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U.S. Citizenship
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Services

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FILE:

MSC 05 334 11722

Office: NEW YORK

Date:

APR 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. The file has been returned to the National Benefits Center. If your appeal was sustained, or if the matter 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.

A handwritten signature in black ink, appearing to read "R. Wiemann", written over a faint circular stamp.

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 a continuous unlawful status, and failed to demonstrate credibly that he was continuously physically present in the United States since November 6, 1986.

On appeal, the applicant asserted that he had responded to the director's notice of intent to deny.

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 was 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 confirm 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.

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.

As to continuous physical presence since November 6, 1986, 245A(a)(3) of the Act states, "[a]n alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . by virtue of brief, casual, and innocent absences from the United States."

The applicant has the burden of proving by a preponderance of the evidence that he or she resided continuously in the United States from January 1, 1982 until he or she filed his or her application, was continuously physically present in the United States from November 6, 1986 until the date of filing the application, 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.

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.

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant's employment must provide the applicant's address at the time of employment, identify the exact period of employment, show periods of layoff, state the applicant's duties, declare whether the information was taken from company records, and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

The applicant submitted the instant Form I-687 application on August 30, 2005. On that application the applicant stated that he was born on May 5, 1968. The applicant indicated, at Item 30, that he lived at [REDACTED] in Richmond Hill, New York, from October 1981 to April 1988; at [REDACTED] also in Richmond Hill, from August 1992 to March 2000; at [REDACTED] in Richmond Hill from November 2001 to January 2003, and at [REDACTED] from February 2003 to "Present."¹

¹ The applicant signed the application on August 19, 2005.

This office notes that the residential history provided does not state where the applicant lived from April 1988 to August 1992.

The applicant stated, at Item 32, that he went to Canada during November 1986 for a social visit, and to India from some unspecified date during May 1988 to some unspecified date during July 1992 to visit his family.

The applicant stated that he worked as "House Help" from October 1981 to April 1988.² The address he gave for that employment was his home address at [REDACTED]. The applicant further stated that he was self-employed at his [REDACTED] address from August 1992 to February 1999, at his [REDACTED] address from November 2001 to January 2003, and at his [REDACTED] address from February 2003 until "Present."

This office notes that this chronology mirrors the applicant's residential history, except that the residential history states that the applicant quit the [REDACTED] address during March of 2000, whereas the employment history indicates that he ceased to work there during February 1999. This office further notes that this employment history does not indicate where the applicant worked from April 1988 to August 1992.

The record contains:

- copies of some portions of the applicant's Indian passport,
- a letter dated November 15, 2005 from the applicant,
- a letter dated December 11, 2005 from a religious organization,
- two affidavits dated December 13, 2005,
- an undated affidavit,
- notes from the applicant's March 20, 2006 interview, and
- a letter dated May 8, 2006 from the applicant,

The record contains no other evidence pertinent to the applicant's continuous residence or continuous physical presence in the United States during the salient periods.

The applicant's passport confirms that the applicant's birthday is May 5, 1968.

The applicant's November 15, 2005 letter states that the applicant lived continuously in the United States from 1981 to 1988.

² This office notes that, during October 1981 the applicant was 13 years old.

The December 11, 2005 letter from the religious organization states that the applicant has been a member of that congregation for a long time, but does not state more specifically the date the applicant began visiting the congregation.

The regulation at 8 C.F.R. § 245a.2(d)(3) states, in pertinent part,

Proof of residence. Evidence to establish proof of continuous residence in the United States during the requisite period of time may consist of . . .

* * * *

- (v) Attestations by churches . . . by letter which
 - (A) Identifies the applicant by name;
 - (B) Is signed by an official (whose title is shown);
 - (C) Shows inclusive dates of membership; [and]
 - (D) States the address where the applicant resided during the membership period.

The letter from the applicant's church does not conform to the requirements of that regulation as it does not state the dates of the applicant's residence. Pursuant to 8 C.F.R. § 245a.2(3)(vi)(L) that letter will be considered, but it will be accorded less evidentiary weight because it does not satisfy that regulatory requirement.

Further, at item 31 of the Form I-687 application, the applicant was required to list affiliations, associations, clubs, organizations, churches, unions, businesses, etc. to which he had belonged. The applicant did not list in that space the church that subsequently provided him the December 11, 2005 letter. This discrepancy causes the reliability of that letter to decline yet further. .

