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FILE:

MSC-05-238-12888

Office: DALLAS

Date: OCT 14 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:

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.


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, Dallas. 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, on May 26, 2005 (together comprising the I-687 Application). The director issued a Notice of Intent to Deny (NOID) the I-687 Application on February 17, 2006, finding that the applicant was not eligible for CSS/Newman class membership based on the information provided by the applicant. The NOID also noted that previously, on October 16, 2003, the applicant had been denied such eligibility for class membership in the legalization class action lawsuits and that some of the supporting documentation provided by the applicant as evidence of class membership was fraudulent.¹ In rebuttal, the applicant submitted her own statement detailing her residence in the United States dating from 1981 and her unsuccessful efforts to apply for legalization in 1987, 1991 and 2003; a letter from Our Lady of Lourdes Church in Dallas confirming that the applicant was registered there in 1981 and was one of the church members who was helped with the immigration process in 1987 and 1988; and a statement from counsel noting that the NOID was erroneous in finding the applicant ineligible for class membership and in confusing the requirements of the LIFE Act (see footnote 1) and the requirements of the CSS/Newman Settlement Agreements. The director denied the I-687 Application, concluding that, after reviewing the application and accompanying evidence and the information provided in response to the NOID, there was no evidence to indicate that the applicant met the requirements of Title 8 C.F.R. § 245a.2(b). The decision included the language of that regulation as follows:

- (1) An alien (other than an alien who entered as a nonimmigrant) who establishes that he or she entered the United States prior to January 1, 1982, and who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

The director also noted that Our Lady of Lourdes Church had been contacted, and [REDACTED] who had signed the letter noted above, had been at the church for only five and a half years, had no personal knowledge of the applicant before then and had based the information in the letter on the testimony of other individuals.

On appeal, the applicant submits additional evidence and a brief by her counsel. Counsel asserts that the denial was “based solely on the applicant’s inability to establish the requisite physical presence – an issue that was not even addressed in the [NOID].” He claims that neither the 2003 denial of the applicant’s I-485 LIFE Act application nor the NOID disputes that she established the requisite continuous residence and physical

¹ The NOID was referring to the denial of the Form I-485, Application to Register Permanent Residence or Adjust Status, filed by the applicant on March 11, 2003 pursuant to the Legal Immigration Family Equity Act of 2000 (LIFE Act).

presence. Counsel reiterates that class membership has been established and that the NOID confused the requirements under the LIFE Act with the requirements under the settlement agreements, asserting that, unlike the LIFE Act, the CSS/Newman Settlement Agreements contain no requirement to provide written proof of having filed a claim for class membership.

Counsel is correct regarding the requirements for class membership. The AAO notes, however, that in the director's denial and on appeal the applicant has been given the benefit of class membership by having her I-687 Application considered on the merits pursuant to the CSS/Newman Settlement Agreements. The issue on appeal is not class membership, but rather, as indicated in the director's decision, whether the applicant has provided sufficient evidence of residence and presence during the requisite time period. The AAO notes that there is no indication that the director's final decision confused the different requirements, but rather that the NOID, in focusing on class membership, failed to give notice of the lack of evidence of residence required for eligibility. However, the applicant has not been prejudiced by the issuance of the NOID and has had sufficient notice of the eligibility requirements for benefits under the CSS/Newman Settlement Agreements. There is no requirement to issue a NOID in the adjudication of an I-687 Application, though CIS may provide a NOID. Moreover, the applicant has been aware of the residence and presence requirements for temporary residence under the CSS/Newman Settlement Agreements since the time she filed her application. She was also been put on notice of the insufficiency of her evidence by the director's final decision.

Upon a *de novo* review of the relevant evidence in the record, the AAO agrees with the director's conclusion that the applicant has not established by a preponderance of the evidence that she is eligible for the benefit sought.²

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).

