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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
and Immigration
Services**

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AUG 03 2009

FILE:

MSC-05-283-10124

Office: LOS ANGELES

Date:

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:

SELF-REPRESENTED

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.

John F. Grissom
Acting 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, Los Angeles, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant appears to be represented; however, the record does not contain Form G-28, Notice of Entry of Appearance as Attorney or Representative. Therefore, the applicant shall be considered as self-represented and the decision will be furnished only to him.

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 denied the application after determining 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 testified under oath that he was absent from the United States for more than 45 days during the requisite period, and that therefore he was not eligible for the immigration benefit sought. 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, the applicant asserts that he was absent from the United States due to his father's illness and death. The applicant also asserts that he never told the immigration officer that he was absent from the United States for three months, and that now that he has reviewed his father's death certificate, he realizes that he was actually absent from the United States from November 27, 1986 to January 5, 1987. The applicant submits as evidence on appeal a copy of his father's death certificate, along with an English translation, which shows his father's date of death as December 3, 1986.

The applicant was issued a Notice of Intent to Deny (NOID) by the AAO on May 4, 2009 requesting that he provide evidence sufficient to demonstrate his continuous residence in the United States since before January 1, 1982, and throughout the requisite period.

The applicant responded to the NOID by issuing a declaration of his eligibility. The applicant did not provide any new evidence to be considered by the AAO.

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.

As noted above, the applicant must establish that he was continuously physically present in the United States from November 6, 1986 through May 4, 1988, or until he filed or attempted to file the Form I-687 application. 8 C.F.R. § 245a.2(b)(1). Any absence from the United States during this time period must be brief, casual and innocent.

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).

An alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, 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 eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.15(c)(1).

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 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 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 and continuous physical presence in the United States throughout the requisite period. Here, the applicant has failed to meet this burden.

The applicant testified under oath during his immigration interview that he entered the United States in December of 1973. He further stated during the interview, “I left the country for 3 month[s] from Nov '86 thru Dec. '87.” On his Form I-687 application at part #32 the applicant stated under penalty of perjury that he traveled to Mexico due to an emergency from November of 1986 to January of 1987. The applicant stated on appeal that he was absent from the United States from November 27, 1986 to January 5, 1987, due to his father’s illness and death on December 3, 1986. The applicant states in response to the AAO NOID that he stayed in Mexico after his father’s death to console his mother because she became ill as well. The applicant submits a copy of his father’s death certificate.

Here, the applicant did not submit any medical documents, doctor’s reports or hospital records to show that his mother suffered a sudden change in her health that would have caused him to delay his return to the United States. In addition, he has failed to present documentation to show what date he left the United States and what date he returned to the country. As noted above, to meet his burden of proof, the applicant must provide evidence of eligibility apart from his own testimony, and in this case he has failed to do so.

Continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless return could not be accomplished due to emergent reasons. 8 C.F.R. § 245a.2(h)(1)(i). “Emergent reasons” has been defined as “coming unexpectedly into being.” *Matter of C*, 19 I&N Dec. 808 (Comm. 1988).

The applicant’s admitted absence from the United States for a period of more than 45 days, is clearly a break in any period of continuous residence he may have established. As he has not provided any evidence other than his own attestation that it was his mother’s unexpected and sudden health issues that was the “emergent reason” for his failure to return to the United States in a timely manner, 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*.

A legalization applicant must show continuous physical presence in the United States from November 6, 1986 through the date his application is filed. An absence during this period which is found to be brief, casual and innocent shall not break a legalization applicant's continuous physical presence. Section 245A(a)(3)(B) of the Act, 8 U.S.C. § 1255a(a)(3)(B). *See e.g. Espinoza-Gutierrez v. Smith, INS, et al.*, 94 F.3d 1270 (9th Cir. 1996). The *Espinoza-Gutierrez* court held that a legalization applicant's absence would not represent a break in continuous physical presence if it was found that the absence was brief, casual and innocent as defined by the court in *Rosenburg v. Fleuti*, 374 U.S. 449 (1963) *See also Assa 'ad v. U.S. Attorney General, INS*, 332 F.3d 1321 (11th Cir. 2003)(which affirmed the portion of the holding in *Espinoza-Gutierrez* relied upon here, but disagreed with a different aspect of that holding). The AAO finds that the applicant's absence from the United States in this case was not brief, casual and innocent in that the record indicates: that he was absent from the United States for more than 45 days.¹ *See Rosenberg, supra* (where the court looked to (1) the duration of the alien's absence; and (2) the purpose of the absence.

The applicant submitted the following evidence:

A copy of his California Driver's License with an expiration date of 1980, where the applicant's address is listed as [REDACTED] in Los Angeles, California. This information is inconsistent with what the applicant stated on his Form I-687 application at part #30, where he listed [REDACTED] in Los Angeles, California as his address from 1974 to 1982. Although the applicant asserts on appeal that the inconsistency is due to his using his employer's address – the mechanical shop where he worked – because it was a safer place to receive his mail, he did not list such employment on his Form I-687 application nor did he list the address on his Form I-687. It is also noted that on the applicant's Form I-687 at part #33, he indicated that he was a boxer and trainer from 1974 through 1987.

- A copy of a Certificate of License issued to [REDACTED] by the State Athletic Commission of Nevada with an expiration date of December 31, 1980. The Certificate lists [REDACTED] age as 28 which is inconsistent with the applicant's date of birth September 3, 1949. It is also noted that although the applicant asserts that he used the name [REDACTED] he has failed to present evidence to substantiate that claim. 8 C.F.R. § 245a.2.

