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FILE: [REDACTED]
XLV-89-055-01026

Office: PHOENIX

Date: MAY 21 2008

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 210 of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:

[REDACTED]

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 status as a special agricultural worker (SAW application) was denied by the Acting Director, Phoenix District Office. The applicant appealed the decision to the Administrative Appeals Office (AAO). The decision is now before the AAO on appeal. The appeal will be dismissed.

The director denied the application because he determined that the applicant was not eligible for temporary resident status. The director referred to the applicant's failure to submit additional evidence in response to the Notice of Intent to Deny (NOID). The NOID stated that the United States Embassy in Dhaka, Bangladesh had interviewed the applicant in connection with his SAW application and determined that the applicant was unable to present credible evidence of his residence in the United States or his performance of at least 90 days of agricultural work in the United States during the 12-month period ending May 1, 1986. The director also referred to the individual who had corroborated the applicant's employment claims. Specifically, the director stated that this individual had been convicted of creating and supplying false documents in support of SAW applications.

On appeal, counsel for the applicant stated that the evidence supports that the applicant was in the United States during the requisite period; evidence that the applicant's alleged former employer submitted fraudulent affidavits does not indicate that he submitted a fraudulent affidavit on behalf of the applicant; the delay in adjudicating the application prejudiced the applicant; and penalizing the applicant for his failure to produce additional documentation violates due process. The applicant also provided a witness affidavit, as well as a signed statement in which the applicant described his alleged qualifying employment.

In order to be eligible for the special agricultural worker program (SAW program), an applicant must have engaged in qualifying agricultural employment for at least 90 man-days during the twelve-month period ending May 1, 1986, and must be otherwise admissible under section 210(c) of the Immigration and Nationality Act (Act) and not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a). An applicant has the burden of proving the above by a preponderance of the evidence. 8 C.F.R. § 210.3(b).

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.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he engaged in qualifying agricultural employment for at least 90 man-days during the twelve month period ending May 1, 1986.

The record indicates that the applicant filed a Form I-700 SAW Application on November 30, 1988 at an office of the Immigration and Naturalization Service (INS), currently Citizenship and Immigration Services (CIS), in Reno, Nevada. The record indicates that the applicant was physically outside the United States at that time. Section 210 of the Act specifically provided for individuals outside the United States to submit SAW applications at appropriate consular offices outside the United States. Therefore, the applicant should have filed his SAW application at an American Embassy or Consulate in his home country. However, to facilitate processing of the application, it was forwarded by INS to the United States Embassy in Dhaka, Bangladesh (Dhaka Embassy).

At part #22 of the applicant's SAW application, where applicants were asked to list all fieldwork in perishable commodities from May 1, 1983 through May 1, 1986, the applicant listed employment for [REDACTED] at various farms in Imperial, California. The applicant stated that he worked for 121 days from May 1985 to May 1986 thinning, weeding, and harvesting tomatoes, lettuce, onions, cantaloupes and sugar beets.

The applicant submitted an Affidavit Confirming Seasonal Agricultural Employment (Form I-705) signed by an individual who identified himself as [REDACTED]. The Form I-705 states that the applicant worked for [REDACTED] at various farms in Imperial, California thinning, weeding, and harvesting tomatoes, lettuce, onions, sugar beets, and cantaloupes for 121 days from May 1, 1985 to May 1, 1986. CIS records indicate that [REDACTED] pled guilty to violating 8 U.S.C. § 1160, Creating and Supplying False Documents for Amnesty Applications. This indicates that [REDACTED] provided false documents for amnesty applications and, therefore, casts some doubt on the credibility of the documents [REDACTED] provided on behalf of the applicant.

CIS records indicate that the applicant was interviewed by the Dhaka Embassy on May 7, 1991 and on October 13, 1992. At the interviews, the applicant was unable to present written employment records or other documents in support of his SAW application, other than the Form I-705 signed by [REDACTED]. The applicant provided two photographs of himself that were allegedly taken in the United States. The photographs did not indicate when the applicant may have been in the United States. Therefore, they are not relevant to the determination of whether the applicant meets the qualifications for the SAW program. In his interviews, the applicant alleged that he had entered the United States by land via Mexico. The applicant was unable to provide significant details of his journey. He stated that he had no travel documents for any part of either his initial journey from Bangladesh via Mexico to the United States or his return trip back through Mexico to Bangladesh. The applicant alleged that he lost the passport he used to travel. The applicant also signed a statement that he has no additional documentation of his residence in the United States. Based on this information, the Dhaka Embassy concluded that the applicant did not meet the eligibility requirements for the SAW program.

