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FILE:

MSC-05-231-13074

Office: NEW YORK Date:

OCT 01 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.

A handwritten signature in black ink, appearing to read "Robert P. 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, New York. 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. 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. Specifically, the director stated in her Notice of Intent to Deny (NOID), that the applicant failed to submit evidence other than his own testimony as proof that he resided in the United States during the requisite period. The director granted the applicant 30 days within which to submit additional evidence in support of his application. Though the director noted that the applicant submitted additional evidence in response to the NOID, she found this evidence did not satisfy his burden of proof. Therefore, the director determined the applicant was not eligible to adjust to temporary resident status pursuant to the CSS/Newman Settlement Agreements and denied the application.

On appeal, the applicant asserts that the director failed to adequately consider the documents he submitted in support of his application.

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) 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 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, 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 a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to Citizenship and Immigration Services (CIS) on May 19, 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 indicated that he resided in Flushing, New York from June 1981 until the end of the requisite period. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that he was absent once during the requisite period, when he went to Malaysia to visit family from November to December in 1987. At part #33, where the applicant was asked to list all of his employment in the United States since he first entered, he stated that he was employed as a waiter at Chan Chinese Restaurant in Woodside, New York from June 1981 until July 1987 and then as a chef at the Lotus King Restaurant in Westchester, New York from July 1987 until January 1997.

The applicant submitted an undated declaration with his Form I-687 on which he stated that he first entered the United States on June 22, 1981 and traveled to Malaysia from November to December of 1987. With this declaration, the applicant submitted photocopies of the identity pages of passport # [REDACTED], which was issued to the applicant in 2002 and pages 24 and 25 of another passport. The pages of the second passport indicate that its bearer was issued a B1/B2 Visa by the United States Embassy in Kuala Lumpur in October 23, 1987. It is noted that the applicant indicated on his Form I-687 that his only absence from the United States occurred from November to December 1987. However, this visa indicates that the applicant was in Kuala Lumpur in October 1987, casting doubt on whether the applicant has fully disclosed his absences from the United States during the requisite period to CIS.

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 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. 8 C.F.R. § 245a.2(d)(5). To meet his burden of proof, an applicant must provide evidence of eligibility apart from his or 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).

Prior to the date the director issued her NOID, the applicant failed to submit evidence that he resided in the United States for the requisite period apart from his own testimony.

The director issued a Notice of Intent to Deny (NOID) to the applicant on November 17, 2005. In the NOID, the director stated that she intended to deny the application because the applicant failed to submit evidence as proof of his residence in the United States during the requisite period. The director granted the applicant 30 days within which to submit additional evidence in support of his application.

In response to the NOID, the applicant submitted the following evidence:

- A declaration in which the applicant states that at the time of his interview with a CIS officer, he was not asked for evidence in support of his application. He asks that the evidence he is submitting in response to the NOID be considered.
- An affidavit from [REDACTED], who submits a photocopy of the identity pages of his United States Passport and states that he met the applicant at a Chinese Buddhist Temple in Flushing, New York on September 19, 1981. He states that they were attending a birthday celebration for [REDACTED] at that time. He states that after they first met, they often visited each other and spent holidays and special occasions together. He states that he believes that the applicant first attempted to apply for legalization in April 1988 but was turned away. Though the affiant states that he saw the applicant often, he does not state the frequency with which he saw the applicant during the requisite period or indicate whether there were periods of time during that period when he did not see the applicant.
- The applicant submits photocopies of photographs that he indicates were taken in Queens, New York in 1983 and Los Angeles, California in 1987.

The director denied the application for temporary residence on January 22, 2007. In denying the application, the director stated that the photographs submitted by the applicant were not sufficient to establish that he was in the United States prior to 1982. The director further noted that the applicant submitted the affidavit from [REDACTED], but found that this affidavit, when considered with other evidence in the record, was not sufficient to satisfy his burden of proof.

On appeal, the applicant asserts that the director did not fully consider the evidence he submitted in support of his application.

The AAO has reviewed the evidence submitted by the applicant in support of his application and has found that the applicant has failed to satisfy his burden of proof. Though the applicant stated consistently that he was only absent from the United States once, from November to December in 1987, he has submitted a visa that shows that he was in Kuala Lumpur on October 23, 1987. This shows that the applicant was absent from the United States when he received this visa. Therefore, it appears that the applicant has not fully disclosed all of his absences from the United States to CIS. This discrepancy also casts doubt on the applicant's claim of continuous residence generally. Though he has submitted an affidavit from [REDACTED], this affiant did not indicate whether there were periods of time when he did not see the applicant, further casting doubt on whether the applicant maintained continuous residence in the United States for the duration of the requisite period.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, as well as the inconsistencies and contradictions noted in the record, seriously detract 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 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.