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U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEW YORK

Date:

AUG 13 2008

MSC-05-330-10772

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. 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.

A handwritten signature in black ink, appearing to read "Robert P. 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 decision is now before the Administrative Appeals Office 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 noted in his decision that during the applicant's interview at the district office in New York on April 11, 2006 he testified under oath that he first entered the United States in 1981, that he left the United States for Kenya in January of 1987, and that he remained there for three months, returning to the United States in April of 1987. The director also noted that the applicant was 11 years old when he allegedly entered the United States and that he was unable to recall during his interview with immigration officials where he lived during the requisite period. The director noted that the applicant stated during his interview that he traveled to Kenya because his uncle's father died, but he failed to submit evidence of his departure from or reentry into the United States as claimed. The director further noted that the statements made by the applicant during his interview were inconsistent with the statements he made on his Form I-687 application at part #32, pertaining to his absence from the United States. The director denied the application finding that the applicant had not met his burden of proof and that he was therefore not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, counsel asserts that the director's decision is contrary to the evidence submitted by the applicant, and therefore, it should be reversed.

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

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. 8 C.F.R. § 245a.2(h)(1).

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."

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 of proceeding shows that the applicant submitted a Form I-687 application and Supplement to Citizenship and Immigration Services (CIS), on August 26, 2005. The applicant indicated at part # 32 of the Form I-687 application where absences from the United States were to be listed, that he left the United States and traveled to Kenya for a "family visit" from January of 1987 to April of 1987.

In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant submitted the following attestations:

- A declaration from [REDACTED] regarding an individual named [REDACTED]. There is no reference in the declaration to the applicant in the present matter. Because the declaration does not appear to pertain to the applicant in any way, it cannot be afforded any weight in establishing that the applicant resided in the United States during the requisite period.
- A declaration from [REDACTED] in which she stated that she has known the applicant since 1982 and that he is a loyal and dedicated person. Here, the declarant fails to indicate under what circumstances she met the applicant, the frequency with which she saw the applicant, or any other detail that would lend credence to her claimed knowledge of the applicant and the applicant's residence in the United States during the requisite period. Because the declaration is significantly lacking in detail, it can be afforded only minimal weight in establishing that the applicant resided in the United States during the requisite period.
- An affidavit dated December 3, 2005 from [REDACTED] who stated that the applicant is his brother and that the applicant was with him in the United States since 1981. The affiant further stated that he claimed the applicant on his tax returns during "that period" and that he has requested from the Internal Revenue Service (IRS) copies of his tax returns for that period. The affiant enclosed a copy of his Form 4506-T, Request for Transcript of Tax Return for the years 1982 through 1985, bearing a receipt date of November 29, 2005. The applicant also submitted a copy of a print-out from an unidentified source that indicated that the affiant reported his income for the years 1984 through 1993 and 1998 through 2004. The affiant did not specify the time period during which the applicant purportedly lived with him, nor did he provide copies of his tax returns for any of these years. The affiant also failed to provide any detail relating to the circumstances of the applicant's claimed residence in the United States during the requisite period. Given these deficiencies, the affidavit can be accorded only minimal weight in establishing that the applicant resided in the United States during the requisite period.
- An affidavit from [REDACTED] of Morgan State University in which he stated that he has known the applicant since 1981. The affiant also stated that the applicant is trustworthy, reliable and dependable. Here, the affiant fails to indicate under what circumstances he met the applicant, the frequency with which he saw the applicant, or any other detail that would lend credence to his

claimed knowledge of the applicant and his residence in the United States during the requisite period. Because the affidavit is significantly lacking in detail, it can be afforded only minimal weight in establishing that the applicant resided in the United States during the requisite period.

The applicant submitted the following evidence in response to the director's Notice of Intent to Deny (NOID):

- A letter dated December 21, 2005 from the IRS research clerk in which it is stated that the office was unable to find a record of [REDACTED] having filed tax returns for December 31, 1982, or December 31, 1983, and that therefore, they were unable to send transcripts for those years.
- A copy of a death certificate for [REDACTED] showing that he died in Kenya on July 6, 1991. This certificate is dated subsequent to the requisite period, and therefore, is not relevant to the applicant's residence in the United States.

In denying the application the director noted that the attestations submitted were not credible and that the applicant had failed to submit school records demonstrating his enrollment in a school in the United States as a child. The director also noted that the record demonstrated the applicant's absence from the United States for more than 45 days during the requisite period.

On appeal, counsel asserts that the applicant has been present in the United States since 1981, with the exception of his trip to Kenya in 1987 for three months in order to attend his uncle's father's funeral. Counsel also asserts that the letter written by the declarant [REDACTED] is further proof of the applicant being present in the United States since 1981. Counsel further asserts that the applicant arrived in the United States with his uncle and never received any formal schooling. Counsel concludes by asserting that the applicant's absence from the United States was casual and for a brief period, and that he always intended to return to this country.

The applicant resubmitted on appeal the declaration from [REDACTED]. The applicant also submitted copies of two letters from the IRS dated December 21, 2005 in response to the request made by [REDACTED] in which it was indicated that the agency only makes available, per request, copies of tax transcripts for the current calendar year and the three preceding years.

In the instant case, the applicant has failed to provide sufficient, credible and probative evidence to establish his continuous unlawful residence in the United States throughout the requisite period. He has failed to overcome the issues raised by the director. Although counsel asserts that the applicant's absence from the United States was casual and for a brief period, he has failed to demonstrate that his overstay was due to emergent reasons. The applicant provided no evidence to establish that he truly intended to return to the United States within 45 days. Neither has he submitted evidence sufficient to establish that due to emergent reasons his return was delayed. 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)). Here, the record lacks evidence to suggest that the applicant's absence was prolonged as a

result of unanticipated circumstances. *See Matter of C-*, *supra*. Thus, 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. Therefore, it cannot be concluded that the applicant resided continuously in the United States for the requisite period.

Although the applicant claims to have resided in the United States since he was 11 years old, he provided neither school records nor medical records to substantiate such claim. He also failed to provide any independent documentary evidence from or about any responsible adult or guardian to indicate the circumstances under which he survived in the United States during his childhood and throughout the requisite period. The applicant's brother states that he included the applicant on his tax returns as a **dependent since 1982, however the correspondence from the IRS indicates that** never filed tax returns for the 1982 or 1983 tax years. The attestations submitted are either not credible or are lacking in detail and therefore, can be accorded only minimal weight in establishing that the applicant resided in the United States throughout the requisite period.

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of this 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 applicant's reliance upon documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States for the requisite period 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.