Further examination of the record of the applicant's interviews reveals inconsistencies in his statements. For example, during the first interview, the applicant was asked about his return journey from the United States to Bangladesh. The applicant stated that he returned to Mexico from the United States by foot and returned to Bangladesh from India by road and rail. However, during the second interview, the applicant stated that he returned to the Mexico from the United States by car, rather than by foot, and returned to Bangladesh by road, rather than by road and rail. These inconsistencies cast doubt on the applicant's claim to have entered the United States prior to his interviews in Dhaka and, as a result, cast doubt on the applicant's claim to have performed qualifying employment in the United States during the requisite period. The applicant also failed to provide sufficient detail in the interview regarding the alleged loss of his passport, which could have contained documentation of his entry into Mexico prior to his alleged employment in the United States. For example, the consular officer asked the applicant about the circumstances under which he lost his passport. The applicant initially failed to explain how he lost his passport. Instead, he described various attempts he had made to record the loss of his passport. After several follow-up questions from the officer, the applicant eventually stated that he may have lost his passport in the crowd in the passport office. The applicant was also unable to recall the full name of his old friend from Bangladesh who introduced the applicant to [REDACTED]. The lack of detail provided in the applicant's interviews casts additional doubt on his claim to have entered the United States prior to his interviews in Dhaka and, as a result, casts doubt on the applicant's claim to have performed qualifying employment in the United States during the requisite period.

The record indicates that a denial was erroneously issued by the Western Service Center to the applicant on April 1, 1993, based on the applicant's failure to appear for scheduled interviews in the United States. The applicant appealed the decision to the AAO and explained that the applicant had been interviewed by the Dhaka Embassy. On September 29, 1997, the AAO issued a notice of derogatory information and request for additional information to the applicant in care of his prior counsel. The notice explained that [REDACTED] had pled guilty to charges of creating and supplying false documents to amnesty applicants. The AAO stated that the applicant's employment documentation is consistent with other documentation found to be fraudulent, and the lack of evidence regarding the applicant's residence in the United States severely diminishes the credibility of the applicant's employment claim. The AAO provided the applicant with 30 days to respond to the notice.

Prior counsel for the applicant responded to the AAO on October 9, 1997. Counsel stated that the applicant had explained in his interview that he had not paid utilities, phone bill, transportation, or food costs and therefore, the applicant's circumstances were not conducive to documentary proof. Counsel also stated that he had spoken to [REDACTED]'s defense attorney, who had stated that no applicant names were provided in [REDACTED]'s criminal proceedings. Counsel stated that there was no evidence that the applicant "is fraudulent [sic]", but merely that prepared some fraudulent documents. Counsel also stated, apparently erroneously, that the applicant was interviewed three times in Dhaka, and the Dhaka Embassy did not deny the application. Counsel also stated that the interviews in Dhaka were "closer in time to the event in question" and that "this lends credibility to [the application] and would militate [sic] towards approval."

On February 14, 2001, the AAO issued a decision to the applicant. The AAO stated that the director had erroneously denied the application for lack of prosecution, although the applicant had appeared

for interviews with United States consular officers in Dhaka on May 7, 1991 and October 13, 1992. The AAO remanded the case to the Western Service Center to render a new decision based on the evidence in the record and the interviews.

In denying the application, the director determined that the applicant was not eligible for temporary resident status. The director referred to the applicant's failure to submit additional evidence in response to the NOID. The NOID stated that the United States Embassy in Dhaka, Bangladesh had interviewed the applicant in connection with his SAW application and determined that the applicant was unable to present credible evidence of his residence in the United States or his performance of at least 90 days of agricultural work in the United States during the 12-month period ending May 1, 1986. The director stated that Mr. Duran Davila had been convicted of creating and supplying false documents in support of SAW applications.

On appeal, counsel for the applicant stated that the evidence supports that the applicant was in the United States during the requisite period; evidence that [REDACTED] submitted fraudulent affidavits does not indicate that he submitted a fraudulent affidavit on behalf of the applicant; the delay in adjudicating the application prejudiced the applicant; and penalizing the applicant for his failure to produce additional documentation violates due process. The applicant also provided a witness affidavit, as well as a signed statement in which the applicant described his alleged qualifying employment.

