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FILE:



Office: NEW YORK

Date: OCT 15 2008

MSC 05 074 10132

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.

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, New York. The appeal will be dismissed.

The record contains a Form G-28 Notice of Entry of appearance dated March 9, 2004, apparently filed pertinent to another application the instant applicant filed with Citizenship and Immigration Services. The applicant did not indicate that anyone assisted him in preparing the instant application or his appeal, and whether counsel acknowledged in that appearance continues to actively represent the applicant is unclear. Because counsel has not withdrawn his appearance and the applicant has not explicitly indicated that counsel no longer represents him, though, this office will recognize counsel.

The director denied the application because she found that the applicant failed to demonstrate credibly that he continuously resided in the United States during the requisite period. This finding relied upon the applicant's admission of an absence from the United States. On appeal, the applicant asserted that the absence was prolonged due to an emergent reason, and that his absence, therefore, did not interrupt his continuous residence.

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 Immigration and Nationality Act (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.

The regulation at 8 C.F.R. § 245a.2(h)(1) states, in pertinent part,

For the purpose of this Act, an applicant for temporary resident status shall be regarded as having resided continuously in the United States if, at the time of filing of the application:

(i) 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 eight (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed . . . .

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 in the United States from January 1, 1982 until he or she filed his or her application, was continuously physically present in the United States from November 6, 1986 until the date of filing the application, 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). 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, 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.

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant’s employment must provide the applicant’s address at the time of employment, identify the

exact period of employment, show periods of layoff, state the applicant's duties, declare whether the information was taken from company records, and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

On the instant Form I-687 application, which the applicant signed on December 9, 2004, the applicant was required to provide an exhaustive list of his residences in the United States since his first entry. As part of that residential history, the applicant stated that, from October 1980 to July 1985 he lived at [REDACTED] in Jackson Height, New York, and from August 1985 to September 1995 he lived at [REDACTED] in Brooklyn, New York.

The applicant was also required to provide an exhaustive list of all of his employment in the United States since January 1, 1982. The applicant stated that from December 1980 through the date of that application he was "self-employed as a door to door daily labor." [Errors in the original.] The applicant listed no other employment on that application.

The applicant was required, on that application, to provide an exhaustive list of his absences from the United States since January 1, 1982. The applicant stated that from April 1987 to June 1987 he went to Canada to visit friends. The applicant did not list any other absences from the United States.

The pertinent evidence in the record is described below

- The record contains a letter, dated June 3, 2004, on the letterhead of [REDACTED] of Brooklyn, New York. That letter was signed by the general manager of the company, whose signature is illegible and who is not otherwise identified. That affidavit states that the applicant worked for that company from December 1980 to October 1985 as a part-time construction helper.
- The record contains an affidavit, dated May 2, 1991, from [REDACTED], manager of [REDACTED] Home Improvements of Brooklyn, New York. Mr. [REDACTED] stated that the applicant worked for that company as a part-time construction helper from December 1985 to August 1989.

Those employment verification affidavits from [REDACTED] and [REDACTED] Home Improvements do not state the applicant's home address during the alleged employment, do not state whether any periods of layoff existed, and do not state either that the information provided was taken from company records or, in the alternative, that employment records are unavailable and why they are unavailable. As such, they do not conform to the requirements of 8 C.F.R. § 245a.2(d)(3)(i). Those employment verification affidavits will be considered pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L), but will be accorded less evidentiary weight than they would have had they complied with the governing regulation.

Further, the applicant did not claim, on the instant Form I-687 application, to have worked for [REDACTED] or [REDACTED] Home Improvement. Rather, he stated that, from December 1980

until he signed that letter during December 2004, he sought day labor employment by going door-to-door. This conflict further diminishes the evidentiary value of this employment verification letters. The applicant's employment verification letters will be accorded very little weight.

