



U.S. Citizenship
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FILE:



Office: NEW YORK

Date:

JUL 08 2008

MSC-05-166-12379

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:



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, New York. 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. 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 denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, counsel asserts that the decision is against the weight of evidence. Counsel states that the supporting documentation was not given due consideration. Counsel states that the stipulation of the settlement agreement was not followed. Counsel states that the passage of time and attendant difficulty of obtaining documents was not put into consideration.

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) 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 on March 15, 2005. At part #30 of the Form I-687 application where applicants are asked to list all residences in the United States since first entry, the applicant showed that he first resided in New York, New York from 1980 until 1990. At part #33, he showed his first employment to be as a self-employed vendor from 1981 until 1990. Notably, the applicant failed to specify the location of his employment during this period.

The applicant submitted the following documentation:

A copy of his passport showing that on July 21, 1980 he received a B-1 multiple entry visa in Lagos, Nigeria. The passport bears two entry stamps indicating that on July 26, 1980 and October 7, 1980 he entered the United States at New York, New York. The passport also bears two entry stamps indicating that he entered Nigeria on March 28, 1981 and July 3, 1985. This document is probative evidence of the applicant’s entry into the United States prior to January 1, 1982.

- A letter from [REDACTED], Presiding Elder, New Life Christian Center (NLCC), located in Bronx, New York. This letter, dated November 28, 2005, is on the NLCC Ministries letterhead and bears a seal. The letter states, "I write to introduce to you Mr. [REDACTED]. Mr. [REDACTED] was first registered as a member of New Life Christian Center in November 1981 – July 1990. During the period, he served as Deacon and was an active member of the Prayer & Evangelistic Ministry of the Church. . . ." The regulation at 8 C.F.R. § 245a.2(d)(3)(v) provides that attestations by churches should state the address(es) where the applicant resided during the requisite period, establish how the author knows the applicant, and establish the origin of the information being attested to. Mr. [REDACTED] letter fails to comply with these delineated guidelines. The letter does not specify if [REDACTED] has personal knowledge of the applicant's involvement with the church or if he obtained this information from another source. The letter also fails to state the applicant's residential addresses during the requisite period. Furthermore, the applicant left blank part #31 of his Form I-687 application, where applicants are asked to list their affiliations with any churches. The applicant's failure to complete this part of the application is contrary to [REDACTED]s assertion that the applicant served as church Deacon and was an active member of the church. Given these discrepancies, this letter is without any probative value as evidence of the applicant's continuous residence in the United States during the requisite period.
- A fill-in-the-blank affidavit from [REDACTED], dated November 18, 2005. This affidavit provides that he has personal knowledge of the applicant's residence in New York City from October 1981 until present. The affidavit states that [REDACTED] is able to determine the date of the beginning of his acquaintance with the applicant in the United States because the applicant is his older brother. This affidavit is vague because it fails to detail [REDACTED]s relationship with the applicant during the requisite period. It is unclear from this affidavit how frequently [REDACTED] came into contact with the applicant during the requisite period. Therefore, this affidavit is of little probative value as evidence of the applicant's continuous residence in the United States during the requisite period.
- A fill-in-the-blank affidavit from [REDACTED], dated November 23, 2005. This affidavit provides that [REDACTED] has personal knowledge that the applicant resided in New York City from 1981 until present. The affidavit states that [REDACTED] is able to determine the date of the beginning of her acquaintance with the applicant in the United States from social gatherings in their community. The affidavit further states, "[w]e worked together and became friends. I will gladly recommend him. I see him on a regular basis." This affidavit is vague because it only contains general statements on how [REDACTED] first became acquainted with the applicant and their subsequent relationship. Furthermore, [REDACTED]s assertion that she worked with the applicant is ambiguous. The applicant showed on his Form I-687 application that since his entry into the United States he has been self-employed as a vendor and cab driver. Ms. [REDACTED] indicated on her affidavit that she is a patient care technician and provided a copy of her North Central Bronx Hospital identification document.

Given these deficiencies, this affidavit is of little probative value as evidence of the applicant's continuous residence in the United States during the requisite period.

