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U.S. Citizenship
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Services

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FILE: [Redacted]
MSC-05-363-10601

Office: NEWARK

Date: FEB 26 2008

IN RE: Applicant: [Redacted]

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. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

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, Newark. 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 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 had not established his class membership under the CSS/Newman Settlement Agreements. Lastly, the director determined that the applicant is inadmissible for unlawful presence under Section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The director denied the application, finding that the applicant is ineligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, counsel for the applicant asserts that the applicant has met his burden of proof by submitting evidence that establishes his eligibility for temporary resident status pursuant to the CSS/Newman Settlement Agreements.

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)(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. 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 (CIS) on September 28, 2005. The applicant signed this application under penalty of perjury, certifying that the information he provided is true and correct. At part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant showed his first addresses in the United States to be in Richmond Hill, New York from December 1981 until September 2002. At part #33, he showed his first employment in the United States to be in Jamaica, Queens, New York employed in “different odd jobs” as a “helper” from January 1981 until June 2002. The applicant’s employment information as a helper for different odd jobs lacks considerable detail. Furthermore, the applicant’s employment information indicates that he has resided in the United States since January 1981; however he listed his first residential address as December 1981. These two discrepancies draw into question the overall credibility of the applicant’s claim of continuous residence in the United States during the requisite period.

In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant submitted with his Form I-687 application a copy of his passport and a affidavit from [REDACTED]. The affidavit from [REDACTED] is a fill-in-the-blank form, which provides little information on the affiant's relationship with the applicant. This affidavit states, "I have known [REDACTED] personally, as a friend (relationship), since 1984." This affidavit is deficient because the affiant fails to provide any information on how he first became acquainted with the applicant and his contact with the applicant in the United States during the requisite period. Therefore, this affidavit is of minimal weight as probative corroborating evidence.

On November 17, 2005, the director, National Benefits Center, issued a Notice of Intent to Deny (NOID) to the applicant. The NOID provides that the applicant failed to submit documentation to establish his eligibility for Temporary Resident Status. The applicant was afforded thirty (30) days to provide additional evidence in response to the NOID. The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documentation that may be provided 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. The applicant failed to provide any of these documents in support of his claim of continuous residence in the United States.

An applicant may also submit "any other relevant document." 8 C.F.R. § 245a.2(d)(3)(vi)(L). In response to the NOID, the applicant submitted a written statement detailing his eligibility for temporary resident status and the reason he does not have contemporaneous documentation of his residence in the United States during the requisite period. It should be noted that to meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6).

In response to the NOID, the applicant also submitted an affidavit from [REDACTED] and resubmitted the affidavit from [REDACTED]. The affidavit from [REDACTED] is also a fill-in-the-blank form, which provides little information on the affiant's relationship with the applicant. This affidavit states, "I have known [REDACTED] personally, as a Friend (relationship), since 1981." This affidavit is deficient because the affiant fails to provide any information on how he first became acquainted with the applicant and his contact with the applicant in the United States during the requisite period. Moreover, the affiant's misspelling of the applicant's name draws into question the validity of his claimed relationship with the applicant since 1981. Therefore, this affidavit is of minimal weight as probative corroborating evidence.

The district director, Newark, denied the application for temporary residence on July 24, 2006. In denying the application, the director determined that the applicant had not established 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 had not established his class membership under the CSS/Newman Settlement Agreements. Lastly, the director determined that the applicant is inadmissible for unlawful presence under Section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The director concluded that the applicant failed to provide sufficient evidence to establish his eligibility for temporary residence under Section 245A of the Act.

