

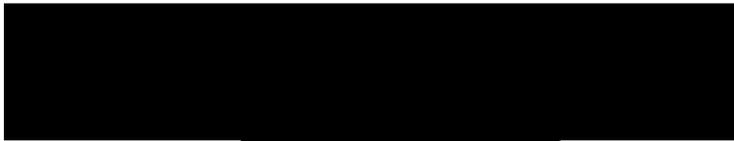
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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 05 081 10377

Office: LOS ANGELES

Date:

FEB 28 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. 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, Los Angeles, and that 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, on December 20, 2004. 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 that the record contained inconsistent testimony from both the applicant and from his alleged former employer regarding his dates of residency and employment in the United States, thus calling into question the overall credibility of his claim. Therefore, the director determined that the applicant was not eligible to adjust to Temporary Resident Status pursuant to the terms of the CSS/Newman Settlement Agreements, and he denied the application.

On appeal, the applicant states that the statements he made during his interview with a Citizenship and Immigration Services (CIS) officer were truthful, and the director stated no reason to doubt the applicant's oral testimony. The applicant states that his testimony should be presumed truthful unless proven otherwise. He asserts that the affidavits and testimony he submitted all verify that he was in the United States during the appropriate time period. He also states that he has "found other evidence and can now verify his residence" and indicates that additional evidence will be submitted within 30 days. However, as of this date, no further evidence has been received, and the record will be considered complete.

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 be 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).

Under the CSS/Newman Settlement Agreements, for purposes of establishing residence and physical presence, in accordance with the regulation at 8 C.F.R. § 245a.2(b)(1), "until the date of filing" shall mean 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 periods, 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).

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.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he resided in the United States for the duration of the requisite period. Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to Citizenship and Immigration Services (CIS) on December 20, 2004. 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 stated that he resided at [REDACTED] in Mendota, California from April 1985 until June 1986 and at [REDACTED] in La Puente from July 1986 until November 1988. The notes from the applicant's interview with a Citizenship and Immigration Services (CIS) officer show that he later sought to amend these dates, stating that he lived at the [REDACTED] address from November 1981 until December 1988, and at the [REDACTED] address from April 1981 until October 1981. Part # 33 of this application requests the applicant to list his employment in the United States since his entry. The applicant indicated that performed agricultural work for [REDACTED] Labor Contractor in Firebaugh, California from May 1985 until May 1986. Similarly, he sought to amend the Form I-687 at the time of his interview, noting that he worked for this employer from December 1981 until 1988. Part #32 of this application requests that the applicant indicate all absences from the United States dating back to January 1, 1982. Here, the applicant indicated that he traveled to Mexico from December 1987 until January 1988 due to the birth of his child. He later added at the time of his interview that he went to Mexico at this time to visit his sick mother. The applicant stated on his Form I-687 that he last came to the United States on April 18, 1985.

The applicant has the burden of proving by a preponderance of the evidence that he has resided in the United States for the requisite period. 8 C.F.R. § 245a.2(d)(5). 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). The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of documentation that an applicant may submit 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. An applicant may also submit any other relevant document pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant submitted evidence to establish his continuous residence in the United States from 1989 through 2003, including copies of pay stubs, personal income tax returns, and IRS Forms W-2 for these years. However, as these documents do not fall within the statutorily relevant time period, they are not relevant to this matter.

The applicant also submitted a copy of his birth certificate, a copy of his marriage certificate, and copies of birth certificates for three of his children. It is noted that the applicant has a child born in Mexico on January 16, 1988, and a child born in Mexico on March 24, 1986. Both birth certificates indicate that the applicant resided at [REDACTED], Naucalpan, Mexico, at the time the births were registered.

The applicant also submitted a notarized letter dated November 30, 2004 from [REDACTED] Farm Labor Contractor, prepared on company letterhead and signed by [REDACTED]. [REDACTED] stated that the applicant was employed by his farm labor contracting firm from May 1, 1985 until May 1, 1986 for a total of 105 days, during which time he performed agricultural duties in the Central San Joaquin Valley. He stated that the relevant payroll records were destroyed because they were outdated, but he has maintained personal contact with the applicant and "was able to recognize him."

The applicant was interviewed by a Citizenship and Immigration Services (CIS) officer on June 17, 2005. As noted above, during his interview, he testified under oath that he first entered the United States in November 1981, and that he worked for [REDACTED] from November 1981 through December 1988, notwithstanding the earlier statement he made on his Form I-687, which was signed under penalty of perjury.

At the time of his interview, the applicant submitted a second notarized letter from [REDACTED] dated May 12, 2005. [REDACTED] stated that the applicant worked for his firm from November 1981 through December 1988 for an estimated 100 days each year. Neither the applicant nor [REDACTED] explained why he initially stated that the applicant worked for him for one year, from May 1985 to May 1986.

The applicant's administrative record also contains a Form I-687 application signed by the applicant in 1995. At that time, he indicated that he last entered the United States on June 12, 1987, thus contradicting his current testimony that his only trip outside the United States was from December 1987 until January 1988.

The director referenced in her decision a Form I-765 application filed by the applicant in 1996 in which he also indicated that he last entered the United States on June 12, 1987. The applicant indicated on his previous Form I-687 that he had no children although the current record shows that he has at least two children born before 1995. When asked to list all of his residences in the United States since first entry, the applicant indicated that he resided at [REDACTED] in West Covina, California from January 1981 until August 1989. He stated that he was employed as a salesperson at a Goodwill Thrift Store from February 1980 until October 1990. The applicant did not indicate that he lived in La Puente, California at any time during the requisite period, that he ever worked for [REDACTED] or that he ever performed any type of farm labor.

