



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES, CA

Date: JAN 10 2008

MSC-05-228-10279

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:

[Redacted]

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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 remanded to the Los Angeles District Office for further action and consideration.

The director determined the applicant had not demonstrated that she was a class member per the definition of the CSS/Newman Settlement Agreements. Specifically, the director determined that because the applicant testified before a Citizenship and Immigration Services (CIS) officer and then signed a sworn statement, which established that she did not travel outside the United States after November 6, 1986 without advance parole the applicant did not meet her burden of establishing class membership pursuant to the definition of class membership as stated in the CSS/Newman Settlement Agreements. The director went on to say that at the time of her interview with a CIS officer, the applicant indicated that she was turned away during the original legalization period because she did not have enough evidence to apply for legalization. Therefore, the director found the applicant was a class member. The director granted the applicant thirty (30) days within which to submit additional evidence in support of her application. It is noted that this NOID was issued on February 8, 2006. In her Notice of Decision, the director stated that though her office afforded the applicant thirty (30) days from February 8, 2006 to respond to her reasons for denial, as of May 11, 2006, her office had not received a rebuttal to the NOID. Therefore, the director denied the application.

On appeal, the applicant asserts that she did respond to the director's NOID. She submits a brief and proof that she responded to the director's 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)(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 to the Immigration and Naturalization Service (the Service, now Citizenship and Immigration Services or CIS) 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).

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 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 (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.

To meet the requirements of class membership and therefore be entitled to relief pursuant to the CSS Settlement Agreement, an applicant must fall into one of two subcategories as stated in paragraph 1 on page 3 of the settlement agreement:

- A. All persons who were otherwise prima facie eligible for legalization under section 245A of the INA, and who tendered completed applications for legalization under section 245A of the INA and fees to an INS officer or agent acting on behalf of the INS, including a QDE, during the period from May 5, 1987 to May 4, 1988, and whose applications were rejected for filing because an INS officer or QDE concluded that they had traveled outside the United States after November 6, 1986 without advance parole.
- B. All persons who filed for class membership under Catholic Social Services, Inc. v Reno, CIV No. S-86-1343 LKK (E.D. Cal.) and who were otherwise prima facie eligible for legalization under Section 245A of the INA, who, because an INS officer or QDE concluded that they had traveled outside the United States after November 6, 1986 without advance parole were informed that they were ineligible for legalization, or were refused by the INS or its QDEs legalization forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to timely file or complete a written application.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that she is a class member, and sufficient evidence to establish that she resided continuously in the United States in an unlawful status from prior to January 1, 1982 through the date she attempted to file a Form I-687 application with the Service in the original legalization application period of May 5, 1987 to May 4, 1988. 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 CIS on May 16, 2005. 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 her addresses in the United States during the requisite period to be [REDACTED] in Venice, California from December of 1980 until October 1982; [REDACTED] in Venice, California from October 1982 to July 1986; [REDACTED] in Venice, California

from July of 1986 until July of 1988. At part #32 of the application where the applicant was asked to list all of her absences from the United States since January 1, 1982, she showed two absences. The first absence shown is from June to July of 1982 where the applicant indicates she went to Mexico to get married. The applicant then showed that she left in 1988 because her parents were ill. Here, the applicant originally showed that she left and returned in the month of March 1988. However, notes taken by the CIS officer at the time of the applicant's interview indicate that that applicant asked that officer to change the month of this absence to reflect that she left and returned in September 1988. At part #33 of this application where the applicant was asked to list her employment since entry, she indicated that she has always been a homemaker.

The record contains a declaration from the applicant that was signed on April 2, 2005. In this declaration, the applicant states that she entered the United States in December of 1981. It is noted here that this is not consistent with the applicant's Form I-687, which shows that the applicant resided in the United States since December of 1980. It is further noted that the applicant has consistently stated that she entered in 1980 on all other documents in the record. She goes on to say that in March 1988 she left the United States to visit her mother and her husband's parents in Mexico who were ill. She states she returned that same month. She states that she attempted to apply for amnesty during the legalization period in April 1988 but was turned away because she was told she was not eligible for amnesty because of her travel to Mexico that year.

