identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

L1

[redacted]

FILE: [redacted] Office: HOUSTON Date: FEB 0 4 2009

MSC 06 067 13218

IN RE: Applicant: [redacted]

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:

[redacted]

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, Houston, Texas. The 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, and a Form I-687 Supplement, CSS/Newman (LULAC) 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. In so finding, the director noted that the applicant had not submitted documentation in response to her Notice of Intent to Deny (NOID), which was sent to the applicant on December 10, 2007. In the NOID, the director stated:

> Service records reflect that on October 3, 2006, you appeared before the Service for an interview regarding your I-687 application. During the interview, you informed the Service Officer, under oath, that you first entered the United States sometime in November 1981, without inspection, at Brownsville, Texas. You claimed you departed the United States in June 1987, and reentered that same month, without inspection. You then departed the United States in September 1997, and reentered the same month, without inspection.
>
> A review of the record of proceedings shows that Immigration officers apprehended you on August 21, 1997. You informed the officials that you had been living in the United States for about seven years and that you entered the United States in October 1989, without inspection, at Brownsville, Texas.
>
> In addition to the above, you only submitted affidavits from individuals to support your testimony and your claim of living and residing in the United States during the requisite period from January 1, 1982 until the date of filing the application. However, most of those affidavits are from the early 1990's and they do not have current telephone numbers listed....
>
> You do not have any proof of your residence or physical presence from 1981 through 1988 apart from many unverifiable affidavits.

On appeal, the applicant acknowledges that he received the director's NOID and submits copies of three "affidavit of witness" forms from [redacted] and [redacted] in support of his application.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1255a(a)(2). 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 for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, 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 "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 the evidence for relevance, probative value, and credibility, within the context of the totality of the evidence, to determine whether the facts to be proven are 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 three notarized documents listed above neither singly or collectively establish that the applicant had been in unlawful status since before January 1, 1982 through the date when he attempted to first file for legalization during the original filing period from May 5, 1987 ending on May 4, 1988.

On his Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, that he filed on December 6, 2005, the applicant stated that his only absences from the United States since entry were two visits to Mexico with returns in the same months in June 1987 and September 1997. However, the record contains a Form I-213, Record of Deportable Alien, dated August 21, 1997, indicating that that an officer of the former Immigration and Naturalization Service (INS) apprehended the applicant at or near Brownsville, Texas. At his interview with the INS officer, the applicant stated that he had last entered the United States without inspection in October 1989 near Brownsville, Texas, and that his total time in the United States was about seven years.

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 this country under the

provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference drawn from the documentation provided depends on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

On appeal, the applicant attempts to strengthen his claim to residence during the requisite period by submitting additional notarized statements. However, he has failed to address the inconsistencies noted by the director with respect to his initial entry into the United States.

The applicant 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.

It is noted that, in removal proceedings held on September 4, 1997, an Immigration Judge in Houston, Texas, ordered the applicant deported to Mexico. It is further noted that the record contains a Form I-205, Warrant of Removal/Deportation, issued by the Acting District Director of the Houston, Texas, INS office establishing the applicant was deported to Mexico on September 9, 1997. The applicant is thus inadmissible to the United States. For this additional reason the application may not be approved.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.