Under the CSS/Newman Settlement Agreements, for purposes of establishing residence and physical presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

² The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 periods, 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, *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. *See* 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information.

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that she entered before 1982 and resided in the United States for the requisite period, which, as noted above, is from prior to January 1, 1982 through the date when she was discouraged from filing her I-687 Application, between May 5, 1987 and May 4, 1988. The record includes the pending I-687 Application as well as a prior Form I-687, dated June 4, 1991, which the applicant claims was submitted in support of her class member application in a legalization class-action lawsuit; and a Form I-485, Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity Act of 2000 (LIFE Act), filed on March 11, 2003.

The applicant submitted the following evidence relevant to the requisite period:

- A form affidavit from [REDACTED], dated May 5, 2005, stating that she had personal knowledge that the applicant resided in Dallas, Texas, from December 1981 to 1991, that the applicant came to the U.S. in December of 1981, that she met the applicant in December 1981 and that they both worked for the same cleaning service. She added that the applicant “wanted to be successful and work hard and she knew the U.S. had more to offer.” She provided her own address in Dallas and listed the applicant’s two addresses in Dallas from 1981 to 1991, consistent with information that the applicant had provided on her I-687 Application. Other than listing the applicant’s addresses from 1981 to 1991 where indicated on the form, the affidavit lacks details of the claimed relationship of over 20 years that would indicate direct personal knowledge of the applicant’s whereabouts or the circumstances of her entry into the United States in 1981 or her residence in the United States thereafter. The duplicative language in the form, noted below in the declaration from [REDACTED] also raises questions as to the credibility of the affidavit. The affidavit, thus, has minimal weight as evidence of the applicant’s residence in the United States during the requisite period.
- A form declaration from [REDACTED], also dated May 5, 2005, also stating that the applicant came to the U.S. in December of 1981, that she met the applicant in December 1981 at a Christmas party and that she [REDACTED] was employed by [REDACTED] Cleaning at that time, and that the applicant “wanted a better job. She was tired of struggling in Mexico and she [knew] the U.S. had more to offer her.” She added that she believed the applicant came to the U.S. with “herself” and stated that between January 1982 and May 1988, “I and [the applicant] were very good friends. We loved to make tamales and [sell] them. During the holidays.[sic] There was a lot of times that [the applicant] needed a ride to get around and I would take her. [The applicant] did not have family so we celebrated holidays together.” It is clear that [REDACTED] did not have any personal knowledge of the applicant, as the applicant submitted her own statement that she was married in 1981, entered the United States in December 1981 with her husband and her two children, aged eight and six at that time, and resided as a family thereafter. The declaration, which is not notarized, clearly contradicts the applicant’s own statements, and thus lacks credibility. It has no weight as evidence of the applicant’s residence in the United States during the requisite period.
- A letter from [REDACTED], dated March 9, 2006 on letterhead of Our Lady of Lourdes Church in Dallas, stating that he “hereby acknowledge[s] that [the applicant] was registered in our church in 1981” and that she was one of the individuals helped by the parish in 1987 and 1988 with the immigration process. Reverend [REDACTED] added that they did not have paperwork as proof because they “trashed them in order to make room for other members['] applications.” As noted above, CIS indicated that they had contacted [REDACTED] in March 2006, that he had been at the church for only five and a half years, and that he stated that he had no personal knowledge of the applicant before then and based the information in the letter on the testimony of other individuals. The letter is not notarized and is not based on personal knowledge of the applicant or her residence in the United States. It thus has no weight as evidence of the applicant’s residence in the United States during the requisite period.
- A letter from [REDACTED], dated “March 2005” on his letterhead showing an address in Fort Worth, Texas, stating that the applicant “was seen in this office in May 1986.” Medical records must

show the date of treatment to be considered as evidence of residence. *See* 8 C.F.R. 245a.(d)(3)(iv). [REDACTED] letter is neither notarized nor accompanied by a form of identification, does not provide a date of treatment and does not indicate whether the doctor has personal knowledge of the treatment or whether there are medical records in his office that support his statement. Lacking this information, his statement has no weight as evidence of the applicant's residence in the United States during the requisite period.