Further still, 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, and 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, 591-92 (BIA 1988). That the applicant submitted affidavits that conflict with his employment history as he reported it on the instant Form I-687 application does not merely detract from the evidentiary value of those particular affidavits. It detracts from the evidentiary value of all of the applicant's evidence and from the credibility of all of the applicant's assertions.

- The record contains a G-325 Biographic Information form. Although the applicant signed that form, he did not date his signature. That form, however, accompanied a Form I-485 Application to Register Permanent Resident or Adjust Status that the applicant signed on March 9, 2004 and submitted on April 19, 2004, and this office believes, therefore, that the applicant completed and signed that form within a month or two of March 9, 2004. On that form the applicant stated that he had lived at [REDACTED] in Brooklyn, New York, since April 1997. This office notes that on the instant Form I-687 the applicant indicated, to the contrary, that he had lived at [REDACTED] in Brooklyn, New York, since 1995 and continuing when he signed that form on December 9, 2005. The applicant did not indicate, on the Form I-687, that he ever lived at [REDACTED]. The record contains no explanation of this discrepancy.

That the applicant provided a residential history on the Form G-325 than conflicts with the residential history he provided on the instant Form I-687 application diminishes, yet further, the credibility of the applicant's assertions.

- The record contains a declaration, dated February 5, 1992, from [REDACTED] of Brooklyn, New York. He stated that he met the applicant in Brooklyn, New York during 1980. He stated that he knows that the applicant resided continuously in the United States, with the exception of one absence, because the applicant visited him occasionally and they saw movies and went shopping together.
- The record contains a declaration, dated December 7, 2004, from [REDACTED], whose address was not provided. The declarant stated that he has known the applicant since January 1981, but did not state whether the applicant lived in the United States at any time.

The record contains an undated declaration from [REDACTED] of Flushing, New York. The declarant stated that he met the applicant in December 1980. The declarant stated that the applicant has been continuously physically present in the United States since January

1, 1982, with the exception of one short absence, but did not reveal his basis for that asserted knowledge.

The declarations of [REDACTED], and [REDACTED] bear what purport to be the seals and signatures of notaries public. The ostensible notaries did not indicate, however, that they ascertained the declarants' identities or administered oaths to them. The declarations are not, therefore, affidavits and will not be accorded the additional evidentiary weight accorded to affidavits and other sworn statements. Further, that ostensible notaries are unfamiliar with the standard form of a notary's attestation raises the suspicion, at least, that the people who signed and sealed those declarations are not, in fact, notaries.

Further, the declaration of [REDACTED] does not state that the applicant has ever lived in the United States. It is, therefore, of no value in demonstrating that the applicant continuously resided in the United States during the requisite period.

- The record contains a declaration, dated March 1, 1988, from [REDACTED], vice-president of [REDACTED] Construction Company, of Lynbrook, New York, on that company's letterhead. [REDACTED] stated that he has known the applicant since 1981, but did not state whether the applicant lived in the United States during the interim. That affidavit is also of no value in demonstrating that the applicant resided in the United States during the requisite period.
- The record contains a declaration, dated May 29, 2002, from [REDACTED], of Brooklyn, New York, who stated that he has known the applicant since 1984. The affiant did not state whether the applicant had ever lived in the United States. It is of no evidentiary value in showing that the applicant continuously resided in the United States during the requisite period.

The declarations of [REDACTED] and [REDACTED] bear the signatures and seals of New York City Commissioners of Deeds. Whether those commissioners are authorized to administer oaths is unknown to this office, but, in any event, the declarations contain no indication that oaths were administered. As such, those documents are not affidavits and will not be accorded the additional evidentiary weight accorded to affidavits.

- The record contains an affidavit, dated August 5, 2003, from [REDACTED] on letterhead of the Worldwide Travel Service of New York, New York. The affiant stated that he has personal knowledge that the applicant entered the United States before January 1, 1982 and has continuously resided there since, except for a brief absence. The affiant did not state the source of his asserted personal knowledge.
- The record contains an affidavit, dated October 3, 2004, from [REDACTED] who stated that he is the secretary of the Bangladesh Society of New York. The affiant stated that the applicant has been a member of that society since 1981, but did not explicitly state that the applicant has lived in the United States since that time.

