

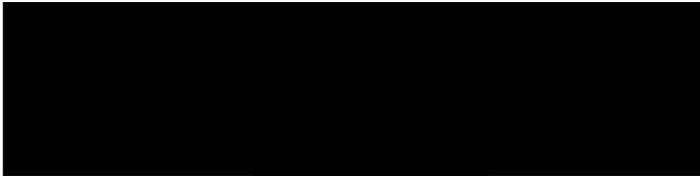
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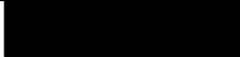
U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEW YORK

Date:

OCT 07 2008

MSC-05-279-11176

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. 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 black ink, appearing to read "Robert P. Wiemann".

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. That decision is now before the Administrative Appeals Office 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 the applicant to be inadmissible under Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for committing fraud by knowingly misrepresenting facts in order to obtain immigration benefits. The director further 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 denied the application, finding 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.

On appeal, counsel asserts that the applicant has met his burden of proof to establish that he meets the requirements for temporary resident status. Counsel states that there could have been a typing mistake or innocent error that caused the discrepancy in the applicant's evidence. Counsel asserts that there is no real proof that the applicant committed fraud or made willful misrepresentations.

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).

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) 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).

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 has submitted sufficient credible evidence to meet his burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The record shows that the applicant submitted a Form I-687 Application and Supplement to Citizenship and Immigration Services (CIS) on July 6, 2005. At part #30 of the Form I-687 application where applicants are asked to list all residences in the United States since first entry, the applicant showed that during the requisite period he resided in Brooklyn, New York from October 1981 until February 1991. At part #33, he showed that during the requisite period he was employed as a newspaper hawker in Brooklyn, New York from October 1981 until June 1986 and as a construction helper in Brooklyn, New York from September 1986 until February 1991.

The applicant submitted the following relevant documentation:

- An affidavit from [REDACTED], dated June 30, 2005. The affidavit indicates that [REDACTED] became acquainted with the applicant in the United States in 1981. It states that since this date, they have met in different social gatherings and festivals. However, the affidavit fails to indicate the location of these events and whether they were during the requisite period.

Furthermore, the affidavit states that in September 1987, Mr. [REDACTED] accompanied the applicant to the INS (Immigration and Naturalization Service) office in New York City during the applicant's attempt to submit a Form I-687. This information is inconsistent with a legalization front-desking questionnaire the applicant furnished with his Form I-687.¹ The applicant indicated on this questionnaire that he attempted to file a Form I-687 with the INS in New York on January 12, 1988. Given this discrepancy, this affidavit is without any probative value as evidence of the applicant's residence in the United States during the requisite period.

- A copy of a lease for the rent of [REDACTED], Brooklyn, New York. The applicant indicated on his Form I-687 that he resided at this address from October 1981 until June 1986. This agreement, dated December 15, 1981, was valid for the period of January 1, 1982 until December 30, 1984. The lease agreement shows that it was signed by the landlord, [REDACTED], and tenant, [REDACTED] in the presence of the applicant. However, the lease agreement does not show that the applicant was actually residing at this address. Therefore, the probative value of this document is limited as only evidence of the applicant's presence in the United States on the date this agreement was purportedly signed, December 15, 1981.
- A copy of an invoice from [REDACTED], optometrist. This invoice is dated June 17, 1982 and is in the amount of \$81.00. The probative value of this document is also limited as only evidence of the applicant's presence in the United States on the date this receipt was purportedly issued, June 17, 1982.

On April 2, 2006, the director issued a Notice of Intent to Deny (NOID) to the applicant. The director found that the applicant submitted no evidence of his entry into the United States on October 29, 1981. The director found that the lease agreement, dated December 15, 1981, lacks probative value. The director determined that the applicant is inadmissible to the United States under Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willfully misrepresenting a material fact. The director further determined that the applicant had not met his burden of proof as to his continuous residence in the United States during the requisite period. The director afforded the applicant 30 days to submit additional evidence in response to the NOID. Specifically, the director requested the applicant to submit all original lease agreements from December 15, 1981 until May 4, 1988.

In rebuttal to the NOID, the applicant asserted that he was continuously physically present in the United States from November 6, 1986 until May 4, 1988. The applicant stated that he entered the United States on or before January 1982 without inspection from the Bahamas to Miami by boat with the help of an agency. The applicant stated that for this reason it is not possible for him to furnish any relevant travel documents. The applicant indicated that it is impossible for an illegal immigrant to provide an official record of his physical presence in the United States from January 1, 1982 until May 1988.