One of the December 13, 2005 affidavits is from [REDACTED], and states that he has known the applicant since 1981, when they used to play together at a park. The affiant also stated, "I know that [the applicant] tried to file Amnesty 81 during 1986-87 but was turned down by INS personnel. [Errors in the original.] The affiant did not state the basis for his asserted knowledge.

The other December 13, 2005 affidavit is from [REDACTED] and states that she met the applicant during 1981 when his mother worked as a housekeeper in the affiant's neighborhood and the affiant's house. That affiant also stated, "I know that [the applicant] tried to file Amnesty 81 during 1986-87 but was turned down by INS personnel. [Errors in the original.] The affiant did not state the basis for her asserted knowledge.

The undated affidavit is from [REDACTED] and states that she met the applicant at a wedding in New York during 1981, and that she knows the applicant has been physically present since that time.

At his March 20, 2006 interview the applicant stated that he had entered the United States by air during October 1981 with his mother, but that he has no medical records, dental records, rent receipts, utility bills, *et cetera*. He stated that he and his mother used a fraudulent passport or fraudulent passports to enter the United States, and that the agent who procured that document retained it after their entry. He further stated that, although he entered the U.S. during 1981, the year he turned 13 years old, he never attended school in the United States.

Yet further, the applicant stated at that interview that he lived at _____ in Richmond Hill beginning in 1981. The date he stated that he relinquished that address appears to be July 8, although the year is unclear.³ In any event, he did not state, at that interview, that he relinquished that residence during April 1988, as he stated on the Form I-687.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, the applicant must resolve any inconsistencies in the record with competent, independent, objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

As to his absences from the United States, the applicant stated that he had left only twice between January 1, 1982 and May 4, 1988. The applicant stated that he went to Canada during November 1986. The applicant further stated that he went to India during June or July of 1988 and returned during 1992.

The applicant also stated at his interview that he married in June 20, 1988, a marriage that his aunt arranged, that his wife has never been to the United States, Canada, or Mexico, and that he has three children, born June 1989, October 1991, and February 1993.

In his May 8, 2006 letter, the applicant reiterated that he entered the United States during 1981 and resided in the United States continuously thereafter. The applicant also reiterated that he had been continuously present in the United States from November 6, 1986 through May 4, 1988 with the exception of 30 days.

At his interview, the applicant stated that he originally tendered his amnesty application during 1996. In his May 5, 2006 letter the applicant stated that he initially attempted to file a Form I-687 during 1986 or 1987.⁴ The two December 13, 2005 affidavits both state that the applicant attempted to file for amnesty during either 1986 or 1987. The date upon which he first attempted to submit an amnesty application is not specified elsewhere in the record.

³ That portion of the interviewer's notes is illegible.

⁴ Quoting from the letter, "This is correct that in 1986 – 87 I applied for my Application I-687 but the same has not been accepted by the I.N.S." [Errors in the original.]

As was noted above, in accordance with the CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10, eligibility under that settlement hinges upon the applicant having 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. Although the evidence of this in the record is quite thin, this office will assume, *arguendo*, that the applicant did attempt to file an amnesty application between those dates.

In a Notice of Intent to Deny (NOID), dated November 15, 2005, the director noted that the applicant had presented no contemporaneous evidence of his entry into the United States or his residence or physical presence in the United States during the salient period. The director found that, in view of the inconsistencies in the record, the evidence in the record was insufficient to demonstrate the applicant's residence in and presence in the United States during the requisite periods. The director stated that, absent reliable evidence in support of the applicant's eligibility, CIS would find that the applicant had not demonstrated that he entered the United States prior to January 1, 1982, had not demonstrated that he resided continuously in the United States in an unlawful status since January 1, 1982, and had not demonstrated that he was continuously physically present in the United States since November 6, 1986. The director indicated that CIS intended, absent additional evidence, to find the applicant ineligible for temporary resident status pursuant to Section 245A of the Act.

The applicant was accorded 30 days to respond to that notice. The record contains no response. In the Notice of Decision, dated July 22, 2006, the director denied the application based on the reasons stated in the NOID, that is the applicant's failure to credibly demonstrate his continuous residence and continuous physical presence during the appropriate periods.

