



U.S. Citizenship
and Immigration
Services

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FILE:

MSC-05-133-11803

Office: NEW YORK

Date:

DEC 22 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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed or rejected, 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.


John F. Grissom, Acting 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, or *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 Director, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application, finding that the applicant is ineligible for temporary resident status pursuant to Section 245A of the Immigration and Nationality Act (Act). Specifically, the applicant testified at his interview with a U.S. Citizenship and Immigration Services (USCIS) officer on July 20, 2005 that he first entered the United States in 1982, then left the country in 1986, and reentered the United States on October 11, 2002. Based on this evidence, the director concluded that the applicant had not met the continuous residence and physical presence requirements for temporary resident status.

On appeal, the applicant submits a brief in which he states that he entered the United States before January 1, 1982 and further asserts that he met the continuous residence and physical presence requirements. Additionally, the applicant claims that he has never received the director's Notice of Intent to Deny (NOID) and submits additional evidence to be considered. The additional evidence submitted on appeal includes an affidavit from a friend and proof that the applicant was not in the United States when the director issued the NOID.

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

The applicant shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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, "[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 or petition.

The issue here is whether the applicant has met his burden of proof to establish that he entered the United States before January 1, 1982 and has continuously resided in the United States in an unlawful status throughout the entire requisite period.

On appeal, the applicant submits evidence that he was not in the United States when the director issued the NOID. The evidence submitted in connection with his absence from the United States is credible, and the AAO will consider the additional evidence submitted.

In an attempt to establish continuous residence in the United States since before January 1, 1982, the applicant submits an affidavit from [REDACTED] in his affidavit states that he first met the applicant in late 1981 when the applicant came to attend the free Islamic teaching at a mosque located on 97th Street after Friday prayer. [REDACTED] however, does not provide detailed information as to the applicant's residence in the United States during the requisite period and does not state how regularly he met with or talked to the applicant or provide other details about the relationship to establish the credibility of his assertion. The lack of detail regarding the events and circumstances of the applicant's residence is significant given his claim to have a friendship with the applicant spanning 25 years.

[REDACTED] further states in the affidavit that the applicant started to work as a deliveryman in late 1988. The applicant, however, stated at his interview with a USCIS officer that he left the United States in 1986. Additionally, the applicant did not list a position or a job as a deliveryman in his Form I-687. The inconsistencies in the record here not only seriously undermine [REDACTED] credibility and his claim that he met the applicant in late 1981, but they also undermine the applicant's credibility that he has continuously resided in the United States for the duration of the requisite period.

In testimony and in a sworn statement the applicant indicated that he first came to the United States in 1982. On appeal, however, the applicant asserts that he entered the United States before January 1, 1982.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application. *Id.* at 591. No evidence has been submitted to explain or reconcile these inconsistencies in the record.

Finally, as indicated above, no single absence for more than 45 days and no multiple absences for a total of more than 180 days from the United States are allowed during the requisite period, unless return cannot be accomplished due to emergent reasons. Moreover, the regulations require an applicant for temporary resident status to maintain continuous physical presence in the United States from November 6, 1986 until the applicant filed or attempted to file a completed application for temporary resident status. Only absences that are deemed brief, innocent, and casual do not break the physical presence requirement. The applicant testified during interview and indicated in a sworn statement that he left the United States in 1986 and did not return until 2002. His absence from the United States in 1986 is well over 45 days and the applicant has not provided any explanation of an emergent reason or reasons relating to his inability to return to the United States within the prescribed time allowed. Nor does he claim that his 1986 absence is either brief, casual, or innocent.

The absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period and lack of detail noted in the record, seriously detract from the credibility of his claim. Additionally, the inconsistencies in the record combined

with the applicant's testimony and sworn statement that he did not reside in the United States between 1986 and 2002 materially affect his eligibility for the benefit sought. 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, the inconsistencies in the record, and his testimony under oath that he was not in the United States between 1986 and 2002, it is concluded that the applicant is ineligible for temporary resident status pursuant to Section 245A of the Act.

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