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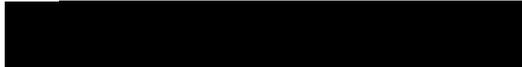
Office: HOUSTON

Date: NOV 14 2008

MSC-06-083-11465

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, your file has 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 if your case was 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, Houston. 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 (together comprising the I-687 Application). The director denied the application, finding that the applicant failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and has resided continuously in an unlawful status for the requisite period.

On appeal, the applicant produces four affidavits intended to show that he entered the United States before January 1, 1982 and have continuously resided in the United States in an unlawful status since then.

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)(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 shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

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). 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, "[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 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 issue in this case is (1) whether the applicant entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. In support of his appeal, the applicant submits four additional affidavits from friends and former co-workers. The record also contains a personal affidavit, a completed Form I-687 filed in 1990, two notarized letters and a signed letter from Felix Mexican Restaurant, and three affidavits executed in 1990. Additionally, the applicant also submitted a number of stamped envelopes sent by the applicant from his home address in Texas, pay stubs, tax returns,

and W-2s from 1991 to 2004, which will not be discussed here because evidence of residency after May 4, 1988 is not probative of residence during the requisite time period.

With respect to the applicant's entry into United States before January 1, 1982, the applicant's affidavit states that he first entered the United States in 1979 and has been residing in the United States since 1980. This claim is supported by four affidavits that the applicant submitted on appeal. The affidavits specifically state where the affiants first met the applicant, how they date their acquaintance with him, or whether they have direct, personal knowledge of the address at which he was residing in 1980. The affiants' references to sharing room and working together with the applicant at a specific time period in 1980 are persuasive. All of the affiants state their willingness to come forward and testify if necessary on behalf of the applicant. Considering all of the evidence individually and under totality of circumstances, it is concluded that the applicant has met his burden of proof by a preponderance of the evidence that he entered the United States before January 1, 1982.

However, the applicant fails to meet his burden of proof by a preponderance of the evidence that he has "continuously" resided in an unlawful status in the United States throughout the requisite period. **In this case, the term continuous has a significant legal meaning.** As stated earlier, continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip and the total of all absences are more than 180 days during the requisite period, unless return could not be accomplished due to emergent reasons.

In this case, the applicant attempts to prove his continuous residency in the United States throughout the requisite period by two notarized employment letters issued in 1990 by [REDACTED], the owner of Felix Mexican Restaurant, and a letter written in 2006 by [REDACTED] the manager of the restaurant. These letters fail to comply with the regulatory requirements at 8 C.F.R. § 245a.2(d)(3)(i), however. For example, both [REDACTED]'s and [REDACTED] letters do not indicate whether the information was taken from official company records and whether the Service may have access to the records. Furthermore, [REDACTED] letter does not state the alien's address at the time of employment and periods of layoff. This information is significant because the applicant listed on his Form I-687 that he was employed by Felix Mexican Restaurant from December 1980 to June 1981, between October 1990 and May 1997, and again from January 2001 to the present date.

Additionally, on his Form I-687, the applicant indicated he had only two absences during the requisite period, once in December 1983 and from June to July 1986. However, the applicant's affidavit submitted in response to the director's Notice of Intent to Deny (NOID) states that he had more departures than what he had initially listed on his Form I-687. Furthermore, the applicant admitted in his affidavit that he frequently visited his family in Mexico in the 1980s but stopped short of revealing the frequency and the duration of each visit and said that he could not remember them.¹ While it is not reasonable to expect an applicant who has been residing in the

¹ The applicant stated that he stayed in Mexico for only a few days for each visit, usually less than a week.

United States since prior to January 1, 1982, to specifically remember the frequency and duration of each visit to Mexico during the requisite period, the omission of such information without any efforts to recover it is fatal to the applicant's claim to eligibility. Moreover, the director in her NOID also noted that three of the applicant's children were born in Mexico in 1982, 1985, and 1987 respectively, and that the applicant at one time admitted to have gone for a long time in 1985. While the applicant states in his affidavit that he did not remember ever saying a long time, he acknowledged that it's possible he visited his family in Mexico in 1985.

Taken all the evidence together, these inconsistencies seriously undermine the credibility of the applicant's claim to continuous residence during the requisite period. 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 inconsistencies in the record and the lack of credible supporting documentation, it is concluded that he 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.