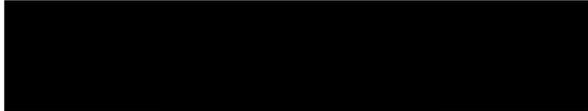


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FILE: [REDACTED]
MSC 05 315 10908

Office: NATIONAL BENEFITS CENTER

Date: MAR 03 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: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the National Benefits Center. If your appeal was sustained, or if the matter 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 Director, National Benefits Center. The appeal will be dismissed.

The district director denied the application because the applicant failed to demonstrate credibly that she entered the United States before January 1, 1982, and thereafter resided in a continuous unlawful status.

On appeal, the applicant submitted additional evidence but no argument.

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 was 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 confirm 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.

As to the requirement of continuous residence in the United States from January 1, 1982 through the date the application is filed, the regulation at 8 C.F.R. § 245a.2(h)(1) provides that an applicant shall be regarded as having resided continuously if no single absence during the salient period was longer than 45 days and the aggregate of all absences does not exceed 180 days.

As to continuous physical presence since November 6, 1986, 8 U.S.C. § 1255a(a)(3) states, "[a]n alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . by virtue of brief, casual, and innocent absences from the United States."

The applicant has the burden of proving by a preponderance of the evidence that he or she resided continuously and in an unlawful status in the United States from January 1, 1982 until he or she filed his or her application, that he or she was physically present in the United States from November 6, 1986 until the date of filing the application except as excused by 8 U.S.C § 1255a(a)(3), that he or she is admissible to the United States under the provisions of section 245A of the Act, and that he or she 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 and continuous physical presence 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, *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 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.

With the Form I-687 visa application, the applicant submitted no evidence pertinent to her claim of continuous unlawful residence in the United States from prior to January 1, 1982, through December 31, 1987 or to her continuous physical presence in the United States from November 6, 1986 to the date she filed her application.

In a Notice of Intent to Deny (NOID), dated November 17, 2005, the director noted that the applicant had failed to submit that evidence. The director indicated that CIS intended, therefore, to find the applicant ineligible for temporary resident status pursuant to Section 245A of the Act. The applicant was accorded 30 days to respond to that notice.

In response, the applicant submitted various documents, none of which were relevant to demonstrating her continuous unlawful residence and continuous physical presence in the United States during the salient periods.¹

¹ The evidence submitted in response to the NOID included two form affidavits from affiants claiming to know that the applicant previously applied for legalization. Neither of those affidavits,

In the Notice of Decision, dated July 26, 2006, the director denied the application based on the finding that the applicant had failed to demonstrate that she entered the United States before January 1, 1982 and resided continuously in the United States after that date.

On appeal, the applicant submitted an affidavit dated September 18, 2006. The record contains no other evidence pertinent to the applicant's continuous residence in the United States during the salient period. The applicant offered no argument on appeal.

The body of the September 18, 2006 affidavit states, in its entirety,

This letter is in reference to [the applicant]. I have known her for practically all her life as our families are very close friends. I know she first traveled to the United States with relatives in 1980 where she was also home schooled.

I know that by January 1, 1982 she was living in this country illegally because she entered without a valid VISA.

I know that from January 1, 1982 until May 4, 1988 she has reside [sic] in the Country in a continuous unlawful status.

That affidavit was not accompanied by any evidence that the affiant herself was in the United States during the periods she claims to know that the applicant was in the United States.

The issue raised in the decision of denial is whether the applicant has furnished sufficient credible evidence to demonstrate continuous unlawful residence in the United States beginning prior to January 1, 1982.² The applicant was born on June 21, 1977 and turned three during 1980, when the affidavit alleges she entered the United States. She was approximately four and one-half years old on January 1, 1982. This would not preclude her entering the United States prior to that date, but subjects the instant application to a higher level of scrutiny.

The applicant did not complete her Form I-687 application. At item 30 the applicant listed four Brooklyn residences at which she has allegedly resided since her entry, but did not provide dates, even approximate dates, at which she resided at each, as she was required to do. At item 33, the only employment information the applicant provided is her statement that she was self-employed in "Home Care." The applicant did not provide the dates of that employment, as she was required to do. Other required information was also omitted from that application.

however, indicates when the applicant entered the United States or whether she subsequently resided in the United States.

² Although the NOID indicated that the applicant failed to demonstrate her continuous presence in the United States since November 6, 1986 and her admissibility, those issues were not relied upon in the decision of denial.

The instructions to Item 32 state, in pertinent part:

ABSENCES FROM THE UNITED STATES SINCE ENTRY: List most recent absence first and then all previous absences dating back to January 1, 1982.

[Emphasis in the Original.]

The applicant left item 32 blank, indicating that she has not departed the United States since her first entry.

At item 16 the applicant indicated that she last entered the United States on August 1, 2000. At item 17 the applicant indicated that entry was pursuant to a visa.