The applicant submitted an affidavit in which he provided information regarding his entry into the United States. In this affidavit, the applicant stated that it took him several hours to cross the border from Mexico to the United States. However, CIS records indicate that the applicant stated in his first interview that it took him 30 to 40 minutes to cross the border from Mexico to Calexico, California. In addition, in the affidavit the applicant stated that a truck took him from the United States side of the border to a small border town in the United States, where he met with others who were planning to go to El Centro. The applicant stated that he chose to join these people when they drove to El Centro. However, CIS records indicate that the applicant stated in his first interview that people were waiting for him in a car when he crossed the border into the United States, and he rode in that car towards El Centro, rather than that he chose to join others planning to go to El Centro. These inconsistencies cast additional doubt on the applicant's claim to have performed qualifying employment in the United States during the requisite period. In his affidavit, the applicant also explained the difficulty of obtaining documentation of residence after having resided in the United States unlawfully.

The applicant provided an affidavit from [REDACTED]. The affiant stated that she has known the applicant since his childhood and that the applicant first came to America in 1985. The affiant stated that she remembers that the applicant contacted her many times by phone during his stay in America and let her know "how he was doing during [sic]." She stated "We had several telephone conversations during the period of year [sic] 1985 to year [sic] 1986 and once in a while he used to sick [sic] for advises [sic] from me." This affidavit fails to include detail regarding the affiant's frequency of contact with the applicant during the requisite period, the applicant's specific period of residence in the United States, and verifiable information including the region where the applicant resided in the United States during the requisite period. As a result, this affidavit is found to lack sufficient detail to corroborate the applicant's claim to have been present in the United States during

the requisite period. More importantly, this affidavit fails to state that the applicant performed qualifying employment in the United States during the requisite period.

In summary, in his attempt to establish that he worked at least 90 man-days of qualifying employment in the United States during the requisite period, the applicant provided a Form I-705, two photos, and one affidavit. The Form I-705 was signed by [REDACTED]. Mr. [REDACTED] pled guilty to violating 8 U.S.C. § 1160, Creating and Supplying False Documents for Amnesty Applications. This casts some doubt on the credibility of [REDACTED]'s statements on the Form I-705. The two photos provided by the applicant fail to indicate the date on which he was in the United States and, therefore, are not relevant to determining whether he performed qualifying employment in the United States during the requisite period. The affidavit from [REDACTED] lacks sufficient detail to confirm that the applicant was present in the United States during the requisite period, and fails to state that the applicant performed qualifying employment during the requisite period. The Dhaka Embassy also found that, in his interviews, the applicant failed to provide significant details of his journey to the United States. The applicant's statements in his two interviews with the Embassy were inconsistent with each other. The applicant's statements in one of his interviews were inconsistent with his statements in a recent affidavit. These inconsistencies, together with the lack of detail provided by the applicant in his interviews, cast additional doubt on the applicant's claim to have performed qualifying employment in the United States during the requisite period. As a result of the inconsistencies in the applicant's statements, the adverse information regarding [REDACTED] and the applicant's failure to provide additional credible evidence in support of his application, the applicant is found not to have met his burden of establishing that he worked at least 90 man-days of qualifying employment in the United States during the requisite period under both 8 C.F.R. § 210.3(b)(1) and *Matter of E- M--*, supra. The applicant is, therefore, ineligible for temporary resident status under section 210 of the Act on this basis.

Although the applicant argues that his right to procedural due process was violated, he has not shown that any violation of the regulations resulted in "substantial prejudice" to him. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an applicant "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The applicant has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the applicant's case. Although counsel states that the passage of time has resulted in prejudice to the applicant, it is noted that the evidence provided by the applicant closer in time to the requisite period was internally inconsistent. In addition, the applicant stated in an interview that occurred more than 15 years ago that, at that time, he had no additional documentation of his residence. Therefore, counsel's argument that the passage of time has resulted in prejudice to the applicant is without merit. The applicant's primary complaint is that the director denied the application. As previously discussed, the applicant has not met his burden of proof and the denial was the proper result under the regulation. Accordingly, the applicant's claim of a violation of his right to procedural due process is without merit.

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