A copy of a court disposition showing that on January 18, 1996, the applicant was arrested and charged with *Criminal Possession of a Forged Instrument in the Second Degree* in violation of section 170.25 of the New York Penal Law. The disposition shows that on March 13, 1996, he pled guilty to *Disorderly Conduct* in violation of section 240.20 of the New York Penal Law. *Disorderly Conduct* is a violation, which carries a sentence of imprisonment not exceeding fifteen days. N.Y. Penal Law §§ 240.20, 70.15 (McKinney 1996). According to the regulation at 8 C.F.R. § 245a.1(o), this crime is defined as a misdemeanor under the Immigration and Nationality Act. An applicant for temporary resident status must establish that he has not been convicted of any felony or of three or more misdemeanors committed in the United States. Section 245A(a)(4) of the Act, 8 U.S.C. § 1255a(a)(4). Hence, the applicant is not statutorily ineligible for temporary resident status, under section 245A(a)(4) of the Act, 8 U.S.C. § 1255a(a)(4), based on his conviction for this offense.

On December 4, 2007, the director issued a Notice of Intent to Deny (NOID) to the applicant. The director found that the applicant's passport shows that he entered Nigeria on March 28, 1981. The director noted that during the applicant's interview and on his Form I-687 application he failed to mention his 1981 departure from the United States. The director found that the affidavit from [REDACTED], Presiding Elder at the New Life Christian Center, lacks identification for [REDACTED] and proof that he was in the United States during the requisite period. The director also found that this letter fails to demonstrate [REDACTED]'s direct personal knowledge of the events and circumstances of the applicant's residency. The director found that the affidavit from the applicant's brother [REDACTED], stating that the applicant has resided in the United States since October 1981, is not credible because CIS records show that [REDACTED] entered the United States in July 1987. Lastly, the director found that the affidavit from [REDACTED] lacks proof that she was in the United States during the requisite period and fails to demonstrate her direct personal knowledge of the events and circumstances of the applicant's residency. The director determined that the applicant failed to meet his burden of proof that he qualifies for temporary resident status. The director afforded the applicant a period of 30 days to submit additional evidence in support of his application.

In response to the NOID, the applicant resubmitted his previously filed evidence. On January 24, 2008, the director denied the application. In denying the application the director determined that the applicant had not established by a preponderance of the evidence that he actually resided in the United States prior to January 1, 1982. The director further determined that the applicant had not met his burden of proof that he resided in the United States in an unlawful status from January 1, 1982 through May 4, 1988. The director concluded that the applicant failed to meet his burden of proof in the proceeding and denied the application.

While the director was correct in his overall decision, there was an error in his analysis of the requisite period at issue in this case. The director determined that the applicant failed to

establish his residence in the United States from January 1, 1982 until May 4, 1988. However, under section 245A of the Act, 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). According to the CSS/Newman Settlement Agreements, the term "until the date of filing" 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. 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 asserts that the decision is against the weight of evidence. Counsel states that the supporting documentation was not given due consideration. Counsel also states that the stipulation of the settlement agreement was not followed. Counsel states that the passage of time and attendant difficulty of obtaining documents was not put into consideration.

It should be noted that counsel indicated on the appeal notice that he would submit a brief within 30 calendar days. However, counsel failed to submit a brief to the AAO within this time period. On June 10, 2008, the AAO sent a notice to counsel requesting a copy of his brief and/or any additional evidence. As of the date of this decision, counsel has not responded to this request.

In this case, the applicant has established his entry into the United States prior to January 1, 1982. The applicant's passport bears an entry stamp showing that on October 7, 1980 he entered the United States at New York, New York. However, the applicant has failed to furnish sufficient evidence to establish his continuous residence in the United States from this date until the end of the requisite period. As discussed, the letter from [REDACTED], Presiding Elder, New Life Christian Center, and the affidavits from [REDACTED] and [REDACTED] fail to demonstrate the authors' direct personal knowledge of the applicant's continuous residence in the United States during the requisite period. The absence of 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 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.