The record reflects that at her interview with a CIS officer on February 7, 2006, the applicant, who appeared at her interview with her attorney and an interpreter, indicated that she made a mistake on her Form I-687. She stated that she did not leave on March 1988 but rather in September of that year to have a child in Mexico. Therefore, the officer changed the date of that absence at the time of the interview and asked the applicant to initial that change. The record further contains a sworn statement taken at the time of the applicant's interview. The statement is written in Spanish but indicates that the applicant had only two absences from the United States since she entered, one in June 1982 and the other in September 1988. In this statement the applicant reiterates that these were the only two absences she has ever had from the United States since she first entered.

The applicant has the burden of proving by a preponderance of the evidence that she has resided in the United States for the requisite period. 8 C.F.R. § 245a.2(d)(5). To meet her burden of proof, an applicant must provide evidence of eligibility apart from her 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).

In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant provided affidavits, tax documents, birth certificates of her three children who were born in the United States and immunization records for those children.

Details of those documents is as follows:

- An affidavit from [REDACTED] who asserts that he has known the applicant since 1980 because he used to live in the same neighborhood as the applicant. The affiant states that he used to see the applicant at least twice a week. Here, the affiant has not provided an address at which it is personally known to him that the applicant lived. He has not offered proof that he himself was in the United States at that time or provided an address of residence in the United States at which he lived when he was the applicant's neighbor. He has not indicated whether there were periods of time during which he did not see the applicant or provided dates through which he was the applicant's neighbor. Because this affidavit is significantly lacking in detail, it can be afforded little weight in establishing that the applicant resided in the United States before January 1, 1982 and then continuously since that time and for the duration of the requisite period.
- A declaration from [REDACTED], the applicant's husband's uncle who states that in April of 1988 he went with the applicant to the Plaza del Sol office when she attempted to apply for amnesty. He goes on to say that when she appeared before the immigration officer, she was told that because she had just returned from Mexico where she was visiting her sick father and because she left without the proper papers she did not qualify for amnesty. It is noted here that the applicant has not consistently stated whether it was her mother or her father who was sick at that time.

Tax documents for years that are relevant to the requisite period:

- A 1983 Form 1040 that is not signed and is dated February 14, 1985. The address listed on this Form 1040 is consistent with that shown to be the applicant's address in 1983 and 1984.
- A 1984 Form 1040 that is not signed and is dated February 14, 1985. The address listed on this Form 1040 is consistent with that shown to be the applicant's address in 1984 and 1985.
- A 1985 Form 1040 that is signed by the applicant and her husband on February 7, 1986. It is noted that the address shown on this document, which was signed in February of 1986 shows the address that the applicant has indicated she did not live at until July of 1986 on her Form I-687.

Immunization Records:

- An immunization record for [REDACTED] who was born on April 4, 1983. Here, the record shows that the applicant's daughter was immunized against various diseases in May, August and then September of 1983; June of 1984 and then in January of 1988. This record indicates that all immunizations that occurred before 1994 were copied from another document. That other document is not in the record.
- An immunization record for [REDACTED] who was born on June 21, 1984. Here, the record shows that this child, who was not born until June of 1984 was immunized in January, May, June, August, September, and November of 1983. It is noted that these are all dates that occurred before this child was born and therefore it is not possible that he could have received inoculations on those dates. The record further shows that this child received immunizations in October of 1984 and August of 1987. It is further noted that the record indicates all immunization records represented on this document that occurred before 1999 were copied from another document. That other document is not in the record. Because this document shows that the applicant's son received vaccinations on dates that occurred before he was born, doubt is cast on the accuracy of this record.

- An immunization record from [REDACTED] who was born after the requisite period on September 15, 1988. This document does not show that this individual received any immunizations during the requisite period.

