



U.S. Citizenship
and Immigration
Services

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LA

[REDACTED]

FILE:

[REDACTED]

Office: NEW YORK

Date: MAY 12 2008

MSC 05 334 11552

IN RE:

Applicant:

[REDACTED]

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.

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, New York, and 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. The director determined that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. The director further determined that the applicant's single two-month absence in 1987 also rendered him statutorily ineligible for temporary resident status. While the AAO agrees with both findings, it is noted that the director's underlying analysis placed undue emphasis on the applicant's inability to provide documentation of his entry into the United States. It is unreasonable to expect an alien to provide valid documentation of an unlawful entry. As such, the director's finding in this regard is hereby withdrawn, as it has no bearing in determining the applicant's statutory eligibility for the immigration benefit sought.

Notwithstanding the director's error, the overall conclusion that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements was correct and will be affirmed.¹

On appeal, the applicant challenges the director's findings and submits additional evidence in support of his claim.

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 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

Under the CSS/Newman Settlement Agreements, 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. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

¹ Additionally, although the director denied the application, in part, based on the determination that the applicant failed to establish class membership, the fact that the application was adjudicated suggests that the applicant was treated as a class member, despite any adverse findings. As such, the AAO's decision will focus strictly on the applicant's eligibility for temporary resident status.

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).

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, 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.

The issue in this proceeding is whether the applicant has established that he resided in the United States continuously in unlawful status during the requisite time period. Here, the applicant has failed to meet this burden. The record shows that the director issued a Notice of Intent to Deny (NOID) on November 15, 2005, noting that the applicant had failed to submit any supporting documentation with his Form I-687. In response, the applicant provided the following:

1. An affidavit dated November 30, 2005 from [REDACTED] who claimed that he first met the applicant in 1984. Although the affiant attested to the applicant's good moral character and expressed his admiration for the applicant, he provided no details that would lend credibility to an alleged 21-year relationship with the applicant or to the applicant's claimed continuous residence during the requisite period.
2. An affidavit dated December 9, 2005 from [REDACTED] who claimed that he met the applicant during the summer of 1982. He claimed that his parents had friends who lived near the applicant in the Bronx and that he has been friends with the applicant ever since

their first meeting. He further stated that his and the applicant's wives and children are also friends. However, the affiant did not explicitly corroborate the applicant's claim of continuous residence, nor did he provide any details about the applicant to lend credibility to an alleged 23-year relationship.

3. An undated affidavit from [REDACTED] who claimed to have known the applicant "for many years" and has known him to be a good husband and father. However, this affiant's statements lack probative value, as they contain no information to suggest that she was aware of the applicant's residence in the United States during the requisite time period.
4. An affidavit dated December 8, 2005 from [REDACTED] who claimed to have known the applicant for over 15 years. In light of the date of the affidavit and the time period during which the affiant claimed to have first met the applicant, this affidavit lacks probative value, as the affiant clearly did not meet the applicant until after the relevant statutory period had expired.

On June 12, 2006, the director issued a second NOID informing the applicant of his ineligibility for the immigration benefit sought based on the insufficiency of his supporting documentation. The applicant responded with a letter dated July 10, 2006 where he claimed that he was separated from his family when he entered the United States at the age of nine. He further claimed that as a result of his age, he was unable to remember the events that took place during the relevant time period. However, it is reasonable to expect the applicant to provide an explanation as to how he survived in a foreign country, who cared for him during the time of his youth, who he lived with, and why he was unable to provide any school or immunization records given the fact that he was of school age during the statutory period. The applicant also provided two affidavits notarized on July 12, 2006. One affidavit was from Estelle Bardavid, who corroborated her son's earlier statement in which he claimed that he first met the applicant during the summer of 1982. The other affidavit was from [REDACTED] who reiterated claims made in his prior affidavit with regard to the time period during which he first met the applicant. It is noted that neither affiant provided any details about the events and circumstances of the applicant's life during his purported residence in the United States within the statutory period. As such, neither statement will be afforded significant evidentiary weight.

In a decision dated September 18, 2006, the director denied the application concluding that the applicant failed to establish that he entered the United States prior to the commencement of the statutory period and further determined that the applicant failed to establish continuous residence in the United States based on his admitted two-month absence.

On appeal, the applicant provides additional identity documentation regarding affiants whose statements were submitted earlier. However, these documents fail to cure the basic deficiencies in the content of the affidavits submitted. Further, the applicant claims that he never stayed in any one place for a long period of time when he first arrived to the United States. However, this claim is entirely inconsistent with the information provided in No. 30 of his Form I-687, where the history of residences in the United States shows one address where the applicant claimed to have resided from November 1981 to April 1990. 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). In the present matter, the applicant's claim that he came to a foreign country at the age of nine and managed to reside here without the care of his parents is in itself dubious, and is even less credible when considered in light of the inconsistency cited above as well as the overall lack of supporting evidence.

In summary, the applicant's entire claim rests upon deficient statements of third parties, none of which expressly state that any of the affiants actually knew of the applicant's presence in the United States prior to January 1, 1982.

The absence of sufficiently detailed supporting 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 contradictory statements on his application and his 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-*, 20 I&N Dec. 77. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

Additionally, an alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

In the present matter, the director discussed information provided by the applicant at his interview, which took place on May 17, 2006. Namely, the applicant admitted to having been absent from the United States for a period of two months in 1987. The director determined that a two-month absence is considered prolonged pursuant to the provisions in found in 8 C.F.R. § 245a.1(c). Although the applicant was made aware of this adverse information both in the notice of intent and in the final notice of decision, he continues to maintain his claim of continuous unlawful residence without directly addressing the issue of his prolonged absence. The applicant neither disputes that his absence from the United States exceeded forty-five days, nor does he provide any "emergent reason" for the prolonged absence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the present matter, there is no documentation to refute the applicant's admission during his interview. Therefore, the applicant is ineligible for temporary resident status under section 245A of the Act on the basis of his absence as well.

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