The AAO notes that while the director's overall decision was correct, there are a few errors in her analysis. Firstly, the director incorrectly cites to the continuous residence requirement in 8 C.F.R. § 245a.15(a), which is a provision for legalization under the Legal Immigration Family Equity (LIFE) Act. The director should have instead cited to the provisions for legalization under the Immigration Reform and Control Act of 1986 (IRCA) as delineated in 8 C.F.R. § 245a.1. Secondly, the director incorrectly states that the applicant failed to establish that he has maintained continuous physical presence in the United States from November 6, 1986 through May 4, 1988 in accordance with Section 245A(a)(3) of the Act. The Immigration and Nationality Act does not delineate an end date for continuous physical presence under Section 245A(a)(3), 8 U.S.C. § 1255a(a)(3). Instead, it only provides that the applicant must establish that he or she has been continuously physically present in the United States since November 6, 1986. 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)(1). Finally, the director noted that the affidavit from [REDACTED] is not accompanied by evidence that the affiant is a citizen or lawful permanent resident of the United States. There is no requirement that credible affidavits contain evidence of the affiant's citizenship or lawful permanent resident status. Nevertheless, the director's actions must be considered to be harmless error as the AAO conducts a de novo review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6).

On appeal, counsel for the applicant asserts the applicant's eligibility for temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreement. Counsel also resubmits the documentation filed in rebuttal to the NOID.

Counsel asserts, "[c]lass membership applications shall not be denied solely because applicants do not possess documentary evidence establishing class membership." Although the director determined that the applicant had not established his class membership under the CSS/Newman Settlement Agreements, she did not deny the application for class membership. Instead, based on the applicant's class membership, the director adjudicated the application for temporary residence on the merits. Therefore, the director's determination that the applicant had not established class membership had no bearing on the adjudication of the applicant's Form I-687 application.

Counsel further asserts, "[REDACTED] left the United States in July 1987 and returned back in August 1987, and besides that brief absence [REDACTED] has been continuously present in

the United States during the [s]tatutory period. The applicant [REDACTED] came to the United States [sic] for the first time in December 1981. [REDACTED] traveled to India in July 1987 [for a] brief duration of less than one month . . .” Counsel’s assertion attempts to illustrate the applicant’s eligibility for temporary resident status. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported 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).

Lastly, counsel notes, “[i]n order to demonstrate his eligibility for relief under section 245 A of [the] INA, [REDACTED] provides affidavits from the affiants [REDACTED] [sic] and [REDACTED] . . . These affidavits along with the response to [the] NOTICE OF INTENT TO DENY will satisfy the preponderance of [the] evidence standard . . .” Although the applicant has submitted two affidavits, these affidavits do not satisfy his burden of proof. The director has informed the applicant of the deficiencies in these affidavits. The applicant had the opportunity to remedy these affidavits on appeal. However, the applicant neither amended these affidavits nor did he provide any additional evidence. Consequently, these affidavits alone do not demonstrate, under the preponderance of the evidence standard, the applicant’s eligibility for temporary resident status.

The applicant has failed to provide reliable and probative evidence of his residence 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). His application for temporary resident status consists of a Form I-687 that lacks information on his employment history during the requisite period and two supporting affidavits that fail to illustrate the affiant’s contact with the applicant during the requisite period. Hence, these documents, when viewed either individually or within the context of the totality of the evidence, contain minimal weight as probative corroborating evidence. The applicant’s failure to provide any other evidence to establish his continuous residence in the United States during the requisite period renders a finding that he has failed to satisfy his burden of proof, as delineated in 8 C.F.R. § 245a.2(d)(5). The applicant has not submitted sufficient evidence to establish that his claim is “probably true” pursuant to *Matter of E-M-*, *supra*.

It should be noted that the director also determined that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), as an alien who has been unlawfully present in the United States for one year or more, and who again seeks admission within ten (10) years of the date of such alien’s departure or removal from the United States. The director’s determination of the applicant’s inadmissibility under section 212(a)(9)(B)(i)(II) of the Act is in error and shall be withdrawn. CIS has designated applicants for temporary resident status under section 245A of the Act to be in a period of authorized stay pending the final adjudication of their application. This period of authorized stay is applicable to applications for temporary resident status under section 245A of the Act that are pending appeal before the AAO. *See* Memorandum, Immigration and Naturalization Service, HQADN

70/21.1.24-P, *Unlawful Presence*, June 12, 2002. Therefore, the applicant is not subject to this ground of inadmissibility.

In conclusion, 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.