¹ The regulation implementing the statutory requirement of "continuous unlawful residence" in the United States defines that term as no single absence from the United States exceeding 45 days and absences in the aggregate not exceeding 180 days. *See*, section 245A(a)(2)(A) of the Act, 8 U.S.C. § 1255a(a)(2)(A) and 8 C.F.R. § 245a.1(c)(1)(i). The term "continuous physical presence" suggests that a shorter time frame should be applied to determine the permissible length of single and aggregate absences from the United States during the period from November 6, 1986 to May 4, 1988.

- A copy of a letter dated March 15, 1980 that the applicant stated was from Mexico. It appears from the record that the correspondence is a birthday card and that the date was handwritten. It is noted by the AAO that the applicant's name does not appear on the document and that the applicant's birthday is approximately six months (September 3, 1949) after the date noted above.
- A copy of a photograph that the applicant identified as having been taken at the Hollywood Palladium on July 9, 1981. This evidence cannot be used to establish the applicant's eligibility for temporary residence status in that the dates are not verifiable.
- A copy of a newspaper clipping dated November 28, 1981. The document contains descriptive photographs and a 1981 boxing record from the Arena Coliseo in Mexico. However, the applicant's name does not appear on any of the material. Although a copy of the applicant's photograph appears as a part of the document, it is not dated and does not appear to be associated with the Arena Coliseo material. It is also noted that the applicant does not claim to have been absent from the United States in 1981.
- Copies of a medical report from [REDACTED] dated January 20, 1983; a boxer's license issued by the State of California Athletic Commission on March 7, 1983; a boxer's license and record issued on November 19, 1983; and a letter/postcard dated July 1983, all of which are addressed to [REDACTED]. The applicant has failed to submit any evidence to show that he and [REDACTED] are the same person. It is also noted that the address given by the applicant on his Form I-687 differs from the address written on the boxer's license and record issued on November 19, 1983.
- A copy of a handwritten check stub from Luedke Drywall dated February 20, 1986. This evidence is inconsistent with the applicant's Form I-687 application at part #33 where he stated under penalty of perjury that he was employed as a boxer and trainer from 1974 to 1987. It is also noted that Luedke Drywall is located in Texas and that the applicant has never claimed to have lived or been employed in that state. On appeal, the applicant claims that he was located in Texas for a month when he took two of his boxers to fight; however, he has failed to explain why he did not to list the employment on his Form I-687.
- A copy of the applicant's boxing license from Texas Boxing and Wrestling, Commissioner of Labor which shows that the license expiration date is April 6, 1987, and that the applicant's address was listed as [REDACTED] in Houston, Texas. This information is inconsistent with the applicant's Form I-687 application at part #30 where he stated under penalty of perjury that he resided in Los Angeles, California from 1974 to December 1987. The applicant asserts on appeal that the inconsistency is due to the fact that he has to renew his boxing license every year and that in order to obtain the license,

he had to undergo a medical examination. However, he has failed to present evidence to substantiate his claim.

The applicant submitted the following attestations:

- An affidavit dated April 15, 2005 from [REDACTED] and [REDACTED] who stated that they have known the applicant since October 1974. [REDACTED] stated that back then, the applicant used to play on the same soccer team for over ten years, and that the applicant is a highly respected member of his community and church, and that the applicant has been attending church for over twenty years. The affiants stated that they have come to know the applicant's family and has kept in touch with him over the years. This statement is inconsistent with the applicant's Form I-687 application at part #31 where he did not list any association or affiliation with any church or community organization during the requisite period. On appeal, the applicant asserts that although he went to the church to fill out his amnesty papers, he was not a member and would attend church on certain occasions. This statement is inconsistent with the affiants, and therefore, the affidavit is of little probative value.
- An affidavit dated April 22, 2005 from [REDACTED] who stated that he has known the applicant from 1978 to the date appearing on his affidavit, and that he met the applicant at the Main Street Gym. The affiant further stated that he and the applicant became good friends and sparring partners, and that on weekends they would go out to eat at various locations. This affidavit is inconsistent with the applicant's statements in that the applicant admitted to being absent from the United States from December 1987 to January 2003.
- An affidavit from [REDACTED] who stated that he has known the applicant to be present in the United States since 1981 and that he met the applicant at the gym where boxers would train. The affiant further stated that he would visit the gym for many years and would talk with the applicant about his career and upcoming fights. The affiant also stated that after he stopped visiting the gym, the applicant continued to call him or stop by his home for visits.
- An affidavit from [REDACTED] who stated that he has known you since 1983 and that he met the applicant at the Main Street Gym. The affiant further stated that, based upon his father's recommendation, the applicant trained him to box from 1983 to 1987, and that he looks to the applicant as a mentor.

Here, the record of proceeding contains many inconsistencies which call into question the credibility of the applicant's evidence and proof. *Matter of Ho, supra.*

These declarants fail to establish the applicant's continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, the evidence must be

evaluated not by the quantity of evidence alone but by its quality; an applicant must provide evidence of eligibility apart from his or her own testimony; and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility.

Although the declarants state that they have known the applicant since before January 1, 1982, with the exception of [REDACTED] the statements do not supply enough details to lend credibility to a longstanding relationship with the applicant. The affiants fail to specify the applicant's place of residence during the requisite periods. Given these deficiencies, these attestations have minimal probative value in supporting the applicant's claims that he entered the United States prior to January 1, 1982 and resided in the United States throughout the requisite period.

Here, none of the witness statements provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that, individually and collectively, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

In the instant case, the applicant has failed to provide sufficient credible and probative evidence to establish his continuous unlawful residence in the United States since prior to January 1, 1982, and throughout the requisite period. He has failed to overcome the director's basis for denial.

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period and the inconsistencies noted above 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 absence from the United States, the inconsistencies in his statements, and his reliance on documentation that is of little probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States for the requisite periods 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.