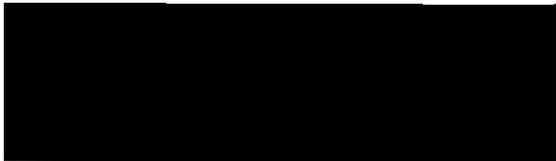




U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY



2
4

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 20 2008**
XCA 88 167 03080

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Temporary Resident Status under Section 210 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:
[REDACTED]

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: This matter is an application for temporary resident status as a special agricultural worker that was initially denied by the Director, Western Service Center and came before the Administrative Appeals Office (AAO) on appeal. The matter was remanded by the AAO and the application was subsequently denied again by the Director, California Service Center. The case is again before the AAO on appeal and the appeal will be dismissed.

The director initially denied the application because the applicant failed to establish the performance of at least 90 man-days of qualifying agricultural employment during the eligibility period. This decision was based on adverse information acquired by the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS) relating to the applicant's claim of employment for [REDACTED] on the [REDACTED]

On appeal from the initial denial, the applicant put forth a new claim of at least 90 days of qualifying agricultural employment for [REDACTED] and other unnamed individuals in the Brawley, California area in the period from May 1, 1985 to May 1, 1986. The applicant submitted three affidavits in support of his appeal.

The AAO remanded the case in order for the director to review and incorporate adverse information relating to the applicant's original claim of agricultural employment into the record. The director reviewed the derogatory information contained in the record and denied the application again based on the adverse information acquired by the Service relating to the applicant's claim of employment for [REDACTED] at the farm of [REDACTED]

On appeal from this most recent denial, counsel asserts that the applicant was not allowed to review the adverse information relating to his claim of employment for [REDACTED] on farm of [REDACTED] which the director relied upon to deny the application. Counsel claims that the withholding of such information constituted a violation of the applicant's right to due process.

In order to be eligible for temporary resident status as a special agricultural worker, an alien must have engaged in qualifying agricultural employment for at least 90 man-days during the twelve-month period ending May 1, 1986, and must be otherwise admissible under section 210(c) of the Immigration and Nationality Act (Act) and not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a). An applicant has the burden of proving the above by a preponderance of the evidence. 8 C.F.R. § 210.3(b).

On the Form I-700 application, the applicant claimed 99 man-days weeding sugar beets and onions for [REDACTED] at the farm of [REDACTED] from May 1985 to May 1986.

In support of the claim, the applicant submitted a corresponding Form I-705 affidavit and a separate acknowledgement of employment both signed by [REDACTED]. On the affidavit, [REDACTED] indicated that he was a foreman at the farm of [REDACTED] in Brawley, California.

In attempting to verify the applicant's claimed employment, the Service acquired information which contradicted the applicant's claim. [REDACTED] provided the Service with two separate lists of foreman that worked for him during the qualifying period. On both of these lists, [REDACTED] indicated that the individual who signed the applicant's employment documentation, [REDACTED] was not employed as a foreman during the qualifying period.

On February 6, 1992, the applicant was advised in writing of adverse information obtained by the Service, and of the Service's intent to deny the application. The applicant was granted thirty days to respond. The record shows that the Service's notice was returned by the United States Postal Service (U.S.P.S.) as undeliverable.

The director concluded the applicant had not overcome the derogatory evidence, and denied the application for the first time on April 7, 1992. Although the record shows that this notice was also returned as undeliverable by the U.S.P.S., the Service subsequently remailed copies of both the notice of intent to deny and notice of denial to the applicant on October 14, 1992.

On appeal from the initial denial, the applicant put forth a new claim of at least 90 days weeding onions and beets for [REDACTED] and other unnamed individuals in the Brawley, California area in the period from May 1, 1985 to May 1, 1986. However, the applicant failed to submit any independent evidence to support his claim of employment for [REDACTED]. In addition, the applicant failed to provide any explanation as to why his new claim of employment for Juan [REDACTED] was not listed on the Form I-700 application and was only advanced after he had been confronted with adverse information regarding his original claim of employment for [REDACTED] at the farm of [REDACTED]. Consequently, the applicant's new claim of employment for [REDACTED] cannot be considered as credible.

