

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

41

FILE:

MSC-05-235-14930

Office: LOS ANGELES

Date: **OCT 31 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:

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, Los Angeles. The decision 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 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 submits a brief on the applicant's behalf.

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 May 23, 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 his first address in the United States to be in Costa Meza, California from 1990 to 1994. At part #33 of the application, where applicants are asked to list their employment in the United States since entry, the applicant responded, “information will be provided at the interview date.” Thus, this applicant’s Form I-687 provides no information his residence and employment history during the requisite period. This omission undermines the credibility of his claim of continuous residence in the United States during the requisite period.

The applicant submitted with his application, identical declarations from Margarita Gaytan, Jose [REDACTED] and [REDACTED], respectively dated November 9, 2005. Their declarations state that they met the applicant in 1980 in California. Their declarations also state that they have seen the applicant “around the city in different places” and have been to the applicant’s house a few times. These declarations are identical and fail to provide any specific information. The declarations fail to convey how the declarants first became acquainted with the applicant. They also do not indicate how the declarants dated their initial contact with the applicant. Furthermore, they do not illustrate the frequency of the declarants’ contact with the applicant

during the requisite period. Given these deficiencies, these declarations are without any probative value as evidence of the applicant's residence in the United States during the requisite period.

The record shows that on May 20, 2002, the applicant filed a Form I-485 application for permanent resident status under Section 1104 of the Legal Immigration Family Equity (LIFE) Act. The applicant filed with this application the following documentation:

- A copy of his 1987 Form 1040A, U.S. Individual Tax Return. The applicant showed his home address on this tax return as [REDACTED] Costa Mesa, California. The applicant also furnished a 1987 Form W-2, Wage and Tax Statement for his employment with Merchants Building Maintenance in Monterey Park, California. The Form W-2 shows the applicant's address as [REDACTED] Costa Mesa, California.
- A copy of his California Identification Card showing that it was issued by the Department of Motor Vehicles on April 29, 1986. The applicant's address on his card is [REDACTED], Costa Mesa, California.
- Copies of the applicant's earnings and deduction statements from Merchants Building Maintenance Company in Monterey Park, California. These statements are for the periods of: April 27, 1986 to May 10, 1986; August 17, 1986 to August 30, 1986; and June 8, 1986 to June 21, 1986. The applicant also furnished a copy of his 1986 U.S. Individual Income Tax Return. The applicant showed his home address on this tax return as [REDACTED] Costa Mesa, California.
- A copy of a letter from [REDACTED] dated December 7, 1993. Mr. [REDACTED] states in his letter that he met the applicant at work in 1986. He states that he is employed by Arco Richfield Company in Carson, California. He states that the applicant has been employed at Atlantic Richfield as a contract employee, working for Merchant, since 1986. He states that the applicant informed him that he has been in the United States since 1980.

These documents show that during the period of 1986 to 1987, the applicant resided at [REDACTED], Costa Mesa, California and [REDACTED], Costa Mesa, California. Since the applicant failed to show his residence and employment in 1986 and 1987 on his Form I-687 application, it cannot be determined when exactly the applicant resided at these addresses. Nevertheless, these documents are collectively of high probative value as evidence of the applicant's residence in the United States in 1986 and 1987.

On March 1, 2006, the director issued a Notice of Denial to the applicant. The director determined that a review of the applicant's case indicates that he was not discouraged from filing

a Form I-687 during the original legalization application period.¹ The director stated that the applicant testified that he went to Mexico with his wife two weeks before the birth of their second child in 1988. The director stated that the applicant's wife testified that she went to Mexico by herself to give birth to their second child one month before the birth of their son. The director determined that the applicant's testimony under oath is not credible. The director determined that the affidavits (declarations) the applicant furnished were not notarized, not verifiable, and do not establish the authors' personal knowledge. The director determined that the applicant submitted evidence of his residence in the United States in 1986, but this does not meet the entire requisite period. The director concluded that the applicant's evidence fails to meet the preponderance of the evidence standard.

On appeal, counsel asserts that there are numerous reasonable explanations as to the reason the applicant's wife did not remember the applicant's presence in Mexico during the birth of their second child. Counsel states that perhaps the applicant's presence was not memorable because this was her second birth. Counsel states that it was memorable to the applicant because he missed the birth of his first child. Counsel states that this event was 20 years ago and who was present at the birth of the applicant's second child was not the highest priority of his wife. Counsel states that considering the length of time that has passed since this event occurred, the difference in the applicant's statement and his wife's statement is minor.

Counsel states that the applicant furnished new affidavits as additional evidence. However, the record does not show that the applicant or counsel furnished such evidence. The record only shows resubmitted copies of the affidavits from [REDACTED] s and [REDACTED]

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 inconsistency 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).

The applicant has failed to provide credible, reliable and probative evidence of his residence in the United States during the requisite period. The applicant has not provided sufficient evidence to establish that he entered the United States prior to January 1, 1982. Nor has he provided

¹ Although the director determined that the applicant was not discouraged from filing a Form I-687 application during the original legalization application period, he did not deny the application for class membership. Instead, the director treated the applicant as a class member and adjudicated the application for temporary residence on the merits.

sufficient evidence to establish that he resided in the United States during the entire requisite period. The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence. *See* 8 C.F.R. § 245a.2(d)(3). The applicant submitted as evidence of his residence in the United States during the requisite period, three identical declarations. These declarations lack considerable detail on the declarants' relationship with the applicant during the requisite period. As such, they are without any probative value as corroborating evidence. The record also shows that the applicant previously furnished with his LIFE Act application, copies of his 1986 and 1987 tax returns; his paycheck stubs from 1986; his 1987 Form W-2; and his California identification card issued in 1986. These documents are collectively of high probative value as evidence of the applicant's residence in the United States in 1986 and 1987. However, such residence does not cover the entire requisite period.

In conclusion, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts 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 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.