Birth Certificates of children born during the requisite period:

- A birth certificate for [REDACTED] who was born in Los Angeles on April 4, 1983.
- A birth certificate for [REDACTED] who was born on June 21, 1984 in Los Angeles. It is noted that the spelling of this child is not consistent with the spelling of his name as reflected elsewhere in the record.

It is noted that the record also contains the applicant's Mexican marriage certificate from June 1982. However, this document does not verify the applicant's presence in the United States. It is also noted that the record contains tax documents and an additional birth certificate that pertain to dates after May 4, 1988. However, the matter in this proceeding is whether the applicant resided continuously in the United States during the requisite period and whether she is a class member. Because these documents do not pertain to the requisite period, they are not relevant to this proceeding.

Thus, on the application, which the applicant signed under penalty of perjury, she showed that she resided in the United States since December 1980. In support of her application, the applicant submitted evidence showing that her husband worked from 1983-1985. She also submitted evidence showing that she had children born in 1983 and 1984 in the United States who received immunizations beginning in 1983. It is noted that one such immunization record shows that the child was immunized before his date of birth, casting doubt as to the accuracy of the dates of the immunizations shown on that document.

The record also shows that the applicant has not been consistent when representing her absence from the United States in 1988. Her Form I-687 shows that she left in March of 1988 to visit sick relatives, as does her declaration signed in April of 2005. However, at the time of the applicant's interview, which was conducted in the presence of her attorney and with the help of an interpreter, the applicant stated that she only left in September of 1988 to give birth to her daughter.

In her Notice of Intent to Deny (NOID), the director noted that the applicant had not been consistent in representing her absences to the Service. The director further noted that as the applicant testified and then submitted a sworn statement stating that she had not left the United States in March of 1988, and because she indicated that she was turned away from the INS office because of "lack of evidence" this indicated that she was not a CSS/Newman class member. It is noted here that the applicant's statement from April of 2005 indicates that the applicant has stated that she was turned away from the INS office because of a lack of evidence of her re-entry into the United States. Therefore, the AAO finds that the applicant has consistently stated that she went to an INS office during the initial legalization period and was turned away because of a lack of evidence of some kind. The applicant's sworn statement does not clearly indicate what evidence the INS officer told her she was lacking. The director stated that because of the applicant's testimony at the time of her interview indicated that the applicant was not a class member, she intended to deny the application on that basis. The director granted the applicant thirty (30) days within which to submit additional evidence to rebut the director's intended denial.

The record shows that on March 7, 2006 twenty seven (27) days after the director issued her decision, [REDACTED] from the Los Angeles District Office received and signed for the applicant's rebuttal statement. Therefore, the record shows that the Service received this applicant's rebuttal to the director's NOID timely. In this rebuttal, the applicant's attorney asserts that the applicant misspoke at the time of her interview. She asserts that the applicant left two times in 1988, in March because her mother was ill and then in September of 1988 because her mother was ill. It is noted that the applicant has previously stated that her September 1988 departure was for the purpose of giving birth to her daughter. The rebuttal goes on to say that the applicant was prevented from applying for amnesty during the original filing period because she had departed in 1988. The applicant's attorney states that the applicant was nervous at the time of her interview but feels that the applicant's original Form I-687 and her statement submitted with her application establish that the applicant is eligible for class membership.

In denying the application, the director erroneously states that as of May 11, 2006, the applicant had not received a rebuttal to the director's NOID. Therefore, the director denied her application.

On appeal, the applicant states that the director received her rebuttal to the director's NOID. She submits a copy of that rebuttal that was signed for and dated as timely received by the Service.

The record also contains a copy of the original rebuttal letter that is dated consistently with the copy provided by the applicant.

It is clear from the record that the applicant did respond to the director's NOID. She timely submitted a rebuttal that was received by the Service and is in the record. The record indicates this rebuttal was not considered at the time the director issued her decision. Therefore, the reasons stated for the applicant's denial in the director's Notice of Decision are not valid.

ORDER: This case is to be remanded for further action and consideration pursuant to the reasons stated above. The director's decision may be certified to the AAO.