- A copy of a printout, dated May 5, 2006, of a Dallas City Health District "Personal Immunization Record" from Oak Cliff Health Center in Dallas. It includes the applicant's name and date of birth and is initialed where the form indicates "Certified By" and date stamped May 5, 2006. The printout shows that the applicant was vaccinated for Measles, Mumps and Rubella on December 17, 1981 and for "Td" on the same date, Dose 1, and on May 5, 2006, Dose 2. The document is objective evidence that the applicant was vaccinated at a Texas health clinic on December 17, 1981.

For the reasons stated above, the affidavits and letters submitted by the applicant have minimal or no probative value as evidence of the applicant's residence in the United States during the requisite period. The medical record submitted on appeal is credible evidence, however, that the applicant was in the United States on December 17, 1981.

The remaining evidence in the record is comprised of the applicant's statements and application forms, in which she claims to have entered the United States in December 1981 with her husband and two children and to have resided during the requisite period in Dallas, Texas. In her statement dated March 16, 2006, the applicant claims that for the first five years in the United States she and her family rented a room in apartments of acquaintances as they could not afford their own place; that they rented rooms from different people during those years, always in about the same location in Dallas; and that she cannot remember every address during that period but knows that the four of them stayed in the same room during those years. She also claims that she met a friend, [REDACTED], at a Christmas dinner party in December 1981, who helped her get a job as a housekeeper; that her children would often go to work with her because she was afraid to send them to school; and that they were "a very close family, and as practicing Catholics, [they] attended Our Lady of Lourdes Catholic Church when they first arrived in 1981 and continued to do so throughout the years."

The applicant's statement is inconsistent with other information she provided previously and with information provided in the affidavits and letters she submitted in support of her application. On her I-687 Application, filed on May 26, 2005, and on her 1991 Form I-687 she indicated that from December 1981 to July 1986 she resided at [REDACTED] in Dallas; this exact information is confirmed by both [REDACTED] and [REDACTED] in their statements (noted above). The information is contradicted, however, by the applicant's own statement of March 16, 2006, that she lived at various addresses during that time period and could not remember them all. Also on her I-687 Application and on her 1991 Form I-687, where applicants are requested to list all affiliations or associations, specifically including churches, she indicated "none." At her interview, however, on January 19, 2006, notations indicate that the applicant added the name of Our Lady of Lourdes in Dallas from "for 4 years" to "present" on her I-687 Application. Again, the information is inconsistent and contradicts the information the applicant

provided in her March 16, 2006 statement – that she and her family attended Our Lady of Lourdes Catholic Church when they first arrived in 1981 and continued to do so “throughout the years.” Her description of how she and her husband and children all entered the United States together and lived in one room together for five years is directly contradicted by the declaration of [REDACTED], who describes herself as the applicant’s close friend. Ms. [REDACTED] stated that the applicant came to the United States in 1981 by herself and did not have any family.

As noted above, to meet her burden of proof, the applicant must provide evidence of eligibility apart from her own testimony. In this case, there is only one credible document in the record that supports her claim of entry, a computer printout that shows the applicant received a vaccination in the United States in December 1981. Her assertions regarding her residence in Dallas during the requisite period, however, are either inconsistent or not supported by any credible evidence in the record. In fact, some of the evidence of record directly contradicts the applicant’s assertions.

The absence of sufficient credible and probative documentation to corroborate the applicant’s claim of continuous residence for the requisite period seriously detracts from the credibility of her 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 and contradictions in the applicant’s testimony and in supporting affidavits and letters, and only one probative document in the record in support of her application, the applicant has failed to establish by a preponderance of the evidence that she 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-*, 20 I&N Dec. at 79-80. 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.