

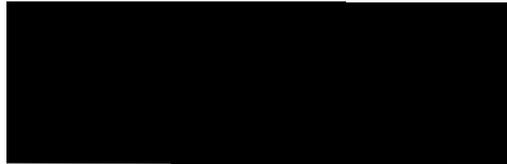
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FILE:

MSC 07 152 11723

Office: LOS ANGELES

Date: JUL 14 2009

IN RE: Applicant:



APPLICATION: Application for Temporary Resident Status under 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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

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) on 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) on February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the director in Los Angeles, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish that he was continuously resident in the United States in an unlawful status from before January 1, 1982 through the date of attempted filing during the original one-year application period for legalization that ended on May 4, 1988.

On appeal the applicant asserts that he has resided in the United States since September 15, 1981, and submits some documentation.

An applicant for temporary resident status under section 245A of the Immigration and Nationality Act (the Act) must establish his or her entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status from before January 1, 1982 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 his or her continuous physical presence 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 the regulation at 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 from May 5, 1987 to May 4, 1988. See CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to lawful temporary resident status. See section 245A(a)(4)(B) of the Act and 8 C.F.R. § 245a.2(c)(1).

As defined in 8 C.F.R. § 245a.1(o):

Misdemeanor means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less [but more than five days], regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p).

As defined in 8 C.F.R. § 245a.1(p):

Felony means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. [In this case the crime is considered a misdemeanor.]

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, has not been convicted of a felony or three or more misdemeanors and is not otherwise inadmissible under the provisions of section 245A(a)(4) 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. *See* 8 C.F.R. § 245a.2(d)(5).

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 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.

The regulations provide an illustrative list of documents – which includes affidavits and “any other relevant document” – that the applicant may submit as evidence of continuous residence in the United States during the requisite period under section 245A of the Act. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant, a native of Mexico who claims to have lived in the United States since September 1981, submitted a timely 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. The Form I-687 bears an initial receipt stamp dated January 11, 2006. On January 16, 2007, U.S. Citizenship and Immigration Services (USCIS) sent a letter to the applicant advising him that his Form I-687 and the Class Membership Worksheet had been

timely submitted, along with the appropriate filing fee, but that the requisite biometrics fee was lacking. The USCIS indicated that the application had been improperly rejected on that basis, and invited the applicant to resubmit the application package in the next 30 days with the correct fee(s). The applicant resubmitted his Form I-687 and Class Membership Worksheet with (fee(s), and a new receipt date of March 1, 2007 was stamped on the Form I-687. Based on the entire record, the AAO concludes that the application was timely filed.¹

On May 7, 2007 the applicant was interviewed at the Los Angeles District Office. On May 9, 2007, a Notice of Decision was issued, denying the application. The decision cited the applicant's failure at the interview to submit sufficient evidence of his continuous residence in the United States during the requisite period for LIFE legalization.

The applicant filed an appeal on May 16, 2007, reiterating his claim to have resided in the United States continuously since September 15, 1981. The applicant submitted photocopies of the following documentation (some or all of which was already in the record) pertaining to his claim of continuous residence in the United States during the years 1981-1988:

An affidavit by [REDACTED] dated January 17, 2003, stating that he is an independent contractor/gardener in Los Angeles who employed the applicant as a "gardener helper" from October 16, 1981 to December 12, 1983.

- A Social Security Statement addressed to the applicant, dated July 18, 2003, listing his taxable earnings for every year from 1984 through 2002.
- An affidavit by [REDACTED], a resident of Alhambra, California, dated October 9, 2006, stating that he met the applicant in January 1984 as a co-worker at a company called CP & C in Los Angeles, and that they have remained in constant touch since then.

An affidavit by [REDACTED] a resident of Ontario, California, dated October 9, 2006, stating that the applicant has been a friend and co-worker since 1988.

An affidavit by [REDACTED] a resident of Paramount, California, dated October 14, 2006, stating he has known the applicant all his life and knows that the applicant has resided in the United States since September 1981.

