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FILE:

MSC-05-327-10971

Office: CHICAGO, IL

Date:

**JAN 02 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. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case 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.

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, Chicago, Illinois, and that decision is now before the Administrative Appeals Office (AAO) on appeal. As the AAO finds that the director's basis for denying the applicant was in error, it will withdraw the director's decision and deny the application based on the applicant's failure to meet his burden of establishing that he continuously resided in the United States for the duration of the requisite period.

The director determined the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that he attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS) in the original legalization application period of May 5, 1987 to May 4, 1988. Specifically, the director stated that the applicant's absence that began in May of 1988 and ended in February 2005 exceeded forty-five (45) days. Therefore, the director stated that the applicant was ineligible to adjust to Temporary Resident Status pursuant to the regulation at 8 C.F.R. § 245a.1(c)(1)(i) and denied the application.

On appeal, the applicant asserts that the director has erred in interpreting the term "continuously resided" as defined in the CSS/Newman Settlement Agreements.

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 to the Immigration and Naturalization Service (the Service, now Citizenship and Immigration Services or CIS) 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).

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 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 (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.

An applicant shall be regarded as having resided continuously in the United States if, at the time of filing no single absence from the United States has exceeded forty-five (45) days and the aggregate of all absences has not exceeded one hundred eighty (180) days between January 1, 1982 and the date of filing his or her application for Temporary Resident Status unless the applicant establishes that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed. 8 C.F.R. § 245a.2(h)(1)(i).

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he resided in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application with the Service in the original legalization application period of May 5, 1987 to May 4, 1988. Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on August 23, 2005. At part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant showed his address in the United States during the requisite period to be [REDACTED] in Astoria, New York from June 1981 until May 1988. At part #32 where the applicant was asked to list his absences since he entered the United States he showed that during the requisite period he was absent once, from December 1986 until January 1987. It is noted that he also showed that after the requisite period, he was also absent from May 1988 until February 2005. At part #33 where the applicant was asked to list all of his employment since January 1, 1982, he showed his first and only employment in the United States to be self-employment in East Chicago as an ice cream vendor from March 2005 until he signed his Form I-687. Notes taken at the time of the applicant's interview with a Citizenship and Immigration Services (CIS) officer also indicate that the applicant stated that he had also had employment at the "Super Duper Gas Station" as a cashier. However, there are no dates associated with that employment indicated on the applicant's Form I-687.

Also in the record is a statement from the applicant. This undated statement asserts that the applicant lived in the United States from June of 1981 until May of 1988. It is noted that on the second page of this statement, the applicant states that he left in April of that year. The applicant goes on to say that he was front desked because he had traveled to India in December of 1986 without advanced parole prior to the original legalization period. He asserts that he is a class member.

The applicant has the burden of proving by a preponderance of the evidence that he has resided in the United States for the requisite period. 8 C.F.R. § 245a.2(d)(5). To meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). The

regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of documentation that an applicant may submit to establish proof of continuous residence in the United States during the requisite period. This list includes: past employment records; utility bills; school records; hospital or medical records; attestations by churches, unions or other organizations; money order receipts; passport entries; birth certificates of children; bank books; letters or correspondence involving the applicant; social security card; selective service card; automobile receipts and registration; deeds, mortgages or contracts; tax receipts; and insurance policies, receipts or letters. An applicant may also submit any other relevant document pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant provided two (2) affidavits from relatives. Details of those affidavits are as follows:

