

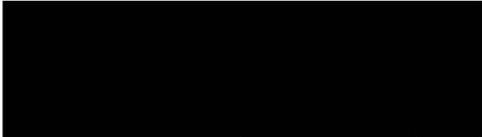
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE:

MSC 06 101 20177

Office: NEW YORK

Date:

FEB 25 2009

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. The file has been returned to the National Benefits Center. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

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 in New York City. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant had not established his continuous physical presence in the United States since November 6, 1986 through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act. The director determined that the applicant's departure from the United States for Canada, on June 30, 1987, to seek employment in Canada, was not brief, casual, and innocent.

An applicant for temporary resident status – under section 245A of the Immigration and Nationality Act (the Act) – 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. *See* 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. *See* 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. *See* 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. *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 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 or petition.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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.

The applicant, a native of Bangladesh who claims to have resided in the United States since December 9, 1980, filed his application for temporary resident status under section 245A of the Act (Form I-687), together with a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet, at the New York District Office on January 9, 2006.

In the Notice of Intent to Deny (NOID), dated January 28, 2008, the director stated that the applicant failed to establish his continuous physical presence in the United States since November 6, 1986 through May 4, 1988.

In the Notice of Decision, dated June 18, 2007, the director denied the instant application based on the reasons stated in the NOID. The director noted that in his response to the NOID, the applicant disclaimed the content of his Form I-687, and the attestation from [REDACTED] pertaining to his departure from the United States in June 1987 to seek employment in Canada. The director also noted that the applicant alleged that the preparer(s) of his Form I-687, and the affidavit of [REDACTED], both erred in stating that he sought employment in Canada.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate his continuous physical presence in the United States throughout the requisite period. The applicant submitted evidence, including letters and affidavits as evidence to support his Form I-687 application. The AAO has reviewed the entire record. Here, the submitted evidence is neither probative, nor credible.

The applicant claims error by the preparers of his Form I-687 application, and, of the affidavit from [REDACTED], to his detriment. However, there is no remedy available for an applicant who

assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on his behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel). Furthermore, USCIS is not responsible for action, or inaction, of the applicant's representative.

At this late stage, the applicant cannot avoid the record he has created. Contrary to the applicant's assertion, the evidence of record indicates that he departed the United States, in June 1987, to seek employment in Canada. Specifically, on his Form I-687, signed on June 25, 1991, the applicant stated that he had departed the United States for Canada "For Job;" and, on his Form for Determination of Class Membership in CSS V. Thornburgh (Meese), signed on April 1, 1992, the applicant again indicated that he had departed the United States for Canada "For Job Search." In addition, the applicant submitted an affidavit from [REDACTED], dated April 25, 2006, also attesting that the applicant's departure to Canada in July 1987 was "in order to looking [look] for [a] job in Canada." It is also noted that the applicant's claims that a preparer made an error in [REDACTED] affidavit, however, the applicant does not provide any documentation whatsoever in support of his assertion.

Clearly, the applicant's departure to Canada on June 30, 1987, to seek employment in Canada, was not brief, casual, and innocent. This departure, therefore, represents a break in his continuous physical presence during the requisite period.

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant has failed to establish his continuous physical presence in the United States throughout the requisite period. Thus, the record does not establish that the applicant entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from that date through the date he attempted to file a Form I-687 during the original one-year application period that ended on May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A(a)(2) the Act.

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