¹ The questionnaire shows that it was signed by the applicant under penalty of perjury on February 10, 1999.

The applicant furnished a **fill-in-the-blank** affidavit from [REDACTED] dated April 18, 2006. This affidavit states that [REDACTED] has personal knowledge of the applicant's residence in the United States at [REDACTED] Brooklyn, New York from June 1986 until May 1988. However, this affidavit does not convey how [REDACTED] first became acquainted with the applicant. Nor does it illustrate their relationship in the United States during the requisite period. Therefore, it is without any probative value as evidence of the applicant's residence in the United States during the requisite period.

On September 10, 2007, the director issued a Notice of Decision to deny the application. In denying the application, the director cited an inconsistency in the record. The director found that the applicant submitted a Form ETA 750, Application for Alien Employment Certification, which he signed on April 4, 2004. The applicant stated on this application that he was the manager of Taj & Store located in Bangladesh from June 1976 until December 1982. The director determined that based on this information, the applicant is statutorily ineligible for temporary resident status. The director further determined the applicant to be inadmissible under Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) for committing fraud by knowingly misrepresenting facts in order to obtain immigration benefits. The director concluded that the applicant failed to meet his burden of proof in the proceeding.

The director was correct in her analysis of the inconsistencies in the applicant's evidence and his failure to submit sufficient documentation to establish his continuous residence in the United States during the requisite period. However, the director's determination that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willfully misrepresenting a material fact is not supported by evidence in the record. Therefore, the director's determination of inadmissibility, pursuant to Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), is withdrawn.

On appeal, counsel asserts that the applicant has met his burden of proof to establish that he meets the requirements for temporary resident status. Counsel states that there could have been a typing mistake or innocent error that caused the discrepancy in the applicant's evidence. Counsel asserts that there is no real proof that the applicant committed fraud or made willful misrepresentations.

The applicant's record reveals inconsistencies that undermine his claim of residence in the United States during the requisite period as well as his own credibility. The record shows that a Form ETA 750, Application for Alien Employment Certification, was filed with the Department of Labor on behalf of the applicant on May 5, 2004. The applicant signed this application under penalty of perjury on April 30, 2004. The applicant indicated on this application that he was employed as a manager with Taj & Store in Bangladesh from June 1976 until December 1982. This information is inconsistent with the applicant's Form I-687, where he showed that he was residing in Brooklyn, New York from October 1981 until June 1986. Additionally, the applicant furnished an affidavit from [REDACTED] which states that in September 1987, he accompanied the applicant to an INS office in New York during the applicant's attempt to submit a Form I-687. This information is inconsistent with a legalization front-desking questionnaire the applicant furnished

with his Form I-687. The applicant indicated on this questionnaire that he attempted to file a Form I-687 with the INS in New York on January 12, 1988.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Id.* In this case, counsel fails to address the inconsistencies in the record with independent objective evidence or an explanation from the applicant. Counsel instead addresses the inconsistency with his own unfounded assertions. However, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Beyond the decision of the director, the applicant's passport reveals information that contradicts the applicant's claim of continuously residing in the United States after the requisite period. The record contains the applicant's original passport issued by the Embassy of Bangladesh in Doha, Qatar on May 31, 1990. This passport shows that the applicant was issued a residence permit from the State of Qatar on July 9, 1991. The passport bears exit and entry stamps that show he departed Qatar on March 2, 1995 and arrived in Bangladesh on March 3, 1995. Additional exit and entry stamps in his passport show that he then departed Bangladesh on June 30, 1995 and reentered Qatar on June 30, 1995. The applicant's passport also bears a B-1 visa issued to him by the United States consulate in Doha, Qatar. The applicant's B-1 visa has an annotation stating that it was issued for the applicant to accompany his employer, [REDACTED], to the United States. The applicant's passport bears an exit stamp for his departure from Qatar on October 20, 1997 and an arrival stamp for his admission to the United States on October 21, 1997. The applicant's residence in Qatar is inconsistent with his claim that he has continuously resided in the United States since October 1981 until present. Although this information does not relate to the requisite period, it is relevant to this proceeding because it seriously undermines the applicant's overall credibility.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, as well as the inconsistencies and contradictions noted in the record, seriously detract from the credibility of his 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 inconsistencies in the record and the lack of credible supporting documentation, it is concluded that he has failed to establish by a preponderance of the evidence that he has 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.