- An affidavit by [REDACTED], a resident of Los Angeles, California, dated October 14, 2006, stating that he met the applicant in Los Angeles in 1982, that they have played soccer together for many years, and that they are good friends.

¹ The applicant filed an earlier Form I-687 under the terms of the CSS/Newman Settlement Agreements on May 22, 2005 (MSC 05 234 10025). After two Notices of Intent to Deny – on December 15, 2005 (MSC 05 234 10025) and November 4, 2006 (MSC 06 101 20668) – the District Director in Los Angeles issued a Notice of Decision on March 6, 2007 (MSC 06 101 20668) denying the application for failure of the applicant to establish that he met the requisites of class membership in the CSS/Newman Settlement Agreements. The applicant appealed the decision to a special master in accordance with the terms of the CSS/Newman Settlement Agreements. This appeal has not yet been adjudicated.

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).

The first issue in this proceeding is whether the applicant has furnished sufficient probative evidence to demonstrate that he resided continuously in the United States in an unlawful status from before January 1, 1982 through the date of attempted filing during the original one-year filing period for legalization that ended on May 4, 1988. The AAO determines that he has not.

While there is considerable evidence in the record that the applicant resided in the United States from 1984 onward – including the Social Security Statement submitted on appeal and other previously submitted documents such as earnings statements, Form W-2 Wage and Tax Statements, and a California driver's license – there is much less evidence of the applicant's residence in the United States before 1984.

With respect to the affidavit by [REDACTED] in 2003, who claims to have employed the affiant as a "gardener helper" from 1981 to 1983, 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 affidavit by [REDACTED] does not comport with these requirements because it did not identify the applicant's address at the time of employment and clearly stated that the information about the applicant was not taken from company records because no such records were kept. With no other corroborative documentation of the applicant's employment by [REDACTED] – such as pay stubs or tax statements – the employment affidavit has limited probative value. It is not persuasive evidence of the applicant's continuous residence in the United States during the years 1981-1983.

As for the affidavits by [REDACTED] and [REDACTED] in 2006, they provide few details about the applicant's life in the United States during the 1980s. [REDACTED] claims to have known the applicant all his life, but provides no information about when he came to the United States himself, the basis of his knowledge that the applicant has been here since 1981, where the applicant lived during the 1980s, and the nature and extent of their interaction during that decade. [REDACTED], who claims to have met the applicant in 1982, likewise offers little information about the applicant's life in the United States during the 1980s – such as where he worked and lived – and the nature and extent of their interaction over the years, except that they

played soccer together. Furthermore, neither affidavit is supplemented by any documentary evidence – such as photographs, letters, and the like – of the affiant’s personal relationship with the applicant in the United States during the 1980s. Thus, the affidavits by [REDACTED] and [REDACTED] have little probative value. They are not persuasive evidence of the applicant’s continuous residence in the United States during the years 1981-1983.

The only other evidence in the record of the applicant’s residence in the United States during the years 1981-1983 consists of the following:

- Two identically formatted affidavits by [REDACTED] of Los Angeles, California, and [REDACTED] of Compton, California, dated July 26, 1990, who stated that they had known the applicant in the United States since 1981 and 1982, respectively, and that knew the applicant had been living at [REDACTED] in Los Angeles since September 1981
- Two original merchandise receipts from the Western Auto Associate Store with handwritten entries identifying [REDACTED] as the customer and dates of February 13, 1983 and February 27, 1983.

The 1990 affidavits of [REDACTED] and [REDACTED] have the same substantive shortcomings as the 2006 affidavits of [REDACTED] and [REDACTED]. They provide little or no information about the circumstances of the applicant’s arrival in the United States, how he met the affiants, and the nature and extent of the applicant’s interaction with the affiants in the United States during the 1980s. Nor did the affiants provide any details about the applicant’s life in the United States during the 1980s, such as where he lived or where he worked. Furthermore, neither affidavit is supplemented by any documentary evidence – such as photographs, letters, and the like – of the affiant’s personal relationship with the applicant in the United States during the 1980s. Thus, the foregoing affidavits have little probative value. They are not persuasive evidence of the applicant’s continuous residence in the United States during the years 1981-1983.