In support of his appeal, the applicant submitted three affidavits that are signed by [REDACTED], [REDACTED], and [REDACTED], respectively. All three affiants asserted that the applicant had performed qualifying agricultural services for different farm labor contractors including [REDACTED] in the Brawley, California area in the 1985/1986 season. All three affiants admitted that their knowledge regarding the applicant's agricultural employment was derived from conversational interchange with members of the family. As such, the probative value of these affiants' testimony is severely limited as they have all acknowledged that their knowledge of the applicant's agricultural employment was gained through mere repetition of what was heard in conversations with other family members rather than knowledge derived from their own direct personal experience and sensory perceptions. Furthermore, the testimony of these three affiants is further limited by the fact that they have acknowledged that they are

members of the applicant's family who have a direct interest in the outcome of these proceedings rather than independent and disinterested third party witnesses.

The record shows that the AAO subsequently remanded the case because the director had apparently relied upon adverse information in denying the application and such adverse evidence had not been incorporated into the record. Specifically, the AAO determined that the director utilized California DE-3B Wage Reports to deny the application without placing copies of these wage reports in the record. However, a review of the notice of intent to deny reveals that the director relied upon lists provided by [REDACTED] of foremen he employed during the qualifying period rather than California DE-3B Wage Reports to conclude that the applicant's claim of employment for [REDACTED] at the farm of [REDACTED] was not credible. While the AAO concluded that the lists of foreman provided by [REDACTED] contained conflicting information, a review of both lists reflects that [REDACTED] clearly specified that [REDACTED] was not employed by him as a foreman during the qualifying period in each of these lists. Consequently, it must be concluded that the California DE-3B Wage Reports referenced by the AAO need not be incorporated into the record as the lists of foremen provided by [REDACTED] are contained in the record of proceedings and constitute sufficient adverse evidence to impair the applicant's claim of at least 90 man-days of qualifying agricultural employment during the eligibility period.

The director reviewed this derogatory information and denied the application again based on adverse information acquired by the Service relating to the applicant's claim of employment for [REDACTED] on the [REDACTED]. The record further shows that director once again informed the applicant that [REDACTED] indicated that the individual who signed his employment documentation, [REDACTED], was not a foreman during the qualifying period in the notice of denial issued on November 10, 2007.

On appeal from this most recent denial, counsel contends that the director has relied upon dated and possibly incorrect information to deny the application. Counsel insists that there may be more than one [REDACTED] as the director had indicated that notes contained in the record reflected that [REDACTED] rather than [REDACTED] had informed the Service that [REDACTED] was not a foreman during the qualifying period in the notice of denial issued on November 10, 2007. Nevertheless, a review of documents contained in the record clearly demonstrates that counsel's contention that there may be more than one [REDACTED] is without merit. Specifically, such documents include a letter containing the letterhead of [REDACTED] dated June 29, 1988 from the attorney of [REDACTED] a letter containing the letterhead of [REDACTED] dated July 18, 1988 from [REDACTED] z, a separate undated handwritten letter containing the letterhead of [REDACTED] from [REDACTED], a memorandum dated December 2, 1988 from the Service officer who called the phone number on the letterhead of [REDACTED] and conducted a telephonic interview with [REDACTED] on such date, and a letter dated December 8, 1988 from the Service officer who personally interviewed [REDACTED] z.

Counsel claims that [REDACTED] may very well have employed [REDACTED] as a foreman but did not know that this was his full and real name and instead knew him by a nickname such as [REDACTED]. However, neither the applicant nor counsel provided any evidence to support this claim. Without independent evidence to corroborate counsel's claim, this explanation cannot be considered as persuasive. 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 asserts that the applicant was not allowed to review the adverse information relating to his claim of employment for [REDACTED] on the farm of [REDACTED] which the director relied upon to deny the application. Counsel claims that the withholding of such information constituted a violation of the applicant's right to due process. However, the pertinent regulation at 8 C.F.R. § 103.2(b)(16) states the following:

Inspection of evidence. An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

(ii) Determination of statutory eligibility. A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner, except as provided in paragraph (b)(16)(iv) of this section.

(iii) Discretionary determination. Where an application may be granted or denied in the exercise of discretion, the decision to exercise discretion favorably or unfavorably may be based in whole or in part on classified information not contained in the record and not made available to the applicant, provided the regional commissioner has determined that such information is relevant and is classified under Executive Order No. 12356 (47

FR 14874; April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security.

