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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CHICAGO

Date: AUG 27 2008

consolidated herein]
MSC 06 097 10964

IN RE:

Applicant:



APPLICATION: Application for Temporary Resident Status under 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.

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 (director) in Chicago, Illinois. It is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded for further action.

The director denied the application on the ground of abandonment, stating that the applicant failed to appear for an interview, without explanation, and failed to request a rescheduling of the interview.

The record indicates that the applicant filed a timely Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (the Act), together with a CSS/Newman (LULAC) Class Membership Worksheet, at the Chicago District Office on December 30, 2005.

On January 18, 2007, the director issued a decision denying the application on the ground of abandonment, in accordance with 8 C.F.R. § 103.2(b)(13), which provides that:

[I]f an individual requested to appear . . . for an interview does not appear, the Service does not receive his or her request for rescheduling by the date of the . . . interview, or the applicant . . . has not withdrawn the application . . . the application . . . shall be considered abandoned and, accordingly, shall be denied.

According to the director, the applicant had been notified by a Call-in Notice, Form G-56, to appear for an interview on November 20, 2006, but did not appear for the interview, or explain his absence by mail to the District Office, or request that the interview be rescheduled.

A denial due to abandonment may not be appealed, though an applicant may file a motion to reopen under 8 C.F.R. § 103.5. *See* 8 C.F.R. § 103.2(b)(15).¹ On February 15, 2007, the applicant filed a timely motion to reopen. In an accompanying letter counsel stated that neither she nor the applicant received the Call-in Notice scheduling the applicant's interview for November 20, 2006. Counsel also stated that she did not receive a copy of the decision.

In accord with counsel's latter claim, the AAO notes that the decision was addressed only to the applicant, despite the fact that a Form G-28, Entry of Appearance as Attorney or Representative, co-signed by the applicant and a member of counsel's law firm, was filed with the Form I-687. More importantly, there is no copy in the record of any Call-in Notice, Form G-56, advising the applicant that an interview was scheduled for November 20, 2006. In fact, there is no evidence in the record of any communication at all from the District Office to the applicant or counsel

¹ The director's Decision incorrectly advised the applicant that he could file an "appeal" within 30 days.

concerning the application for temporary resident status between the time of filing in December 2005 and the denial decision in January 2007.

Based on the documentation of record, the AAO concludes that the District Office did not inform the applicant or counsel of any interview scheduled for November 20, 2006. Accordingly, the denial of the application on the ground of abandonment was improper, and will be withdrawn. The matter will be remanded to the director for further action.

Consistent with its plenary power under 5 U.S.C. § 557(b) to review each appeal on a *de novo* basis, the AAO will also review the evidence of record relating to the applicant's claim of continuous unlawful residence in the United States during the requisite period for legalization under the Act.

An applicant for temporary resident status under section 245A of the Act 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. *See* 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. *See* 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. *See* 8 C.F.R. § 245a.2(b)(1).

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)(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. *See* CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

The regulations also provide that "the alien shall be regarded as having resided continuously in the United States if, at the time of filing . . . 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 for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed." 8 C.F.R. § 245a.1(c)(1)(i).

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. *See* 8 C.F.R. § 245a.2(d)(5).

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.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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 initial evidence of the applicant’s residence in the United States during the 1980s was submitted with a pair of Form I-687s that were filed by the applicant in April and August 1991 in connection with his application(s) for class membership in the LULAC or CSS class action lawsuit. As evidence of his residence in the United States between May 1, 1981, the date he claims to have entered the country, and May 4, 1988, the closing date of the one-year filing period for applications under section 245A of the Act, the applicant submitted the following documents:

- An affidavit by [REDACTED], a resident of Chicago, Illinois, dated April 6, 1991, stating that the applicant was his tenant in a first floor apartment at [REDACTED] in Chicago, Illinois, sharing the premises with others, from May 1981 through July 1985.

An affidavit dated March 20, 1991 by [REDACTED], manager of La Reynera Products, Inc., an importer of Mexican goods in Chicago, stating that the applicant was employed by his former company, La Reynosa Food Products, Inc.,

which went bankrupt in April 1987, as a packer, at a wage of \$3.35/hour, from June 1981 to January 1987.

- An affidavit by [REDACTED] a resident of Springfield, Illinois, dated March 20, 1991, stating that she met the applicant in June 1981 and knew that he worked for her son-in-law ([REDACTED]), at La Reynera Products, Inc.].

An affidavit by [REDACTED], the owner of Supermercado La Raza in Chicago, dated March 18, 1991, stating that the applicant had been a steady customer of his store since about July 1981.

A notarized statement by [REDACTED], co-host of Pepe's Mexican restaurant in Chicago, dated March 18, 1991, indicating that the applicant had been a steady customer since August 1981.

A receipt of [REDACTED], a clothing store in Chicago, dated July 5, 1982, identifying the applicant as the purchaser of a series of merchandise items between that date and September 15, 1982.

Another receipt of [REDACTED], dated March 12, 1983, identifying the applicant as the purchaser of a series of merchandise items between that date and April 3, 1983.

An affidavit by [REDACTED], the owner of Caperucita Roja in Chicago, dated April 6, 1991, stating the applicant had been a good client since July 1982, credit-worthy and always punctual in his payments.

