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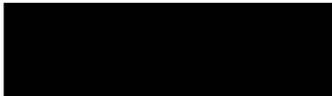
Date:

DEC 11 2008

MSC 05 329 10978

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. 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.

A handwritten signature in cursive script, appearing to read "John F. Grissom".

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 on August 25, 2005. Upon review, the director determined that insufficient evidence had been presented to establish eligibility under section 245A of the Act. On November 15, 2005, the director issued a notice of intent to deny (NOID) stating that the applicant had not established eligibility for temporary residence under section 245A of the Act. Specifically, the applicant had failed to provide sufficient evidence to establish that he first entered the United States before January 1, 1982 and thereafter resided continuously in the United States in an unlawful status for the duration of the requisite period. The director also determined that the applicant had not established that he was continuously physically present in the United States for the requisite period. The applicant was granted 30 days from the date of the notice to submit additional evidence in response to the NOID. In response to the NOID on December 16, 2005, the applicant submitted an affidavit, a bank statement and a copy of his nonimmigrant visa page from his passport. The director denied the application on February 27, 2007, finding that the applicant had not established by a preponderance of the evidence eligibility for temporary residence under section 245A of the Act. The director also noted that the applicant departed the United States in August 1987 and returned October 30, 1987 using a B-1/B-2 nonimmigrant visa. The AAO is unable to determine the date the applicant was caused not to timely file his legalization application within the filing period from May 5, 1987 to May 4, 1988. Therefore, his travel beginning in August 1987 did not necessarily interrupt his continuous residence. The travel is not clearly relevant to the question of whether the applicant has established that he resided unlawfully in the United States through the requisite period. If the director erroneously considered this absence; the error must be considered as a harmless error as the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(b).

On appeal, the applicant states that he told the officer about his absence in 1987. The applicant states that his application satisfies the requirements under the CSS/Newman (LULAC) settlement agreement.

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 245(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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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 submitted sufficient credible evidence to meet his burden of establishing that he (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. Here, the applicant has failed to meet this burden.

At part #30 of the Form I-687 application where the applicant was asked to list her places of residence in the United States she indicated that she resided in New York from May 1981 to September 1990. She indicated at part #33 of her Form I-687 application that she was employed as a chef from June 1981 to February 1990.

In an attempt to establish entry into the United States before January 1, 1982 and continuous unlawful residence in the United States, the applicant provided an affidavit, a bank statement and a copy of his passport. On appeal, the AAO will consider only evidence that is relevant to the requisite period.

In the applicant's interview conducted on April 18, 2006, he stated that he initially entered the United States on May 21, 1981 by crossing the Canadian border and using a passport to enter Seattle. He stated that he did not leave the United States from January 1, 1982-May 4, 1988. The AAO notes that a copy of the applicant's passport indicates that the passport was issued in Malaysia on January 30, 1982 and further that he traveled to Malaysia in 1986. The inconsistencies between the evidence of record and his testimony that he did not leave the United States are material in that they relate to whether or not the applicant was continuously residing in the United States throughout the requisite period. 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 petitioner submits competent objective evidence pointing to where the truth lies. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The affidavit from [REDACTED] states that during 1983, the applicant lived in her house at [REDACTED] Elmhurst, New York. The applicant's Form I-687 shows that the applicant lived at [REDACTED], Flushing, New York from May 1981 to September 1990. The contradictions are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States during the requisite period. No evidence of record resolves this inconsistency. *See Matter of Ho, supra.*

The affidavit neither confirms the applicant's entry into the United States prior to January 1, 1982 nor his continuous residency in the United States. The affidavit fails to explain the circumstances surrounding their initial meeting and how they developed and maintained a friendship over the requisite period. The affiant fails to specify the frequency with which they saw and communicated with each other during the requisite period. The affiant fails to indicate any other details that would lend credence to the claimed acquaintance with the applicant and the applicant's residence in the United States during the requisite period. The affidavit fails to establish the applicant's continuous unlawful residence in the United States for the duration of the requisite period. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from the claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the

facts alleged. Upon review, the AAO finds that the affidavit does not contain sufficient detail to establish its credibility. The affidavit provided by the applicant is not deemed credible and shall be afforded no weight.

In the instant case, the applicant has failed to submit sufficient evidence to overcome the director's denial. The lack of evidence and inconsistencies noted call into question the credibility of the applicant's claim of continuous unlawful residence in the United States throughout the requisite period. The evidence submitted is insufficient to establish the applicant's 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 requisite period.

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 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.