On appeal, the applicant stated that he had responded to the April 5, 2006 notice of intent to deny and would provide additional evidence if it was requested. The applicant also submitted the undated affidavit of [REDACTED] and a copy of his May 8, 2006 letter with the appeal.⁵

The applicant's offer on appeal to provide additional evidence upon request will not be considered. The applicant was able to provide evidence of eligibility with the Form I-687 application, or in response to the direct request for such evidence on April 5, 2006, or on appeal. The appeal will be decided based on the evidence now in the record.

One issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate continuous unlawful residence in the United States from prior to January 1, 1982, through December 31, 1987.

Another issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he was continuously physically present in the United States from November 6, 1986 until the unspecified date between May 5, 1987 to May 4, 1988 when the applicant allegedly

⁵ Although that letter was not previously in the record, the document submitted on appeal is clearly a photocopy.

initially attempted to file his amnesty application, excepting casual, and innocent absences excused by 8 U.S.C. § 1255a(a)(3).

The record contains no contemporaneous evidence of the applicant's entering the United States during 1981, as he claims to have done. The record contains no evidence of the applicant's residence or presence in the United States until he filed the instant application during 2005. The evidence in support of the applicant's claim of eligibility is supported only by affidavits and letters produced for the purpose of supporting the application.

At his interview the applicant said that he had been absent from the United States from June or July 1988 through 1992. On his Form I-687 application he indicated that he left the United States during May 1988.

The applicant's residential history as stated on the Form I-687 gives his address from October 1981 to April 1988; and his address from August 1992 to March 2000, but does not state where he lived from April 1988 to August 1992. The applicant's work history fails to address that same period. This supports the applicant's admission that he was not then in the United States. It tends to contradict, however, the applicant's assertion that he left during June of July.

Again, this discrepancy between the applicant's asserted residential and work histories and his asserted travel itinerary causes this office to reevaluate the reliability and sufficiency of the evidence submitted in this matter pursuant to *Matter of Ho*, 19 I&N Dec. 582.

The applicant stated, at his interview, that he married in June 20, 1988, and that although his wife has never been to the United States, he has children born during June 1989, October 1991, and February 1993. This also tends to support the applicant's admission at his interview that he was in India from 1988 through 1992.

Given the inconsistencies in the record, the evidence submitted in support of the applicant's eligibility, which consists of affidavits and letter, is insufficient to show, by a preponderance of the evidence, that the applicant entered the United States prior to January 1, 1982. Rather, the evidence seems to indicate that the earliest he might have entered the United States was during 1992, after he had married and started a family in India.

Even if the applicant was in the United States prior to 1992, the evidence suggests that he abandoned his United States residence and left the United States no later than April of 1988 in order to return to India, to enter into a pre-arranged marriage, and to start a family. This does not constitute a brief, casual absence. Further, the evidence does not demonstrate that the absence did not exceed the 45 days permissible during a single absence prior to the unspecified date between May 5, 1987 to May 4, 1988 when the applicant allegedly initially attempted to file his amnesty application.

Even if the applicant were shown to have entered the United States prior to January 1, 1982, he would still, therefore, have failed to show that he continuously resided in the United States from January 1, 1982 to the unspecified date between May 5, 1987 to May 4, 1988 when the applicant

allegedly initially attempted to file his amnesty application as required by section 245A(a)(2) of the Act and 8 C.F.R. § 245a.2(h)(1), and failed to show that he was continuously present in the United States from November 6, 1986 through the unspecified date between May 5, 1987 to May 4, 1988 when the applicant allegedly initially attempted to file his amnesty application, as required by section 245A(a)(3) of the Act and 8 C.F.R. § 245a.2(b)(1).

The applicant failed to sustain his burden of establishing continuous unlawful residence in the United States from prior to January 1, 1982, through the unspecified date between May 5, 1987 to May 4, 1988 when the applicant allegedly initially attempted to file his amnesty application and failed to sustain his burden of establishing establish continuous physical presence in the United States from November 6, 1986 through that same unknown date as required under Section 245A(a)(3) of the Act. The applicant is, for both reasons, ineligible for temporary resident status under section 245A of the Act. The application was correctly denied on both of those bases, which have not been overcome on appeal.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In legalization proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed.

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