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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



[REDACTED]

L1

FILE:

[REDACTED]

Office: LOS ANGELES

Date:

IN RE:

Applicant:

[REDACTED]

FEB 22 2011

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:

[REDACTED]

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, Los Angeles. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because she found the evidence submitted with the application was insufficient to establish eligibility for Temporary Resident Status. Specifically, the director noted that the applicant submitted letters/affidavits supporting his claim of permanent residence during the relevant period, however, the affiants fail to include sufficient detail regarding their relationship with the applicant to be probative and credible. The director also noted several inconsistencies with regard to the applicant's addresses and absences during the relevant period. Finally, the director noted that the applicant submitted documents and evidence using alias, [REDACTED] however, the applicant failed to establish the legitimacy of the alias. Noting the paucity of credible evidence in the record which would establish the applicant's eligibility for the benefit sought, the director denied the application on March 8, 2008.

On appeal, the applicant indicates that the evidence in the record establishes his eligibility. He asserts that the director did not properly consider all submitted evidence.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Following *de novo* review, the AAO finds that the applicant has failed to establish his continuous residence in the United States from January 1, 1982 through the end of the relevant period.

Preliminarily, the AAO notes that the director adjudicated the application on the merits and presumptively found the applicant eligible for class membership under the terms of the CSS/Newman Settlement Agreements. On September 9, 2008 the court approved a Stipulation of Settlement in the class action *Northwest Immigrant Rights Project, et al vs. USCIS, et al*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). Class members are defined, in relevant part, as:

1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who
 - (A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an INS officer or agent acting on behalf of the INS, including a Qualified Designated Agency ("QDE"), and whose applications were rejected for filing (hereinafter referred to as 'Subclass A members'); or
 - (B) between May 5, 1987 and May 4, 1988, attempted to apply for legalization with an INS officer, or agent acting on behalf of the INS, including a QDE, under § 245A of the INA, but were advised that they were ineligible for legalization, or were refused

legalization application forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to file or complete a timely written application (hereinafter referred to as 'Sub-class B' members); or

- (C) filed a legalization application under INA § 245A and fees with an INS officer or agent acting on behalf of the INS, including a QDE, and whose application
 - i. has not been finally adjudicated or whose temporary resident status has been proposed for termination (hereinafter referred to as 'Sub-class C.i. members'),
 - ii. was denied or whose temporary resident status was terminated, where the INS or CIS action or inaction was because INS or CIS believed the applicant had failed to meet the 'known to the government' requirement, or the requirement that s/he demonstrate that his/her unlawful residence was continuous (hereinafter referred to as 'Sub-class C.ii members').

2. Enumerated Categories

- (1) Persons who violated the terms of their nonimmigrant status prior to January 1, 1982 in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government.
- (2) Persons who violated the terms of their nonimmigrant visas before January 1, 1982, for whom INS/DHS records for the relevant period (including required school and employer reports of status violations) are not contained in the alien's A-file, and who are unable to meet the requirements of 8 C.F.R. §§ 245a.1(d) and 245a.2(d) without such records.
- (3) Persons whose facially valid 'lawful status' on or after January 1, 1982 was obtained by fraud or mistake, whether such 'lawful status' was the result of
 - (a) reinstatement to nonimmigrant status;
 - (b) change of nonimmigrant status pursuant to INA § 248;
 - (c) adjustment of status pursuant to INA § 245; or
 - (d) grant of some other immigration benefit deemed to interrupt the continuous unlawful residence or continuous physical presence requirements of INA § 245A.

The AAO finds that the applicant has not established his lawful entry to the United States prior to January 1, 1982. On March 3, 2010, the applicant was interviewed by USCIS. During that interview, he testified that he entered the United States in 1979 via San Ysidro, without inspection. He also indicated on his NWIRP Form I-687 that he entered the United States in 1979 without inspection. In response to USCIS' decision that the applicant did not meet the requirements of

NWIRP class membership, the applicant indicated that he legally entered the United States in 1979 on his mother's border crossing card. He submits a copy of his mother's border crossing card date stamped October 1961, however, the applicant fails to indicate how he used this border crossing card 18 years later in 1979 as he testified. Thus, the applicant has not established that he is a member of the NWIRP class as enumerated above.

