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FILE:

MSC-04-363-10030

Office: NEW YORK

Date: SEP 22 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. 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, and is before the Administrative Appeals Office (AAO) on appeal. The Administrative Appeals Office initially summarily dismissed the appeal as frivolous. The AAO will *sua sponte* reopen the appeal and issue a decision to dismiss.

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. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, the applicant asserted that he did not receive the director's notice of intent to deny. The applicant stated that he submitted credible evidence in support of his application. The applicant noted that the affidavits he submitted are amenable to verification. On May 8, 2008, the AAO mailed the applicant copies of the director's notice of intent to deny and denial notice. The AAO granted the applicant an additional 30 days to submit additional documentation in support of his appeal. On June 11, 2008, the AAO determined that the applicant failed to submit such documentation within the allotted 30 day time period, and issued a decision to summarily dismiss the appeal. On June 23, 2008, the AAO received a letter from counsel indicating that the applicant timely submitted additional documentation in support of his appeal. Counsel furnished a Federal Express document showing a delivery date of June 6, 2008. Therefore, the AAO will *sua sponte* reopen the applicant's appeal and issue a decision on the merits of the case.

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) 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 petitioner 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, 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 Supplement to Citizenship and Immigration Services (CIS) on September 27, 2004. At part #30 of the Form I-687 application where applicants are asked to list all residences in the United States since first entry, the applicant showed his first address in the United States to be at [REDACTED] [REDACTED] from April 1981 until July 1990. At part #33, he showed his first

employment in the United States to be as a self-employed vendor at [REDACTED] from April 1983 until July 1990.

The applicant submitted the following documentation:

- An affidavit from [REDACTED] dated September 24, 2004, which provides, “[I] have known [REDACTED] in the United States since 1981 [sic] That [REDACTED] who also resides at [REDACTED] has once lived with me at [REDACTED] from 1981 to 1990. . . .” This affidavit fails to establish how [REDACTED] first became acquainted with the applicant. Furthermore, it does not provide any specific details on their relationship in the United States during the requisite period. Relevant details would include the type of living arrangement/agreement they maintained during their purported nine years of residing together. Given these deficiencies, this affidavit is without any probative value as evidence of the applicant’s residence in the United States during the requisite period.
- An affidavit from [REDACTED], dated September 24, 2004, which provides, “[I] have known the applicant, [REDACTED] in the United States since 1981. That in October 1987, I accompanied the applicant, [REDACTED] to the INS office in NYC, and [REDACTED] advised an INS official that he wished to apply for the 1986 amnesty program, but he was turned away by the INS official. . . .” This affidavit fails to establish how [REDACTED] first became acquainted with the applicant. Furthermore, it does not illustrate the frequency of their contact in the United States during the requisite period. Given these deficiencies, this affidavit is without any probative value as evidence of the applicant’s residence in the United States during the requisite period.
- Three affidavits from the applicant, respectively dated September 24, 2004, September 24, 2004 and June 27, 2005:
 - The first affidavit is entitled, “Affidavit of Employment in the United States,” and provides, “[I] had been a Street Vendor on [REDACTED] from April 1983 to July 1990, and I was making approximately \$350 per week. . . .”
 - The second affidavit is entitled, “Affidavit in Support of My Application (Form I-687),” and provides, “I continued to illegally live in the United States from April 1981 to the time I visited the INS office in NYC, and tried to apply for the 1986 amnesty program. I visited the INS office in NYC with a friend in October 1987, and advised an INS official that I wished to apply for the 1986 amnesty program, but I was turned away by the INS official. . . .”
 - The third affidavit is entitled, “Affidavit in Support of My I-687 Application,” and provides, “I first came to the United States via Canada near Buffalo in April 1981. In February, 1987, I traveled to Toronto, Canada, illegally, to visit my Cousin, [REDACTED] [REDACTED] I returned to the United States from Canada near Buffalo in April 1987. . . .” The affidavit further provides, “In October, 1987, I decided to apply for the 1986

amnesty. . . . The person at the information desk would not accept my application because, she said, I had left the country without an advance parole.”

Although these affidavits attest to the applicant’s eligibility for temporary resident status, they alone do not satisfy his burden of proof. Pursuant to 8 C.F.R. § 245a.2(d)(6), to meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony.

On March 10, 2006, the director issued a Notice of Intent to Deny (NOID) to the applicant. The director determined that the applicant did not submit evidence of his entry into the United States in April 1981, and this entry is not shown in CIS records. The director further determined that the applicant’s trip to Gambia from February 1987 until October 1987 was in excess of eight months and exceeded the regulatory requirements for continuous residence. The director stated that the applicant offered no evidence that his return to the United States could not be accomplished during the allowed time period due to an emergent reason. The director concluded that the applicant is statutorily ineligible for temporary resident status. The director afforded the applicant 30 days to submit additional evidence in response to the NOID.

