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U.S. Citizenship
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FILE:



Office: CHICAGO

Date: JAN 21 2009

MSC-06-081-10800

IN RE:



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. All documents have been returned to the office that originally decided your case. 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, or *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, Chicago, and 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 to United States Citizenship and Immigration Services (USCIS). The director denied the application and found the applicant ineligible for temporary resident status. Specifically, the director noted that the applicant left the United States for more than 45 days in 1992 and failed to offer an emergent reason establishing his inability to return to the United States within the prescribed time allowed, in violation of 8 C.F.R. § 245a.1.

On appeal, counsel for the applicant asserts that the applicant has submitted sufficient credible evidence establishing his continuous unlawful residence in the United States since January 1981. Counsel further states the application of 8 C.F.R. § 245a.1 to this case is unreasonable considering the fact that the applicant has resided in the United States for 26 years, and his total days of absence from the United States, 90 days at best, is very miniscule compared to the number of days he has resided continuously in the United States since 1981. Therefore, to deny the application based on less than .01% absence from the United States is unconscionable and an abuse of law and due process, counsel concludes.

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)(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. CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

The applicant shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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, "[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 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 (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.

The issue in this case is whether the applicant has met his burden of proving by a preponderance of the evidence that he entered the United States in January 1981 and has resided continuously in the United States in an unlawful status since such date and through the date he filed or attempted to file his application for temporary resident status.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

On appeal, counsel for the applicant claims that the application of 8 C.F.R. § 245a.1(c)(1)(i) to the applicant's case is unreasonable, unconscionable, and an abuse of law and due process. As stated above, to be eligible for temporary resident status, the applicant must establish continuous residence in the United States since before January 1, 1982 until he filed or attempted to file his application for temporary resident status. Pursuant to 8 C.F.R. § 245a.1(c)(1)(i), the applicant's residence in the United States is not deemed continuous if during the statutory period, the applicant leaves the United States for more than 45 days on any single trip or if his multiple trips outside the United States equal to more than 180 days, unless he can show that his inability to return to the United States within the prescribed time allowed is due to emergent reasons. The applicant in this case is required to show continuous unlawful residence in the United States from January 1981 to September 1987, when he attempted to file his application. Any absence thereafter is considered irrelevant and should not be considered. Upon a *de novo* review, the AAO finds that the applicant's absence from the United States in 1992 for more than 45 days is irrelevant to this case and will not be considered. The director's decision to deny the application for temporary resident status for the reason stated above shall be withdrawn.

The application may not be approved, however. Upon review of the evidence, the AAO determines that the applicant has failed to meet the burden of proving by preponderance of the evidence that he entered the United States before January 1, 1982 and has resided continuously in the United States throughout the requisite period, specifically between January 1981 and January 1986. On November 20, 2008, the AAO mailed a request for additional evidence (RFE) to the applicant and his counsel, requesting them to furnish additional documentation within thirty days. Thirty days have passed, and neither the applicant nor his counsel have submitted any evidence, including contemporaneous documents, which tend to corroborate the applicant's claim of entry into the United States before January 1, 1982 and continuous residence in the United States for the duration of the entire requisite period.

To show continuous residence in the United States since January 1981, the applicant submitted a number of various documents dated as early as January 1986 and as late as April 1992 including several apartment lease contracts, rent receipts, a standard residential sales contract, bank deposit slips, a vehicle retail installment contract, a traffic citation, a promissory note agreement, certificate of deposit checks made payable to the applicant, school progress reports of [REDACTED], the applicant's son, and letters from two property management companies. The applicant also submitted a letter from [REDACTED], a pediatrician, who claims to have treated the applicant for chest pains and cough in 1981. The record also includes a photocopy of the applicant's Form I-94, showing that the applicant was admitted to the United States as a nonimmigrant visitor on June 11, 1984 until December 10, 1984.

As stated above, the burden is on the applicant to prove by a preponderance of the evidence that he entered the United States before January 1, 1982 and has continuously resided in the United States in an unlawful status since such date until he filed or attempted to file an application for temporary resident status pursuant to Section 245A of the Act. The burden is met when, based on relevant, probative, and credible evidence, the applicant's claim is probably true. Upon a *de novo* review of the evidence, the AAO finds that the various documents submitted above are relevant, probative, and credible as evidence of the applicant's continuous residence in the United States from January 1986, but are insufficient to establish eligibility for the benefit sought. The applicant's Form I-94 is credible as proof that the applicant was probably in the United States between June and December

1984 but the record does not establish continuous residence from before January 1, 1982 to June 1984 or from December 1984 and throughout 1985.

The AAO observes that the applicant, according to his Form I-687, resided at [REDACTED] Florida City, Florida, from January 1981 to July 1984, before living at [REDACTED] Addison, Illinois between August 1984 and October 1986. As evidence that the applicant was in the United States during this time, he submitted a letter from [REDACTED] a pediatrician, who claims to have treated the applicant for chest pain and cough in July 1981 at his office in Chicago. In determining the weight of an affidavit, it should be examined first to determine upon what basis the affiant is making the statement and whether the statement is internally consistent, plausible, or even credible. *Matter of E-M-, supra*. The affiant in this case is a pediatrician claiming to have treated the applicant, a 37-year old man. Furthermore, according to the application, the applicant lived in Florida while [REDACTED] office was in Chicago in 1981. In his letter, [REDACTED] listed the applicant's address at [REDACTED], Addison, Illinois. The applicant did not list his residence at that address until August 1984 on his application. Because [REDACTED]'s statement is inconsistent with the Form I-687 application, the letter lacks credibility, and thus is not probative as evidence of the applicant's claim of residence in the United States since 1981.

The absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period and inconsistency noted above seriously detract from the credibility of his 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 lack of credible supporting documentation, it is concluded that 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.

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