The instructions to item 21 through 29 state, in pertinent part, "If you were admitted as a nonimmigrant, complete Numbers 21 through 29." The applicant left those items blank. The applicant's response to item 17 and her failure to respond to items 21 through 29 indicate that her last entry into the United States was pursuant to an immigrant visa.

Further, the applicant's response to item 16, taken together with the applicant's indication at item 32 that she never left the United States after her first entry, indicates that August 1, 2000 was her first entry into the United States. If this is so the application may not be approved, as the applicant is required, as stated above, to demonstrate that she first entered the United States before January 1, 1982.

The only evidence in the record pertinent to an arrival before that date is the September 18, 2006 affidavit quoted above. That affidavit indicates that the affiant knows that the applicant entered the United States without a valid visa. The affiant did not state whether or not the applicant had an invalid visa, or no visa at all. If, as the applicant herself indicated, the applicant entered pursuant to an immigrant visa, the affiant did not indicate how she knew that immigrant visa was invalid. The affiant did not demonstrate that she, herself, was in the United States during the period in question.

Although that affidavit avers personal knowledge of the applicant's arrival prior to January 1, 1982 and subsequent residence in the United States, it does not give any basis for that asserted knowledge, other than to say that she and the applicant are friends.³ There is no indication that they were in touch every day, every month, or even every year.

The record also contains a copy of the applicant's FBI CJIS criminal record (rap sheet). That record indicates that the applicant, using the name [REDACTED], was charged in Miami, Florida,

³ It does not state, for instance, that the affiant saw the applicant depart from Jamaica, or elsewhere, or saw her enter the United States, or that she encountered the applicant in the United States prior to January 1, 1982.

on September 2, 2000, with attempting to enter the United States by fraud and immigrating without an immigrant visa. The disposition of those charges is unknown to this office.

That the applicant was arrested in Miami on September 2, 2000 appears to conflict with her statement on the Form I-687 that she entered the United States on August 1, 2000 or, in the alternative, to contradict her assertion that she did not subsequently leave the United States.

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. Further, the applicant must resolve any inconsistencies in the record with competent, independent, objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The applicant herself has indicated that she did not enter the United States until August 1, 2000, which, if true, renders her ineligible for the instant temporary residence program. The record contains no contemporaneous evidence of the applicant's entry into the United States before January 1, 1982 or of the applicant's residence in the United States since that date. The single flawed affidavit pertinent to a previous entry and continuous residence is insufficient to reform the application and render it approvable, especially in view of the questionable reliability of the evidence in this case.

The applicant failed to sustain her burden of establishing continuous unlawful residence in the United States from prior to January 1, 1982 as required under Section 245A(a)(3) of the Act. The applicant is therefore ineligible for temporary resident status under section 245A of the Act. The application was correctly denied on that basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

As was noted above, the applicant is obliged to demonstrate her continuous physical presence in the United States from November 6, 1986 until the date of filing or attempted filing of the application.

The only evidence that lends any support to the proposition that the applicant was physically present in the United States is the September 18, 2006 affidavit. That affidavit merely states that the applicant resided in the United States in a continuous unlawful status from January 1, 1982 until May 4, 1988.⁴ The affiant did not state whether or not the applicant had left the United States during that period, or, if she had, for what length of time. The affiant did not demonstrate that she herself was in the United States.

As was noted above, information the applicant provided indicates that she did not enter the United States until August 1, 2000.

⁴ Because filing or attempted filing must have taken place between May 5, 1987 and May 4, 1988 in order to qualify the applicant for CSS/Newman Settlement Agreements' class membership, that period would encompass the filing date of any qualifying application.

The record contains no information pertinent to the periods of time during which the applicant asserts that she lived at the various addresses provided, nor even a succinct statement alleging a history of her residence at those various addresses. The evidence contains no evidence supporting the applicant's claimed employment history in the United States. Although the applicant has indicated that she has been in the United States since 1980, during which year she turned three; the record contains no evidence of her having attended school, other than the affiant's September 18, 2006 statement that the applicant was home schooled. The record contains no medical records to show that the applicant was ever immunized, treated, or even examined in the United States. The record is devoid of any contemporaneous evidence of the applicant's physical presence in the United States.

Further, the record contains no evidence to reconcile the applicant's assertion that she did not leave the United States after her initial entry with the information from her criminal history that she attempted to enter the United States on September 2, 2000.

Under these circumstances, considering the amount of evidence, the reliability of that evidence, and the discrepancies between the evidence and the applicant's assertions, this office finds that the applicant has not demonstrated that she was physically present in the United States from November 6, 1986 until she filed or attempted to file her application. The applicant should have been denied on this additional basis.

The AAO reviews appeals on a *de novo* basis, *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989), and may deny on an additional basis not mentioned in the decision of denial. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed.

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