Furthermore, 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)(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 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.

In support of his assertion that he (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status throughout the relevant period, the applicant submits affidavits from the following individuals: [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

Most of the affiants indicate that the applicant used the alias [REDACTED] however, the applicant has not established that he used this alias and the affiants do not indicate the basis of their knowledge of the applicant's use of the assumed name.

Because the record of proceedings reflects two different names, the applicant has the burden of proving that he was in fact the person who used each name. 8 C.F.R. § 245a.2(d)(2). To meet the requirements of this regulation, documentation must be submitted to prove the common identity, i.e., that the assumed name(s) were in fact used by the applicant. The most persuasive evidence is "a document issued in the assumed name which identifies the applicant by photograph, fingerprint or detailed physical description. Other evidence which will be considered are affidavits(s) by a person or persons other than the applicant made under oath, which identify the affiant by name and address, state the affiant's relationship to the applicant and the basis of the affiant's knowledge of the applicant's use of the assumed name." 8 C.F.R. § 245a.2(d)(2). The applicant does not list this alias on his Form I-687 submitted in 1995 and the affiants do not indicate the basis of their knowledge of the applicant's use of the assumed name.

Since the applicant failed to submit sufficient evidence that the alias properly refers to him, the credibility and probative value of the evidence submitted in any name other than [REDACTED] is substantially diminished.

Additionally, the affidavits contain multiple inconsistencies. For example, [REDACTED] indicates that he worked with the applicant at [REDACTED] from 1983 until 1993, however, the applicant indicates on his Form I-687 submitted in 1995, that he began working for [REDACTED] in 1988.

The record also contains a letter from [REDACTED], AKA [REDACTED] indicating that the applicant was employed from 1982 until 1989. In addition to being inconsistent with the applicant's previous Form I-687 and the affidavit from [REDACTED] this letter fails to meet certain regulatory standards set forth at 8 C.F.R. § 245a.2(d)(3)(i), which provides that letters from employers must include the applicant's address at the time of employment; exact period of employment; whether the information was taken from official company records and where records are located and whether United States Citizenship and Immigration Services (USCIS) may have

access to the records; if records are unavailable, an affidavit form-letter stating that the employment records are unavailable may be accepted which shall be signed, attested to by the employer under penalty of perjury and shall state the employer's willingness to come forward and give testimony if requested. The statements submitted do not include much of the required information and can be afforded minimal weight as evidence of the applicant's residence in the United States for the duration of the requisite period.

indicates that the applicant lived in from 1991 until 1993, however, on his Form I-687 the applicant indicates that he moved to California in 1984.

The AAO also notes that the applicant indicated no employment prior to 1988 on his Form I-687 from 1995 and no residence in the United States prior to 1988. On his Form I-687 from 2005, the applicant indicates that his employment began in 1996.

Finally, as noted by the director, the applicant's child, was born in Mexico on June 25, 1986 and the applicant was present in Mexico to register the child's birth on June 28, 1986. This absence does not correspond to any listed absence on the applicant's Form I-687. The applicant indicates that another individual signed the child's birth registration, however, he does not provide any independent evidence which resolves the inconsistency.

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.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought.

The AAO also notes that the applicant was arrested and pled guilty on December 7, 2000 to violating California Vehicular Code (CVC) section 23152(A) *Driving under the Influence* and 23152(B) *Driving under the Influence with 0.08% or Higher Blood Alcohol*. (Case no.). While two misdemeanor convictions do not render the applicant ineligible for legalization benefits, the Federal Bureau of Investigation (FBI) rap sheet contained in the file indicates that the applicant's convictions were "with priors." The applicant has not submitted evidence of prior convictions, however, the burden of establishing eligibility and admissibility lies with the applicant. This inconsistency has not been resolved.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and 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 has also failed to establish that his

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criminal record does not render him ineligible. 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.