



U.S. Citizenship
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FILE:

MSC-05-004-11123

Office: ATLANTA

Date:

SEP 04 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, Atlanta, and 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 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 noted that the applicant failed to respond to the Notice of Intent to Deny (NOID) dated September 27, 2005. 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 the applicant's claim of eligibility for Temporary Resident Status and submits three affidavits as evidence.

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. See 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 October 4, 2004. At part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant listed his first address as [REDACTED] in New York from March of 1981 to October of 1985; and [REDACTED] in New York from November of 1985 to October of 1989.

In an attempt to establish continuous unlawful residence in the United States the applicant submitted copies of tax records, lease agreements, and other business documents that are dated subsequent to the requisite period, and therefore, are irrelevant to the applicant’s claim of eligibility for the immigration benefit sought. The applicant also submitted the following attestation:

- A letter dated September 15, 2003 from [REDACTED] in which he stated that he has known the applicant since 1973 and that they first met in India. He further stated that applicant came to live with him at [REDACTED] in Astoria, New York when he first came to the United States in April of 1981. This declaration is inconsistent with what the applicant indicated on his Form I-687 application at part #30 where he never indicated that he lived on [REDACTED] in Astoria, New York. It is also noted that the declarant has failed to specify the frequency with which he saw and communicated with the applicant during the requisite period. Because the declaration is inconsistent with statements made by the

applicant and is lacking in detail, it can be afforded little weight in establishing that the applicant resided in the United States during the requisite period.

The director denied the application, determining that the applicant failed to respond to the NOID and that the evidence submitted failed to establish his eligibility for Temporary Resident Status.

On appeal, counsel asserts that the director erred in not issuing a NOID or RFE prior to rendering the denial, and that the applicant's testimony during his immigration interview coupled with the statements he made on his Form I-687 application is evidence that should be considered in determining the applicant's eligibility for the immigration benefit sought. He also stated that the applicant's statements are not contradicted by other evidence in the record, and therefore, the applicant has established his continuous residence in the United States as required. The applicant submits the following attestations on appeal:

- An affidavit dated January 1, 2007 from [REDACTED] who states that he first met the applicant at a birthday party in New Jersey in 1981. He further states that the applicant told him at the birthday party that he was without legal status and that he was living in New York and working for a friend. He also states that he was aware that in 1981 the applicant was working as a cashier on [REDACTED] in New York. The affiant fails to specify the frequency with which he saw and communicated with the applicant during the requisite period. He has also failed to demonstrate proof of his firsthand knowledge of the applicant's whereabouts and circumstances during the requisite period. This affidavit is inconsistent with what the applicant indicated on his Form I-687 application at part #33 where he was asked to list all his employment in the United States, and he does not list any employment in New York. Because the affidavit is inconsistent with statements made by the applicant on his Form I-687 application and is lacking in detail, it can be afforded little weight in establishing that the applicant resided in the United States during the requisite period.
- An affidavit dated January 21, 2007 from [REDACTED] in which he states that he has known the applicant since approximately 1981 and that he met him at a birthday party in New Jersey. He further states that he is aware that the applicant came to the United States in August of 1981 and began living in New York where he started working as a cashier for Niva Trading Company. The affiant stated that the applicant worked as a cashier for about four years and then began working for him as a cashier at M&S Tobacco on Central Avenue in Yonkers, New York for four years. The affiant states that the applicant lived at [REDACTED] in New York for some time and then moved to [REDACTED] in New York for another four years. The affiant fails to specify the dates the applicant lived on [REDACTED] and [REDACTED] in New York. It is also noted by the AAO that the affiant's statements are inconsistent with what the applicant indicated on his Form I-687 application at part #33 where he was asked to list all his employment in the United States, and he does not list any employment in New York. In addition, the affidavit does not conform to regulatory standards for attestations by employers. Specifically, the affiant does not specify the applicant's place of residence during the period of employment, the dates of employment or the number of hours worked. 8 C.F.R. § 245a.2(d)(3)(i). Here, the affiant fails to indicate whether the

employment information was taken from company records. Neither has the availability of the records for inspection been clarified. 8 C.F.R. § 245a.2(d)(3)(i). The record does not contain copies of personnel records or pay statements that pertain to the requisite period to corroborate the assertions made by the affiant. Because the affidavit contains statements that are inconsistent with statements made by the applicant, and because it does not conform to regulatory standards, it can be accorded little weight in establishing that the applicant resided in the United States during the requisite period.

- An affidavit dated January 1, 2007 from [REDACTED] in which he states that he met the applicant in 1981 when they were at a friend's birthday party in New Jersey. The affiant also states that he is aware of the applicant working as a cashier at the Niva Trading Store in New York, and that they often call and stay in touch with each other. Here, the affiant has failed to demonstrate proof of his firsthand knowledge of the applicant's places of residence and circumstances during the requisite period. It is also noted by the AAO that this affidavit is inconsistent with what the applicant indicated on his Form I-687 application at part #33 where he was asked to list all his employment in the United States, and he does not list any employment in New York. Because the affidavit is inconsistent with statements made by the applicant on his Form I-687 application and is lacking in detail, it can be afforded little weight in establishing that the applicant resided in the United States during the requisite period.

In the instant case, the applicant has failed to overcome the basis of the director's denial. While counsel asserts that the applicant was never sent a NOID, the record of proceeding contains a copy of the NOID which was sent to the applicant's last known address. It is also noted by the AAO that the attestations submitted by the applicant are either inconsistent with statements that he made or are lacking in detail. The applicant has failed to explain the inconsistencies and contradictions that exist in the record. Therefore, it cannot be concluded that he resided continuously in the United States for the requisite period.

The absence of sufficiently detailed 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 reliance upon attestations that are inconsistent with his statements and that are lacking in detail and probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States for the requisite period 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.