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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



U.S. Citizenship
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FILE:



Office: NEW YORK

Date:

MAR 17 2009

MSC-05-056-10032

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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed or rejected, 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.

John F. Grissom
Acting 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 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 (together comprising the I-687 Application). The director denied the application, finding that the applicant had failed to meet his burden of proving by a preponderance of the evidence that he entered the United States before January 1, 1982 and had resided continuously in the United States in an unlawful status throughout the requisite period. Specifically, the director found evidence in the record that the applicant's residence in the United States since before January 1, 1982 was broken by a single absence for more than 45 days during the requisite period for which no emergent reason had been established.

On appeal, the applicant submits a brief in which he states that he traveled from New York to Colombia on or about July 3, 1985 and did not return to the United States until December 4, 1985. He further contends that he was unable to return to the United States within 45 days in 1985 for an emergent reason, because a sting ray bit him and hurt his leg while he was swimming in a local river in Colombia. On appeal, the applicant also submits three affidavits from his relatives who state that the applicant could not timely return to the United States because he was bitten by a sting ray while he was swimming in a local river in Colombia and could not walk for two months.

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.

A review of the record in this case reveals that the applicant filed a completed application for temporary resident status on April 21, 1988. The director approved the application, finding that the

applicant had met his burden of proving by a preponderance of the evidence that he entered the United States before January 1, 1982 and had resided continuously in the United States in an unlawful status since that date through the date he filed his application. On August 5, 1989, the applicant was issued temporary resident status. On February 14, 1997, the applicant submitted an application for a replacement temporary resident card; however, because the applicant failed to submit an application for lawful permanent resident status within 43 months after the approval of his temporary resident status in violation of 8 C.F.R. § 245a.3(a), his request for a replacement temporary resident card was denied on October 30, 1997. On June 3, 2003, the applicant further submitted a Form I-485 application to adjust status under the LIFE Act, which was rejected due to an incorrect filing fee.

The applicant filed the current application for temporary resident status on October 4, 2004. The director noted in her notice of intent to deny (NOID) that the applicant was in Colombia on July 11, 1985 to get his passport and did not enter the United States until December 4, 1985. In response to the director's NOID, the applicant submitted a declaration in which he stated that he left New York on or about July 3, 1985 to go to Colombia and did not return to the United States until December 4, 1985 because he was bitten by a sting ray. The director denied the application, finding that the applicant failed to establish continuous residence in the United States since before January 1, 1982 and further that any break in his claim of continuous residence was not due to an emergent reason.

Upon a *de novo* review, the AAO agrees with the director that the evidence does not establish that the applicant entered the United States prior to January 1, 1982. The AAO notes several inconsistencies about the applicant's alleged entry into the United States prior to December 4, 1985, when he was stopped at the border by immigration officials. The birth certificate of the applicant's son, [REDACTED], indicates that the applicant was domiciled in Venezuela on the date of the child's birth in Venezuela on January 24, 1984. The record does not explain how the child was conceived in Venezuela at a time when the applicant states he was living in the United States. Further, the Form I-213, Record of Deportable Alien, indicates that the applicant's first entry into the United States was on December 4, 1985, at which time he had no property, family members or other equities in the United States. The AAO agrees with the director that the evidence establishes that the applicant first entered the United States on December 4, 1985.

There are also inconsistencies in the record regarding the applicant's alleged absence from the United States from July 3, 1985 to December 4, 1985. At his legalization interview on July 20, 1988, the applicant testified that he returned to Venezuela in 1985 to see his son, who was very sick. On appeal, the applicant submits declarations from three family members who testified that the applicant's 1985 absence from the United States was extended due to a sting ray bite. None of these relatives mention the applicant's sick son in Venezuela. This inconsistency is not resolved of record. 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). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application. *Id.*

at 591. The record does not establish that the applicant was absent from the United States from July to December 1985 due to an emergent reason. Any presence in the United States he would have had prior to December 4, 1985 would have been interrupted by this absence.

The inconsistencies of record seriously undermine his credibility and materially affect his eligibility for the benefit sought. The applicant 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.

Beyond the decision of the director, a review of the record further reveals that the applicant was arrested by border patrol agents as he attempted to enter the United States through Calexico without inspection on December 4, 1985. The record also contains a deportation order *in absentia* as the applicant failed to appear before an Immigration Judge (IJ) on June 26, 1986. The applicant is thus inadmissible to the United States, and for this additional reason, the application may not be approved. The record also reveals that the applicant may have three misdemeanor convictions, which would also render him ineligible for the benefit.

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