A letter from [REDACTED] of St. Thomas The Apostle Catholic Church in Chicago, dated April 2, 1991, stating that he had been living at the church for the past seven years and that the applicant had been "working around the parish house" during that entire period since 1984.

- A notarized statement by [REDACTED], a resident of Chicago, dated April 11, 1991, indicating that the applicant is his brother and that they shared an apartment at [REDACTED] in Chicago from August 1985 to June 1986, sharing the rent of \$200/month.

A notarized statement by [REDACTED], a resident of Chicago, dated April 9, 1991, indicating that he had known the applicant since August 1986.

- A notarized statement by [REDACTED] a resident of Cicero, Illinois, dated March 21, 1991, indicating that the applicant and two others rented an apartment from him at [REDACTED] in Chicago from July to November 1986.

- An affidavit by [REDACTED], Secretary and one of the Elders of Cicero Spanish Congregation of Jehovah's Witnesses in Cicero, dated April 7, 1991, stating that he met the applicant in September 1986, that the applicant began attending services regularly in January 1987, and that by March 1987 he was a "baptized and dedicated member" of the church.

A notarized statement by [REDACTED], a resident of Chicago, dated April 9, 1991, indicating that the applicant and other co-tenants rented her apartment at [REDACTED] in Chicago from December 1986 to April 1988, paying rent of \$200/month.

- A notarized statement by [REDACTED], the paymaster of a restaurant called Doc Weed's, dated March 27, 1991, indicating that the applicant was employed as a busboy at its restaurant in Lombard, Illinois, from May 1987 to January 1989.
- A notarized statement by [REDACTED] the bookkeeper of a restaurant called Garibaldi's in Hoffman Estates, Illinois, dated March 27, 1991, indicating that the applicant was hired in an unstated capacity on January 12, 1987, let go, rehired on January 8, 1988, and terminated for good on November 12, 1988.
- An affidavit by [REDACTED] a resident of Cicero, dated July 27, 1991, stating that the applicant rented an apartment from him at [REDACTED] in Cicero from May 1 to September 30, 1988.

The record was later supplemented after the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on May 21, 2002.² In support of that application the following additional documents were submitted as evidence of the applicant's residence in the United States during the years 1981-1988:

- A notarized statement by [REDACTED] the ex-manager of La Reynosa Food Products Inc. and a resident of Chicago, dated February 7, 2004, indicating once again that the applicant had worked for the company as a packer, with wages of \$3.35/hour, from June 1981 to January 1987.
- A notarized statement by [REDACTED], a resident of Chicago, dated February 15, 2004, indicating that she had known the applicant since June 1981 because he previously worked for her husband [at La Reynosa Food Products, Inc.].

² On June 8, 2005, the director denied the application for permanent resident status (MSC 02 223 62136) on the ground that the applicant had not established by a preponderance of the evidence that he entered the United States before January 1, 1982 and resided in the United States thereafter in continuous unlawful status through May 4, 1988. A motion to reopen was denied by the director on August 4, 2006.

A notarized statement by [REDACTED], a resident of Cicero, dated February 16, 2004, indicating that the applicant shared an apartment with her husband [REDACTED] at [REDACTED] in Chicago from August 1985 to June 1986, and shared the rental payment of \$200/month.

- A notarized statement by [REDACTED] a resident of Cicero, dated February 16, 2004, indicating that he and his brother, the applicant, shared an apartment at [REDACTED] in Chicago from August 1985 to June 1986, and shared the rental payment of \$200/month.
- A notarized statement by [REDACTED] a resident of Cicero, dated February 15, 2004, indicating that he had known the applicant and kept in touch since June 1981.
- A letter from the “service overseer” of the North Cicero Spanish Congregation in Stickney, Illinois, dated February 17, 2004, stating that the applicant had been associating with their congregation of Jehovah’s Witnesses since January 1987.

No further documentation relating to the applicant’s residence in the United States was submitted with the current application for temporary resident status. In adjudicating this application (Form I-687) on remand, the director must take all of the documentation listed above into consideration in determining whether the applicant meets the requirement of continuous unlawful residence in the United States from before January 1, 1982 through the date he attempted to file a Form I-687 during the original one-year application period that ended on May 4, 1988.

The AAO notes that the record includes photocopied pages of old passports showing that the applicant was issued a B-2 Multiple Entry Visa on May 22, 1979, valid until May 22, 1983, and a Mexican Border Crossing Identification Card and B-1/B-2 Nonimmigrant Visa on October 11, 1983, with indefinite validity. The passport pages show several entries into the United States with these visas, in particular during 1980 and on September 20, 1986. On his Form I-687 the applicant listed six absences from the United States during the statutory period from January 1, 1982 through May 4, 1988 – all described as family-related trips to Mexico – in May-June 1982, October 1982, September-October 1983, March 1985, August-September 1986, and June 1987. These absences from the United States, for which more definite dates should be provided, must also be taken into consideration by the director in adjudicating this application on remand.

ORDER: The decision dated January 18, 2007 is withdrawn. The matter is remanded to the director for further consideration and the issuance of a new decision.