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U.S. Citizenship
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FILE:

MSC 04 331 21341

Office: NEW YORK

Date:

JUL 11 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. 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. The appeal will be dismissed.

The district director denied the application because the applicant failed to demonstrate credibly that he entered the United States before January 1, 1982, and thereafter resided in the United States in a continuous unlawful status. On appeal, the applicant asserted that the evidence submitted demonstrates his eligibility.

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 Immigration and Nationality Act (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).

As to the requirement of continuous residence in the United States from January 1, 1982 through the date the application is filed, the regulation at 8 C.F.R. § 245a.2(h)(1) provides that an applicant shall be regarded as having resided continuously if no single absence during the salient period was longer than 45 days and the aggregate of all absences does not exceed 180 days.

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, *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 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 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.

The pertinent evidence in the record is described below.

- The record contains an affidavit, dated June 23, 2005, but notarized on June 23, 2005, from [REDACTED] of New York, New York. The affiant stated that he met the applicant during December 1981 at [REDACTED] in Harlem, New York, and that they have since kept in touch and visited each other occasionally. The significance of that document being produced, and possibly signed, on one date and notarized on another is unknown to this office.
- The record contains a statement from [REDACTED] dated August 15, 2005. Although the body of that statement opens, "Please take notice that I, the undersigned, [REDACTED], being duly sworn . . .," the statement contains no notary's attestation or any other evidence that an oath was administered to the declarant. The declarant further stated, "I have know [the applicant] before december [sic] 1981 in new york." [sic]
- The record contains notes from an interview of the applicant on an unknown date by an officer of CIS. Those notes indicate that the applicant stated that he first entered the United States during January of 1981 as a stowaway, but cannot remember the port at which he entered.
- The record contains a sworn statement the applicant gave to a CIS officer on July 11, 2005. The applicant stated,

I traveled by boat from Senegal to Canada. I got off the ship and stayed with a friend in Canada. I was smuggled into the United States in a trailer. I left the United States in 1983 and returned in March 1986.

- The record contains a statement by the applicant dated August 15, 2005 in which he stated that he did not retain evidence of his presence in the United States during the period of requisite residence because he did not know that he would subsequently need it. He further stated, "I also make a mistake to my testimony on July 11, 2005 ,I left the country in marth 1986 and return in may 1986." [Errors in the original.]

The record contains no other evidence pertinent to the applicant's residence in the United States during the salient period.

With the application, the applicant submitted the June 23, 2005 affidavit of [REDACTED], but no other evidence of his continuous residence in the United States during the period of requisite residence.

In a Notice of Intent to Deny (NOID), dated August 2, 2005, the director noted that the evidence shows that the applicant was born on April 23, 1966, and that he would therefore have been only fourteen years old during January 1981 when he claims to have first entered the United States. The director further noted that the applicant provided no credible affidavit from any adult then responsible for his care and support and, although the applicant was then at an age during which school attendance was compulsory, provided no evidence of school attendance. Further still, although vaccinations may have been available to the applicant at that age, he provided no immunization records.

Finally, the director noted that, on July 11, 2005 the applicant admitted that he left the United States during 1983 and returned during March of 1986, an absence in excess of 45 consecutive days, as well as more than 180 days in the aggregate, which renders him ineligible for temporary resident status under section 245A of the Act pursuant to 8 C.F.R. § 245a.2(h)(1). The director granted the applicant thirty days to submit additional evidence.

In response the applicant submitted his August 15, 2005 statement and the August 15, 2005 statement of [REDACTED], both of which are described above.

In the Notice of Decision, dated August 2, 2006, the director denied the application based on the reasons stated in the notice of intent to deny; that is, that the applicant had failed to demonstrate continuous residence in the United States during the period of requisite residence.

The applicant's statement on appeal, in its entirety, is as follows:

I maintain that I have been residing in the United States prior to January 1, 1982; and I provided the documentation to support the credibility [sic] of my application. I could not argue about the mistakes on my application because of misunderstanding; and I

was very emotional during the interview. I am pleased to ask you to reconsider your decision and allow me another chance to meet your requirements. [sic]

The applicant submitted no additional evidence with that appeal.