On July 31, 2006, the director issued a notice to deny the application. In denying the application the director determined that the applicant failed to submit additional evidence in response to the NOID. The director concluded that the applicant failed to meet his burden of proof in the proceeding, and denied the application for the reasons stated in the NOID.

On appeal, applicant asserts that he submitted credible and convincing evidence in support of his application. The applicant states that the affidavits he submitted are credible and amenable to verification. Counsel furnishes as additional evidence an affidavit from [REDACTED] dated May 27, 2008. Counsel also resubmits the previously furnished affidavits from [REDACTED] and [REDACTED].

The affidavit from [REDACTED]

I am very well aware that [REDACTED] initially arrived in the United States in April 1981 without inspection and that he resided continuously in the United States from that time until July 1990 when he returned to Gambia. I know this because [REDACTED] and I have remained close friends since the time we met in Gambia and we have visited each other and kept in close contact since his initial arrival in the United States in April 1981. The first time I reunited with him in the United States was in the summer of 1981 when he came to visit me in my home. In all the time I have known [REDACTED] he has always been forthright with me, therefore I believed him when he informed me that he initially arrived in the United States in April 1981 without inspection and that he resided continuously in the United States from that time until July 1990 when he returned to Gambia. From the summer of 1981 until July 1990, we both attended several social functions such as birthday parties, Christmas parties, weddings, funerals,

and Gambian functions. Therefore I can attest to the fact that he was residing in the United States during that period of time. . . .

This affidavit describes how [REDACTED] first became acquainted with the applicant in Gambia. However, it fails to provide specific information on their relationship in the United States during the requisite period. The affidavit states, "From the summer of 1981 until July 1990, we both attended several social functions such as birthday parties, Christmas parties, weddings, funerals, and Gambian functions." This is a general list of events that does not clearly illustrate the type of functions that they purportedly attended together. Given this deficiency, the statement is of little probative value as evidence of the applicant's residence in the United States during the requisite period.

In conclusion, the applicant has not overcome the basis for the director's denial. The director determined that during the requisite period the applicant had an absence from the United States in excess of eight months and he offered no evidence that his return to the United States could not be accomplished during the allowed time period due to an emergent reason. According to 8 C.F.R. § 245a.2(h)(1), an applicant for temporary resident status shall be regarded as having resided continuously in the United States if, at the time of filing of the application, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between January 1, 1982 through the date the application for temporary resident status is filed, unless the applicant can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. According to the CSS/Newman Settlement Agreements, the term "until the date of filing" 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. See CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10. The applicant indicated in his September 24, 2004 affidavit entitled, "Affidavit in Support of My Application (Form I-687)," that he attempted to file for legalization in October 1987.

During the applicant's interview he testified that he departed the United States from February 1987 until October 1987 to visit his father and mother. The applicant acknowledged that his absence was for approximately eight months. Pursuant to 8 C.F.R. § 245a.2(h)(1), if the applicant's absence exceeds 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-*, defines emergent as "coming unexpectedly into being." 19 I&N Dec. 808 (Comm. 1988). The applicant testified that his eight month travel to Gambia was not due to an emergency. The applicant failed to indicate any emergent reason for his absence to exceed the 45-day period allowed for a single absence. Therefore, it cannot be concluded that he resided continuously in the United States for the requisite period.

Furthermore, the applicant has failed to provide credible, reliable and probative evidence of his residence in the United States during the requisite period. The applicant has not provided sufficient evidence to establish that he entered the United States prior to January 1, 1982. Nor has he established that he has resided in the United States during the requisite period. The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence. See 8 C.F.R. § 245a.2(d)(3). The applicant submitted as evidence of his residence in the United States during the requisite period, three affidavits. The affidavits from [REDACTED] and [REDACTED] lack considerable detail on the affiants' relationship with the applicant in the United States during the requisite period. As such, they are without any probative value as corroborating evidence. On appeal, counsel submitted an affidavit from [REDACTED] which indicates he and the applicant attended social functions together in the United States. However, the affidavit fails to clearly illustrate the type of functions that they purportedly attended together. As such, this affidavit is of little probative value as corroborating evidence. Pursuant to 8 C.F.R. § 245a.2(d)(6), the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. Since the totality of the applicant's documentation is at best of minimal probative value, he has not furnished sufficient evidence to meet his burden of proof in this proceeding. The applicant is ineligible for temporary resident status for this additional reason.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts 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 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.