- The record contains an affidavit, dated October 22, 2004, from [REDACTED] of Brooklyn, New York. Mr. [REDACTED] stated that he has known the applicant since 1980, and that the applicant has resided continuously in the United States since his entry prior to January 1, 1982. The affiant did not state the basis of his asserted knowledge that the applicant continuously resided in the United States.
- The record contains an affidavit, dated October 21, 2004, from [REDACTED], of Long Island City, New York. Ms. [REDACTED] stated, “[The applicant] is personally known to me since December /80 and he has been acquainted in New York.” [Errors in the original.] The applicant did not state whether she knows if the applicant continuously resided in the United States since then.
- The record contains notes from the applicant’s July 27, 2005 legalization interview. At that interview the applicant stated that he left the United States on April 19, 1987 for Vancouver, Canada, and did not return to the United States until June 7, 1987, a period of 49 days.
- The record contains a previous Form I-687. The applicant’s signature on that Form I-687 is dated July 20, 1987.
- The record contains a declaration, dated December 20, 2004 from the applicant. In it, the applicant stated that he first attempted to file a Form I-687 on July 20, 1987.

The record contains no other evidence pertinent to the applicant’s continuous residence in the United States during the salient period.

In a Notice of Intent to Deny (NOID), dated October 4, 2005, the director noted that the applicant admitted, at his legalization interview, that he was absent from the United States from April 19, 1987 until June 7, 1987, and stated that pursuant to 8 C.F.R. § 245a.2(h)(1) the applicant was ineligible for temporary resident status under Section 245A of the Act. The director granted the applicant thirty days to submit additional evidence.

In his response, dated October 19, 2005 and received October 24, 2005, the applicant did not deny that he was absent from the United States from April 19, 1987 to June 7, 1987, but stated that he went to Canada because the death of a friend’s father and the serious illness of the friend’s mother caused the applicant’s friend to become unbalanced. The applicant stated that he remained in Canada beyond 45 days to assure that the friend received proper treatment. The applicant characterized the reason for his prolonged absence as emergent and asked that his absence be excused on humanitarian grounds.

In the Notice of Decision, dated December 14, 2005, the director denied the application, finding that the applicant failed to demonstrate that he resided continuously in the United States during the requisite period.

On appeal, the applicant submitted a declaration,<sup>1</sup> dated December 30, 2005. The applicant reiterated that he left the United States to console a friend whose father had died and whose mother was ill, and that the proper treatment of his friend necessitated an absence in excess of 45 days.

No humanitarian exception exists to the requirement that an applicant for temporary resident status must show continuous residence in the United States during the requisite period. Whether the applicant has demonstrated that the reason for his prolonged absence was emergent within the meaning of 8 C.F.R. § 245a.2(h)(1), however, will be discussed below.

One issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate entry into the United States prior to January 1, 1982, and continuous residence during the requisite period. Another issue is whether the applicant's admitted absence from the United States renders him ineligible for temporary residence status.

Some of the applicant's affidavits and declarations do not allege that the applicant ever lived in the United States. They can be accorded no weight for the proposition that the applicant continuously resided in the United States during the requisite period.

Some of the applicant's affidavits and declarations state that the affiants or declarants have personal knowledge of the applicant's presence and residence in the United States, but do not state the basis of that asserted personal knowledge. They do not, for instance, indicate whether the affiants or declarants routinely visited the applicant in his home, whether the affiants or declarants saw contemporaneous documentary proof of the applicant's residence and presence, whether the applicant or someone else told the affiants or declarants about the applicant's residence and presence contemporaneously, or whether someone told the affiants or declarants more recently about the applicant's residence in the United States. Those affidavits, too, can be accorded only very little evidentiary weight.