The issue raised in the decision of denial is whether the applicant has furnished sufficient credible evidence to demonstrate entry into the United States prior to January 1, 1982, and continuous residence during the requisite period.

The June 23, 2005 affidavit and August 15, 2005 statement of [REDACTED] state that he met the applicant in New York during December 1981. It does not indicate that the applicant resided continuously in the United States through the period of requisite residence. Further, it is not supported by any evidence that [REDACTED] was himself in the United States during December 1981 or during the subsequent requisite period. That evidence is insufficient, in many respects, to demonstrate the applicant's continuous residence in the United States during the requisite period. The applicant submitted no other evidence of his residence in the United States during that period, which was sufficient reason to deny the application.

Further, however, the record contains a sworn statement by the applicant that he left the United States during 1983 and did not return until 1986, which absence necessarily included more than 45 consecutive days and more than 180 days in the aggregate during the requisite period. On appeal, the applicant provided an unsworn statement indicating that he was absent only from March 1986 to May 1986. That unsworn statement is insufficiently credible to overcome a sworn statement given before an officer of the Service and an additional witness. Further, even if believed, an absence from March 1986 to May 1986 may have encompassed more than 45 days during the requisite period.

The applicant has failed to establish entry into the United States prior to January 1, 1982, and continuous residence during the requisite period. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act. The application was correctly denied on that basis, which has not been overcome on appeal. The appeal will be dismissed on that basis.

The record suggests an additional issue that was not addressed in the decision of denial.

The record contains a Certificate of Disposition from the Criminal Court of the City of New York, apparently submitted by the applicant and represented as referring to him, showing that on June 12, 2002 [REDACTED] was arrested for a violation of section 240.20, *disorderly conduct*, a violation of section 165.71, *trademark counterfeiting in the third degree*, and a violation of AC 20-453. The offense covered by AC 20-453 is unknown to this office. On June 13, 2002 [REDACTED] pled guilty to a violation of section 240.20, and was sentenced to one day of community service and one year of conditional discharge. (Docket number 2002CN005079)

The record contains a Certificate of Disposition from the Criminal Court of the City of New York, apparently submitted by the applicant and represented as referring to him, showing that on December 8, 2002 [REDACTED] was arrested for a violation of section 240.20, *disorderly conduct*,

and a violation of AC 20-453. The offense covered by AC 20-453 is unknown to this office. On January 14, 2003 [REDACTED] pled guilty to a violation of section 240.20, and was sentenced to two days of community service and one year of conditional discharge. (Docket number 2003CN010906)

The record contains a Certificate of Disposition from the Criminal Court of the City of New York, apparently submitted by the applicant and represented as referring to him, showing that on December 22, 2003 [REDACTED] was arrested for a violation of section 240.20, *disorderly conduct*, and a violation of AC 20-453. The offense covered by AC 20-453 is unknown to this office. On December 23, 2002 [REDACTED] pled guilty to a violation of section 240.20, and was sentenced to two days of community service and one year of conditional discharge. (Docket number 2003CN010906)

The regulation at 8 C.F.R. § 245a.2(c)(1) states that the application for temporary resident status of an alien who has been convicted of three or more misdemeanors may not be approved. The applicant was convicted, pursuant to his pleas, of three counts of violating section 240.20 of the New York criminal code, disorderly conduct, one count on June 13, 2002, one count on January 14, 2003, and one count on December 23, 2003.

The regulation at 245a.1(o) defines misdemeanor as a crime committed in the United States punishable by more than five days imprisonment but not more than one year. Section 240.20 of the New York criminal law stipulates that disorderly conduct is a violation, which is an offense lesser than either misdemeanors or felonies, as defined by New York law. Article 70.15(4) of New York penal code, however, states that the maximum penalty for a violation is 15 days. Because a violation of section 240.20 of the New York criminal code is punishable by more than five days imprisonment, it constitutes a misdemeanor for the purpose of the instant adjudication.

The applicant has therefore been convicted of three misdemeanors, and, pursuant to 8 C.F.R. § 245a.2(c)(1), the instant application may not be approved for that reason. The application should have been denied on this additional basis.

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