(iv) Classified information. An applicant or petitioner shall not be provided any information contained in the record or outside the record which is classified under Executive Order No. 12356 (47 FR 14874; April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security, unless the classifying authority has agreed in writing to such disclosure. Whenever he/she believes he/she can do so consistently with safeguarding both the information and its source, the regional commissioner should direct that the applicant or petitioner be given notice of the general nature of the information and an opportunity to offer opposing evidence. The regional commissioner's authorization to use such classified information shall be made a part of the record. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

Clearly, the language of the regulation does not mandate that the Service or its successor CIS provide an applicant or petitioner with a copy of a document containing derogatory information used to deny an application or petition. Rather, the regulation requires that an applicant or petitioner be advised of such derogatory information and offered an opportunity to rebut the information and present information in his or her own behalf before the decision is rendered. This is the procedure that has been utilized in the instant case as the director issued two separate notices to the applicant specifically informing him of the derogatory information provided by [REDACTED]

Counsel argues that the applicant had submitted sufficient documentation to establish his eligibility and meet his burden of proof by showing that the claimed employment occurred by a preponderance of the evidence as required by *Matter of E- M-*, 20 I&N Dec. 77 (Comm. 1989). However, the precedent decision cited by counsel, *Matter of E- M-, Id.*, applies to applicants for temporary residence under section 245A of the Act rather than section 210 of the Act. Nevertheless, counsel is correct in part because an applicant for temporary residence status as a special agricultural worker under section 210 of the Act has the burden of proving the claimed employment occurred above by a preponderance of the evidence. 8 C.F.R. § 210.3(b). The question of whether the applicant has met his initial burden of proof is not at issue, but rather the issue is whether the applicant has met his secondary burden of proof in overcoming the adverse information provided by [REDACTED] as it relates to his purported foreman Ramon [REDACTED]. Upon a showing that the claimed employment occurred through a just and reasonable inference of the evidence submitted, the burden shifts to CIS to disprove the applicant's evidence by showing that the inference drawn from the evidence is not reasonable. 8 C.F.R. § 210.3(b). Upon a showing that the inference from the applicant's evidence is not reasonable, the burden of proof then shifts back to the applicant to overcome the adverse information.

In summary, the applicant, on his Form I-700 application, and [REDACTED], on the Form I-705 affidavit, both listed [REDACTED] as the applicant's employer on the farm of [REDACTED]. In addition, [REDACTED] specified that he employed the applicant in his capacity as foreman on the [REDACTED] farm. However, [REDACTED] informed the Service that he did not employ [REDACTED] as a foreman during the qualifying period from May 1, 1985 to May 1, 1986.

The adverse information provided by [REDACTED] serves to negate any inference from the original evidence that the claimed agricultural employment for [REDACTED] at the [REDACTED] farm occurred. Consequently, the burden of proof shifted back to the applicant, who subsequently failed to submit sufficient credible evidence to meet his secondary burden of proof of overcoming such derogatory evidence. Therefore, the documentary evidence submitted by the applicant relating to his application for special agricultural worker status cannot be considered as having any probative value or evidentiary weight.

Generally, 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. § 210.3(b)(1). Evidence submitted by an applicant will have its sufficiency judged according to its probative value and credibility. 8 C.F.R. § 210.3(b)(2). Personal testimony by an applicant which is not corroborated, in whole or in part, by other credible evidence (including testimony by persons other than the applicant) will not serve to meet an applicant's burden of proof. 8 C.F.R. § 210.3(b)(3).

There is no mandatory type of documentation required with respect to the applicant's burden of proof; however, the documentation must be credible. All documents submitted must have an appearance of reliability, i.e., if the documents appear to have been forged, or otherwise deceitfully created or obtained, the documents are not credible. *United Farm Workers (AFL CIO) v. INS*, Civil No. S 87 1064 JFM (E.D. Cal. June 15, 1989).

The fact that [REDACTED] has indicated that the individual who signed the applicant's employment documentation, [REDACTED], was not a foreman during the qualifying period directly contradicts the applicant's claim. The applicant has not overcome such derogatory evidence. Therefore, the documentary evidence submitted by the applicant cannot be considered as having any probative value or evidentiary weight.

The applicant has failed to establish credibly the performance of at least 90 man-days of qualifying agricultural employment during the twelve-month statutory period ending May 1, 1986. Consequently, the applicant is ineligible for adjustment to temporary resident status as a special agricultural worker.

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