- An affidavit from [REDACTED] who states that he lives in Selma, California. Here, the affiant lists the applicant's addresses of residence consistently with what the applicant showed on his Form I-687. He states that the applicant is his relative and that he has lived in the United States since 1981. Here, the affiant does not state how he knows the applicant began living in the United States in 1981. He does not provide a date through which it is personally known to him that the applicant resided in the United States. He does not submit proof that he himself lived in the United States for the duration of the requisite period or state whether there were periods of time during which he did not have contact with the applicant. The affiant does not explain how he can verify the applicant's address of residence during the requisite period. The affiant further fails to submit provide proof of his identity with his affidavit or to provide a telephone number at which he can be reached to verify information contained in the affidavit. Because of this affidavit's significant lack of detail, it can be accorded very minimal weight as proof that the applicant resided in the United States for the duration of the requisite period.
- An affidavit from [REDACTED] who does not indicate where he or she lives on the affidavit. However, the affidavit is notarized by a notary who lives in Fresno, California who has indicated that the affidavit was sworn before her in Selma, California. The affiant indicates that the applicant is his or her cousin and that the applicant has been living in the United States since 1981. It is not clearly indicated that this affiant personally knows that the applicant resided in an illegal status on a date prior to January 1, 1982. The affiant goes on to say that he or she and the affiant see each other at family reunions and parties. Here, the affiant fails to indicate how he or she knows the applicant entered the United States before January 1, 1982, or whether there were periods of time during which he or she did not have contact with the applicant. The affiant fails to indicate whether he or she resided in the United States during the requisite period. The affiant lists addresses associated with the applicant, but does not explain how he or she knows the applicant lived at these addresses. Further, there are no dates associated with the reunions and parties described in the affidavit and it is not clear whether these reunions and parties occurred in the United States or elsewhere. This affiant failed to provide a telephone number at which he or she could be reached to verify information contained in the affidavit. Because of its significant lack of detail, this affidavit can be accorded very little weight in establishing that the applicant resided continuously in the United States for the duration of the requisite period.

Thus, on the application, which the applicant signed under penalty of perjury, he showed that he resided and in the United States since June of 1981 but did not work in the United States until 2005. The only evidence submitted with the application that is relevant to the 1981-88 period in question were two (2) attestations that provide minimal details regarding the circumstances of the applicant's residence in the

United States during the requisite period. Though the affidavits both contain testimony asserting that the applicant resided in New York during the requisite period, the affiants who submitted the affidavits both live in California.

It is noted here that though the director correctly stated that applicants who are eligible for adjustment to Temporary Resident Status are those who establish that he or she entered the United States prior to January 1, 1982, and who have thereafter resided continuously in the United States in an unlawful status, and who 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). The director also correctly noted that applicants shall be regarded as having resided continuously in the United States if, at the time of filing no single absence from the United States has exceeded forty-five (45) days and the aggregate of all absences has not exceeded one hundred eighty (180) days between January 1, 1982 and the date of filing his or her application for Temporary Resident Status unless the applicant establishes that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed. 8 C.F.R. § 245a.1(c)(1)(i) and 8 C.F.R. § 245a.2(h)(1)(i).

As was noted previously, for purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the alien 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, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10. Here, the applicant stated that he attempted to apply for legalization but was turned away from an Immigration and Naturalization Services (INS) office in 1987.

In denying the application, the director noted that the applicant's absence from May 1988 until February 2005 caused him to fail to maintain continuous residence. However, it is noted here, that this absence falls outside of the requisite period. Therefore, the director's assertion that this absence of more than forty-five (45) days caused the applicant to fail to maintain continuous residence is in error. Because this is not a legitimate basis for the denial of the application, the AAO withdraws the director's decision to deny the application on this basis.

The director's error is harmless because 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(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO conducts the final administrative review and enters the ultimate decision for USCIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Here, though the applicant's absence from 1988 until 2005 did not cause him to break his continuous residence, the affidavits submitted by the applicant that are relevant to the requisite period contain minimal details such that they cannot be accorded sufficient weight to allow the applicant to prove by a preponderance of the evidence that he resided continuously in the United States for the duration of that time. Neither affidavit submitted by the applicant is amenable to verification, as they do not contain telephone numbers at which the affiants can be reached.

In his appeal, the applicant's attorney correctly asserts that the director erred in determining that the applicant failed to maintain continuous residence due to an absence that fell outside of the requisite period. Therefore, as was previously noted, because the director erred in his decision, the AAO withdraws that decision, and enters a new decision of denial of the application on the grounds that the applicant did not meet his burden of proving by a preponderance of the evidence that he resided continuously in the United States for the duration of the requisite period.

As is stated above, 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). The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence pursuant to 8 C.F.R. § 245a.2(d)(3). However, the applicant has not provided any contemporaneous evidence of residence in the United States relating to the 1981-88 period, and has submitted attestations from only two people concerning that period that are significantly lacking in details. He has not indicated that he worked in the United States at any point in time during the requisite period. On appeal, he did not submit any additional evidence to establish that he had maintained continuous residence in the United States during the requisite period.

The regulation at 8 C.F.R. § 245a.2(d)(6) states that the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. Here, the evidence produced by the applicant is neither probative nor credible.

Though the director erred in determining the basis of the applicant's ineligibility to adjust status to that of a Temporary Resident, the absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of this 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 applicant's reliance upon documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application 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.