Comparing the two applications, the applicant submitted completely inconsistent information and evidence that seriously undermines the credibility of his testimony. Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. 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).

The director denied the application on July 1, 2006. In denying the application, the director observed that both the applicant and [REDACTED] provided inconsistent testimony, thus bringing into question the credibility of the applicant's testimony and the sufficiency of the remaining evidence. The director also noted that the applicant indicated on his previous Form I-765 that he last entered the United States on June 12, 1987, while the applicant swore under oath in the instant proceeding that he last entered the United States in January 1988.

On appeal, the applicant asserts that the testimony he provided during his interview was truthful and accurate, and that he did in fact enter the United States in November 1981 and work for [REDACTED] from November 1981 through December 1988. He reiterates that he traveled outside the United States on only one occasion, from December 1987 until January 1988. He does not explain why he indicated on his prior Form I-765 that he entered the United States on June 12, 1987, or why he indicated on his 2004 Form I-687 that he last entered the United States on April 18, 1985, but indicated on his 1995 Form I-687 that he last entered on June 12, 1987. The applicant suggests that the first letter from [REDACTED] only covered the period from May 1985 until May 1986 because he "receive[d] wrong information from the Lawyer and Believe [sic] qualify for Agricultural Season same as Section 210 of the Immigration Reform Act of 1986." The applicant states that the second letter provided by [REDACTED] supports his claim that he worked for this employer from November 1981 until May 1986.

The applicant further states that the director should presume his testimony given during his interview to be truthful unless proven otherwise. The applicant states that he testified accurately and has not changed his testimony.

The applicant submits new evidence in support of his appeal, including:

1. An affidavit of witness from [REDACTED], a resident of La Puente, California, who states that she has personal knowledge that the applicant has resided in La Puente, California since April 1981. She states that she and the applicant were co-workers and that they live in the same neighborhood. She states that she sees the applicant every day because he lives next door to her. Based on the applicant's own statements on the instant Form I-687, he resided in Mendota, California, rather than La Puente, California during the requisite period, thus raising questions as to whether Ms. [REDACTED] was a neighbor of the applicant's since 1981 or whether she has any direct, personal knowledge of the applicant's residence during the relevant timeframe. She does not indicate where or when she and the applicant were co-workers or provide any other relevant testimony. Given the significant lack of detail and the inconsistency between the affiant's testimony and the beneficiary's own statements, the affidavit is lacking in credibility and probative value.
2. An affidavit of witness from [REDACTED], a resident of Rialto, California, who states that he has personal knowledge that the applicant resided in La Puente, California since October 1981. He states that he is able to date the beginning of his acquaintance with the applicant from "Auto Mechanic Works." Here, the affiant does not state how he dates his acquaintance with the applicant or how frequently he saw him during the requisite period. As noted above, the applicant does not claim to have resided continually in La Puente since 1981, which raises questions regarding the credibility of [REDACTED] statements. It appears that [REDACTED] is claiming that the applicant has utilized his auto repair services since 1981, but is not clear on what basis he claims to have personal knowledge of the applicant's continuous residence. For these reasons, [REDACTED]'s statement is also lacking in credibility and probative value.
3. An affidavit of witness from [REDACTED] who states that he has personal knowledge that the applicant has resided in La Puente, California since October 1981. He states that he met the applicant "through his wife's work" and that they "got together on weekends." As noted above, the applicant submitted a copy of his marriage certificate, which shows that he was married in March 1998. Even if [REDACTED] met the applicant through his wife before they were married, the record shows that the applicant's wife was 14 years old in October 1981, thus casting doubt on [REDACTED]'s claim that he met the applicant "through his wife's work" at that time. [REDACTED]'s affidavit is neither credible nor probative.

As is stated above, 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. The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence pursuant to 8 C.F.R. § 245a.2(d)(3).

Here, the applicant has relied upon his own inconsistent testimony, the inconsistent testimony of [REDACTED] and the three affidavits referenced above, which are lacking in credibility and probative value. With respect to the two different letters from [REDACTED] the applicant implies that he obtained the initial letter under the advice of counsel, perhaps to be submitted in support of an application for temporary resident status under section 210 of the Act. Again, it is incumbent upon the applicant to resolve any inconsistencies in the

record by independent objective evidence. Again, 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. The applicant has not submitted evidence on appeal to overcome the inconsistencies noted by the director.

The absence of sufficiently detailed and consistent evidence 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 many inconsistencies in the record and the applicant's reliance upon inconsistent employment letters and affidavits with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application 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.

Beyond the decision of the director, it is noted that an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulations provide relevant definitions at 8 C.F.R. § 245a.

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

The applicant indicated on his Form I-687 application at Part #35 that he had never been arrested, cited, charged, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations. However, at the time of his interview with a CIS officer, the applicant stated that he has been arrested twice. He stated that he was arrested for drunk driving, served one day in jail and paid a fine. He also stated that he was arrested in 2001 for "false use of a Social Security Number," for which he served time on weekends for three months and was fined \$3,500. The record contains no arrest records or court records for either of these arrests, and thus it cannot be determined with certainty whether either offense was a felony. The burden is on the applicant to provide affirmative evidence that he is eligible for the benefit sought. Here, by failing to disclose his arrests at the time of filing, and by failing to submit evidence of the final court disposition for each arrest at the time of his interview, the applicant did not

meet that burden. For this additional reason, the applicant has not established that he is eligible for status as a temporary resident.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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