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MSC-05-237-14660

Office: TUKWILA

Date: FEB 26 2009

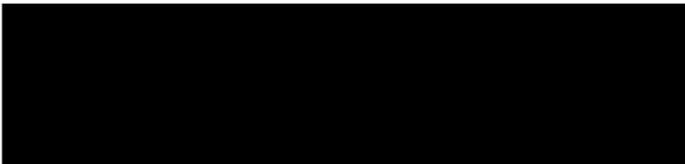
IN RE:

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:



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. Grisson, 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, Tukwila. 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 noted that the affidavits and attestations submitted by the applicant lacked detail, were not credible, and were not amenable to verification.¹ 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 that the director's action in denying the application was an abuse of discretion, that the director did not properly evaluate the applicant's evidence, and that the evidence submitted should be considered as a whole. Counsel also asserts that the applicant's statements and attestations submitted are sufficient to demonstrate his eligibility for the immigration benefit sought.

Although the district director inferred that the applicant had not established that he was eligible for class membership pursuant to the CSS/Newman Settlement Agreements, because he was never absent from the United States, the district director treated the applicant as a class member by adjudicating the Form I-687 application. Consequently, the issue of class membership will not be dismissed on appeal, and the AAO will adjudicate the applicant's appeal as it relates to his admissibility and his claim of continuous unlawful residence in the United States since prior to January 1, 1982.

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).

¹ The director's detailed analysis of the evidence submitted by the applicant has been made a part of the record of proceeding, and therefore, will not be repeated verbatim on appeal.

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.

Evidence submitted by the applicant that is dated subsequent to the requisite period is irrelevant to his claimed residence in the United States during the requisite period, and will therefore not be considered as having any probative value.

The record shows that the applicant submitted a Form I-687 Application and Supplement to United States Citizenship and Immigration Services (USCIS) on May 25, 2005.

The applicant submitted the following affidavits as evidence of his residence during the requisite period:

- An affidavit from [REDACTED] manager of Authentic Indian Cuisine in which he stated that the restaurant employed the applicant as a waiter from November 1981 to December 1990. **Here, the affiant's statement does not conform to regulatory standards for attestations by employers.** Specifically, the affiant does not specify the address(es) where the applicant resided throughout the claimed employment period, whether the employment was part-time or seasonal, or 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 of proceeding does not contain copies of personnel or payroll records to corroborate the assertions made by the affiant. Because the affidavit does not conform to regulatory standards, it can be accorded little minimal weight in establishing that the applicant resided in the United States during the requisite period.
- An affidavit from [REDACTED] in which he stated that he is the applicant's father and that the applicant came to visit him in Canada from July 10, 1987 to July 28, 1987. Although the affiant's statement is evidence of the applicant being in Canada in July of 1987, it is insufficient to demonstrate the applicant's presence in the United States.
- An affidavit dated May 4, 1991 from [REDACTED] in which he stated that the applicant resided with him at [REDACTED], apartment [REDACTED] in New York City from October 1981 to the present (May 4, 1991). This statement is inconsistent with the applicant's Form I-687 application at part #30 where he stated that he resided at the above noted address from October 1981 to December 1990, and at [REDACTED] in Seattle, Washington from March 1991 to May 1991. Although 1990 and 1991 are outside the statutory period, the unresolved inconsistency casts doubt on the applicant's proof. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, the affiant has failed to specify the terms and conditions of the applicant's stay at the New York City address nor has he provided independent documentary evidence to substantiate his claim.

- Affidavits dated November 9, 2005 and September 26, 2006 from [REDACTED] in which he stated that he met the applicant in June of 1982 in New York at an Indian Restaurant where the applicant was working as a waiter. He also stated that they have developed a good friendship and that they have met with each other on a number of occasions since June of 1982. Here, the affiant fails to specify the name of the restaurant where he met the applicant. He also fails to specify the applicant's place of residence or any knowledge of the circumstances of the applicant's living in the United States during the requisite period.
- An affidavit from [REDACTED] in which he stated that he has known the applicant since his college days in India. He further stated that he met the applicant while dining at the Indian Restaurant in New York where the applicant was working in January of 1986. He also stated that he and the applicant have met on a number of occasions since. The affiant fails to specify the name or location of the Indian Restaurant where he met the applicant. He also fails to specify the applicant's place of residence or any knowledge of the circumstances of the applicant's living in the United States during the requisite period.

Because the above noted affidavits are significantly lacking in detail, they can be accorded little weight in establishing that the applicant continuously resided in the United States during the requisite period. Although the director considered the [REDACTED] and [REDACTED] affidavits as some evidence of the applicant's presence in the United States in 1982 and 1986, they are insufficient to establish his continuous unlawful residence in the United States since prior to January 1, 1982.

In denying the Form I-687 application, the director noted that the evidence submitted by the applicant failed to meet the regulatory criteria for affidavits, and that it was insufficient to establish the applicant's continuous residence in the United States throughout the requisite period.

On appeal, counsel reasserts the applicant's claim of eligibility for temporary resident status.

In the instant case, the applicant has failed to provide sufficient, 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 issues raised by the director. The affidavits submitted are lacking in detail, the employment declaration fails to comply with regulatory standards and the affidavit from [REDACTED] is inconsistent with statements made by the applicant.

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, and the inconsistencies in the evidence discussed 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 reliance upon documents that fail to comply with regulatory standards and that are lacking in detail and in 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.