Even among those items of evidence that retain evidentiary weight, that evidentiary weight is greatly diminished by the conflicts between the two different residential histories the applicant submitted and the two different employment histories the applicant submitted. None of the applicant's evidence can be accorded much weight.

The evidence must be evaluated not by the quantity of evidence alone but by its quality. 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 its amenability to verification. Given the paucity of credible supporting documentation the applicant has failed to meet his burden of proof and failed to submit evidence sufficient to establish continuous residence in an unlawful status in the United States during the requisite period. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act. The application was correctly denied on this basis, which has not been overcome on appeal.

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<sup>1</sup> Although that declaration bears the signature and seal of a notary public, it contains no indication that the notary administered an oath to the applicant. It is not, therefore, an affidavit.

The remaining issue is whether, if the applicant had demonstrated residence in the United States during the requisite period, his admitted absence from the United States would still render him ineligible for permanent resident status pursuant to section 245A of the Act.

The regulation at 8 C.F.R. § 245a.2(h)(1) indicates that if an applicant was absent from the United States for more than 45 days during the salient period, then that applicant is not regarded as having resided continuously in the United States during that salient period.

As is stated in 8 C.F.R. § 245a.2(b)(1), the salient period began on January 1, 1982 and ended on the day that the applicant filed or attempted to file a completed Form I-687 between May 5, 1987 and May 4, 1988.

On his December 7, 2007 declaration, the applicant stated that he attempted to file his initial Form I-687 on July 20, 1987. That assertion is supported by the previous Form I-687 application in the file, in which the applicant's signature is dated July 20, 1987. In the instant case, then, the period of requisite residence ran from January 1, 1982 to July 20, 1987.

The applicant admitted that he was absent from the United States from April 19, 1987 to June 7, 1987, a period of more than 45 days, all of which were within the period of requisite residence.

Because the applicant was absent from the United States for more than 45 consecutive days, the applicant is *prima facie* ineligible pursuant to 8 C.F.R. § 245a.2(h)(1). That regulation also allows, however, that a longer absence may be excused if the applicant's return was prevented by emergent reasons. Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

The plain language of the regulation at 8 C.F.R. § 245a.2(h)(1), which is set out above, makes clear that the longer absence is excused only if an emergent reason prevents the applicant's return, rather than occasioning his leaving the United States. The situation that prevents the applicant's return to the United States must, therefore, arise after the applicant leaves the United States. In the instant case, the applicant stated, in his response to the NOID, that "due to the deteriorating condition of my friend I had to remain [in Canada] for more than 45 days." On appeal, the applicant stated, "I had to stay in Canada for more than 45 days for proper treatment of my friend." [sic]

The applicant appears, then, to be asserting that he went to Canada to console a friend grieving the death of his father and the serious illness of his mother, and then remained when the friend's serious condition, apparently something akin to a nervous breakdown, came into being while the applicant was in Canada. The applicant has correctly alleged an emergent reason for his staying in Canada beyond the allowable 45 days.

The regulation at 8 C.F.R. § 245a.2(h)(1), however, does not speak of an applicant alleging an emergent reason, but of "**establish[ing]** that due to emergent reasons, his or her return to the United States could not be accomplished within [45 days]. [Emphasis provided.] This office finds that the applicant's mere

assertion is insufficient to establish, by a preponderance of the evidence, that his failure to return to the United States within 45 days was due to emergent reasons. The applicant is therefore ineligible pursuant to 8 C.F.R. § 245a.2(h)(1) because he was absent from the United States for more than 45 days during the period of requisite residence and has not shown that this absence should be excused as being occasioned by emergent reasons. For this additional reason, the applicant has not established that he resided continuously in the United States during the requisite period and is ineligible for temporary resident status under section 245A of the Act.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In legalization proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. 8 C.F.R. § 245a.2(d)(5). 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.