As for the merchandise receipts dated in February 1983, the customer is identified only as Mr. [REDACTED], who may or may not be the applicant in this case. The address and city lines are blank on both receipts. Thus, even if the customer, [REDACTED], is the applicant, the receipts do not identify any residential address for him in the United States. Nor do the receipts identify any address for the Western Auto Associate Store. Furthermore, there is no date stamp or official marking of any kind on the receipts to verify that they were actually written in February 1983. For the reasons discussed above, the receipts have little probative value. They are not persuasive evidence that the applicant was residing in the United States in 1983.

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant has not established his continuous unlawful residence in the United States during the years 1981-1983. Therefore, the applicant has not established that he resided continuously in the United States in

an unlawful status from before January 1, 1982 through the date he attempted to file a Form I-687 during the original one-year application period for legalization that ended on May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A(a)(2) of the Act.

On this ground alone, the application cannot be approved.

Beyond the decision of the director, the record includes Federal Bureau of Investigation (FBI) identification records, based on the applicant's fingerprints, indicating that the applicant was arrested by the Los Angeles Police Department on December 30, 1987, and charged with "hit and run resulting in death or injury" under California law.² On December 15, 2005, USCIS issued a NOID (in regard to the applicant's previously filed Form I-687, MSC 05 234 10025) advising the applicant that he may be ineligible for temporary resident status under section 245A of the Act because of the above criminal charge (identified in the NOID as SID # [REDACTED]). The applicant was instructed to submit "Certified Court Documents (Conviction Order, Sentencing Order, Probation Order, Etc.) which establish the final disposition of [the] case." The NOID also stated that the "[d]ocuments should clearly indicate whether a conviction was considered a felony or a misdemeanor under existing State/Federal law at the time of conviction."

In response to the NOID the applicant submitted a form letter from the Los Angeles Police Department, dated January 9, 2006, informing the applicant that for information regarding the disposition of his case (identified as booking # [REDACTED] date of arrest 12/30/1987) he should contact the Criminal Courts Building on Temple Street in Los Angeles. The applicant also submitted two photocopied form letters signed by "Deputies" of the Superior Court in Los Angeles on Temple Street. One letter, dated January 15, 2003, stated the following:

In reply to your inquiry concerning a felony record in this court, I have examined the indexes, **by name only** – from January 1980 to January 2002 – and find no record in the Los Angeles County Superior Court of the State of California, of an action naming [REDACTED].

The other letter, dated January 9, 2006, stated the following:

In reply to your inquiry concerning a felony record in this court, please be advised that I have examined the indexes – from January 1, 1990 to January 9, 2006 – and find no record in the Superior Court of California, County of Los Angeles, of an action naming [REDACTED].

² The FBI record includes the following identifiers for the arrest and criminal charge: [REDACTED]
Agency – LAPD [REDACTED]; [REDACTED]

Neither of these two letters complied with the instructions in the NOID, because neither constitutes a certified court document that shows the final disposition of the specific criminal charge against the applicant: hit and run resulting in death or injury. In fact, the letter dated January 9, 2006, is irrelevant to the issue in this case because it only covers the time period of 1990 to 2006, whereas the applicant's criminal charge dates from 1987. In addition, the authenticity of the other letter appears suspect. For one thing, it is dated January 15, 2003, which was three years before the applicant requested information about his criminal record. The AAO also notes that the round court seal is superimposed on a square box, which may indicate that it is obscuring the original contents of the box. A more precise determination of authenticity is impossible because the applicant did not submit this letter (or the other) in the original. Both letters are photocopied documents.

For the reasons discussed above, the AAO determines that the applicant has failed to establish that he has not been convicted of a felony committed in the United States, as required under section 245A(a)(4)(B) of the Act. Thus, the applicant has not established his admissibility to the United States under section 245A(a)(4) of the Act, as required for the applicant to be eligible for temporary resident status under the Act.

On this ground as well, the application cannot be approved.

The appeal will be dismissed, and the application denied.

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