



U.S. Citizenship
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FILE:

MSC-06-104-12514

Office: HARTFORD

Date:

JUL 14 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. 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, Hartford. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Although a Form G-28, Notice of Entry of Appearance as Attorney or Representative, has been submitted, the individual named is not authorized under 8 C.F.R. § 292.1 or 292.2 to represent the applicant. Therefore, the applicant shall be considered as self-represented and the decision will be furnished only to the applicant.¹

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 she had continuously resided in the United States in an unlawful status for the duration of the requisite period. The director noted that the applicant's absence from the United States from November 1987 to January 1997 was in excess of the one hundred eighty (180) day limit, and that as the applicant went back to Kenya to attend school, her absence was not brief, casual, or innocent. The director denied the application finding that the applicant had failed to establish that she entered the United States prior to January 1, 1982 and had failed to demonstrate continuous physical presence in the United States from November 6, 1986 to the date of filing for amnesty or May 4, 1988.

On appeal, the applicant asserts that the director's action in denying the application was an abuse of discretion, that the director used the wrong evidentiary standard in reviewing the evidence. The applicant further asserts that her absence from the United States from November 1987 to January 1997 was brief, casual, and innocent and was therefore insufficient to establish a break in her continuous physical presence in the United States. The applicant also asserts that there is no material misrepresentation in either her testimony or the evidence she submitted. The applicant states that the affidavits submitted are credible and that the record contains sufficient documentation to establish her eligibility for temporary resident status. The applicant does not submit any evidence on appeal.

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

¹ The applicant was represented in this proceeding by the [REDACTED] of Putnam, Connecticut. On December 19, 2005, however, [REDACTED] was issued an order from the Superior Court, Judicial District of Hartford, Connecticut suspending him from the practice of law, until further order of the Court. Consequently, [REDACTED] was suspended from the practice of law in all matters before U.S. Citizenship and Immigration Services on February 3, 2006. Accordingly, the applicant in this proceeding is considered at present to be self-represented.

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 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).

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 her burden of establishing continuous unlawful residence and continuous physical presence in the United States throughout the requisite period.

The applicant testified under penalty of perjury during her immigration interview that she entered the United States in 1980 and was absent from the United States from November 1986 to January 1987 for a family visit, and from November 1987 to January 1997 to attend school. Although the applicant claims on appeal that her absence from the United States in 1987 was brief, casual, and innocent, she has failed to establish that she has been continuously physically present in the United States from November 6, 1986 until the date of filing the application. The applicant stated at her interview that her parents attempted to file in 1987; however, she has not presented any evidence to substantiate that claim. To meet her burden of proof, the applicant must provide evidence of eligibility apart from her own testimony. 8 C.F.R. § 245a.2(d)(6). She has not shown that her absence from November 1986 to the time of filing was brief, casual and innocent. Such absence thus interrupted any period of continuous physical presence that she had.

A legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. Section 245A(a)(3)(A) of the Act, 8 U.S.C. § 1255a(a)(3)(A). 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 she was absent from the United States for more than 45 days;² to attend school. *See Rosenberg, supra* (where the court looked to (1) the duration of the alien’s absence; and (2) the purpose of the absence.

² 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

The applicant submitted the following attestations as evidence:

- An affidavit from [REDACTED] who stated that she is the applicant's mother and that she, her husband and her daughters entered the United States from Canada on February 11, 1980. The affiant stated that her family resided at [REDACTED] in Hartford, Connecticut from 1980 to 1981 and that they then moved to [REDACTED] in Hartford, Connecticut. She stated that her family was present when her niece was born in May of 1981 and when her twin nephews were born in February of 1985. She stated that around September of 1987 she and her husband went to the New York immigration office to file for amnesty, only to be turned away because of an earlier trip they had taken outside the United States. This statement is inconsistent with the applicant's Form I-687 application at part #33 where she stated under penalty of perjury that she resided at [REDACTED] in Hartford, Connecticut from December 1980 to October 1987. Here, the inconsistencies and contradictions cast doubt on the applicant's proof. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts 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 (BIA 1988).
- An affidavit from [REDACTED] who stated that she is the applicant's aunt and that she has visited with the applicant and her family at least once a week since their coming to the United States in February of 1980. She also stated that the applicant's family was present at her house at [REDACTED] in Hartford, Connecticut when her daughter was born in May of 1981 and when her twin sons were born in February of 1985. She states that she accompanied the applicant's parents to the immigration office in September of 1987 at which time they were turned away.

In the instant case, the applicant has failed to provide sufficient, credible and probative evidence to establish her continuous unlawful residence in the United States throughout the requisite period. She has failed to overcome the issues raised by the director. Based upon the applicant's admissions, she was absent from the United States from November 1987 to January 1997. Such absence is not brief, casual and innocent and interrupted any period of continuous physical presence. The AAO notes further that the applicant submitted affidavits that are inconsistent with her statements made on her Form I-687 application, and that she has failed to provide sufficient evidence to demonstrate her presence in the United States since before January 1, 1982.

determine the permissible length of single and aggregate absences from the United States during the period from November 6, 1986 to May 4, 1988.

Although the applicant claims to have resided in the United States since she was 6 years old, she provided neither school records nor medical or immunization records to substantiate such claim.

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period 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 and her reliance upon documents that are inconsistent with her statements, it is concluded that she 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.