United States to be as a self-employed vendor in New York, New York from 1981 until 1998. The Form I-687 requests applicants to list the dates of their employment and residence in the United States in the format of month and year. However, the applicant failed to comply with these instructions. This lack of detail draws into question the credibility of the applicant’s claim of continuous residence in the United States during the requisite period.

The applicant submitted the following documentation:

- An affidavit from [REDACTED] dated June 18, 2005, which states, “[p]lease take Notice that I, the Undersigned, [REDACTED] Being duly sworn, depose and say in the Matter

of the Presence of [REDACTED] in the U.S.: that I am the Witness Herein. I have known [REDACTED] before December 31st 1981 in New York.” This affidavit fails to establish how [REDACTED] first became acquainted with the applicant. It is also ambiguous as to the date of their first acquaintance. Furthermore, the affidavit fails to convey [REDACTED] direct personal knowledge of the applicant’s continuous residence in the United States during the requisite period. Given these deficiencies, this affidavit is without any probative value as evidence of the applicant’s continuous residence in the United States during the requisite period.

- An affidavit from [REDACTED], dated June 18, 2005, which states, “. . . I have witnessed [REDACTED] having temporarily Left the U.S. to travel abroad after November 6, 1986. Upon information and belief, due to that temporary Absence from the U.S., [REDACTED] could not manage to successfully file for his Benefits for the LULAC/CSS Amnesty Program.” This affidavit fails to establish [REDACTED] direct personal knowledge of the applicant’s departure from the United States on November 6, 1986. There are no details on how [REDACTED] witnessed the applicant’s departure from the United States. Given this deficiency, this affidavit is without any probative value as evidence of the applicant’s residence in the United States in November 1986.

On June 20, 2007, the director issued a Notice of Intent to Deny (NOID) to the applicant. The director found that the affidavits from [REDACTED] are neither credible nor amenable to verification. The director noted that the applicant testified he first left the United States to go to Senegal in June 1985 to visit family and returned in 1989. The director found that this testimony is in conflict with the applicant’s Form I-687, which provides that he departed the United States from June 1985 until August 1985 to visit his family in Senegal. The director found that the applicant did not maintain continuous residency in the United States because both of these absences are individually in excess of 45 days. The director noted that the applicant did not establish that his absence was for an emergent reason. The director determined that the applicant is, therefore, ineligible for temporary resident status pursuant to 8 C.F.R. § 245a.2(h)(i). The director further determined that the applicant failed to establish his class membership under the CSS/Newman Settlement Agreements. It should be noted that although the director found that the applicant failed to establish his class membership, she did not deny the application for class membership. Instead, the director, based on the applicant’s class membership, adjudicated the application for temporary residence on the merits.

The applicant was afforded a period of thirty (30) days to submit additional evidence in response to the NOID. Pursuant to 8 C.F.R. § 245a.2(d)(6), to meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documentation that may be furnished 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).

In rebuttal to the NOID, the applicant submitted a statement, which provides, "I would also like to let you know that I was very honest during the interview. I did say the truth. Since the evidence that I provided before has no probative value, I am including another one with this letter. This affidavit contained proof that the affiant was in the united stated [sic] prior [sic] 1981 and it also included his phone number and identification. He explained in depth detail of how and when we met."

The affidavit at issue in the applicant's rebuttal is from [REDACTED] The affidavit from dated July 20, 2007, states in pertinent part:

. . . I am a citizen of the United States and I know [REDACTED] since 1981. I met [REDACTED] [sic] cultural festival in Harlem New York. When I met him he was working as a street vendor selling African Art and other general merchandizes. Though I met many people at the festival, [REDACTED] was the only vendor whom I kept contact with. This was due to the fact that he had the most exquisite African Art I [sic] never seen before. So I took a particular interest in knowing him well. After that we met on many other occasions discussing about art and our religion (Muslim). . . .

This affidavit describes how [REDACTED] first became acquainted with the applicant. However, it does not detail their contact throughout the requisite period. Relevant details would include the frequency and type of contact they maintained during this period. Given this deficiency, this affidavit is of little probative value as evidence of the applicant's continuous residence in the United States during the requisite period.

On July 21, 2007, the director issued a denial notice to the applicant. The director determined that the information and documentation the applicant submitted in rebuttal to the NOID were insufficient to overcome the grounds for denial. The director concluded that the applicant failed to meet his burden of proof in the proceeding, and denied the application.

On appeal, the applicant asserts that he first traveled to Senegal from June 1985 until August 1985. The applicant states that he traveled again to Senegal from August 1989 until October 1989. The applicant states that he broke his continuous residence of more than 45 days abroad because of an emergency situation. The applicant states that during his first trip in 1985 he stayed longer because his father was very ill and required his physical presence for moral support. The applicant states that during his second visit to Senegal in 1989 his father's condition became worse, so he again stayed to give him support. The applicant notes that his father passed away on the 5th week of his second visit.

The issue of the applicant's absence from the United States during the requisite period relates to his ability to establish his continuous residence in the United States. According to 8 C.F.R. § 245a.2(h)(1), an applicant for temporary resident status shall be regarded as having resided continuously in the United States if, at the time of filing of the application, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between January 1, 1982 through the date the application for temporary resident status is filed, unless the applicant can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed. Since the record does not show the exact dates of the applicant's departure from the United States in 1985, a determination on whether this absence exceeded 45 days will not be made in this proceeding.

In summary, the applicant has failed to provide credible, reliable and probative evidence of his residence in the United States during the requisite period. The applicant has not provided sufficient evidence to establish that he entered the United States prior to January 1, 1982. Nor has he established that he has resided in the United States during the requisite period. The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence. *See* 8 C.F.R. § 245a.2(d)(3). The applicant submitted as evidence of his residence in the United States during the requisite period, two affidavits from [REDACTED] and an affidavit from [REDACTED]. As discussed, the affidavits from [REDACTED] are without any probative value and the affidavit from [REDACTED] is of little probative value. Pursuant to 8 C.F.R. § 245a.2(d)(6), the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. Since the applicant's documentation is, at best, of little probative value, he has not furnished sufficient evidence to meet his burden of proof in this proceeding.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, seriously detracts from the credibility of his claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the lack of credible supporting documentation, it is concluded that the applicant has failed to establish by a preponderance of the evidence that he has continuously resided in an unlawful status in the United States for the requisite period 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.