

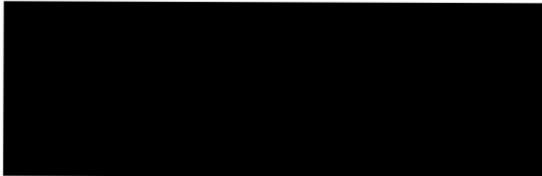
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, D.C. 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



4

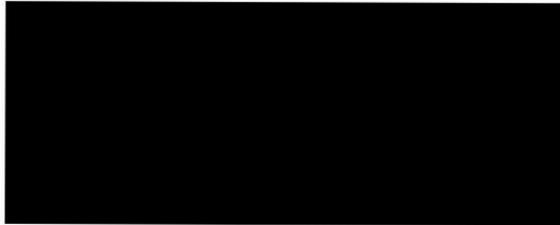
FILE: [REDACTED]
MSC 06 084 12421

Office: BOSTON

Date:

JUN 01 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, Boston, Massachusetts, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) *Meaning of affected party.* For purposes of this section and §§ 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

Although the record contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, authorizing [REDACTED] to act on behalf of the applicant, [REDACTED] is no longer authorized to represent the applicant pursuant to 8 C.F.R. § 292.1(a).¹ As such, the decision will be furnished only to the applicant.

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 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, the applicant asserts that he obtained employment from June 1981 through 1990 and provided evidence to support this assertion. The applicant asserts that he meets the requirement for continuously residing in an unlawful status in the United States.

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).

¹ See <http://www.usdoj.gov/eoir/profcond/chart.htm>.

Section 1104(c)(2)(B)(ii) of the LIFE Act states in the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, such alien must establish that the period of authorized stay as a nonimmigrant expired before such date through the passage of time or that the alien's unlawful status was known to the Government as of such date.

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), “until the date of filing” shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, 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. *See* 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 including affidavits 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.* 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 (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 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.

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.

In an attempt to establish continuous unlawful residence in the United States prior to January 1, 1982, the applicant submitted:

- Photocopied diplomas issued in May 1984 from El Reno Junior College (Oklahoma) and on May 16, 1987, from Texas Southern University.
- A college transcript from University of Houston-University Park for the 1985 summer and fall semesters and 1986 spring and summer semesters.
- A college transcript from Texas Southern University for the 1984 and 1986 fall semesters and 1985 and 1987 spring semesters.
- A student identification card and a college transcript from El Reno Junior College for the 1982 fall semester, 1983 spring, summer and fall semesters and 1984 spring semester. The transcript indicates that the applicant entered on August 23, 1982, and received his degree (Associate in Arts) on May 11, 1984.
- A photocopied Certificate of Appreciation dated May 2, 1984 from El Reno Junior College.
- An affidavit from [REDACTED], who indicated that he met the applicant through his niece in November 1981 in Oklahoma City. The affiant asserted that he assisted the applicant in finding part-time jobs and recommended that he attend El Reno College. The affiant asserted that he lost touch with the applicant once the applicant graduated from El Reno College, but met him again a few years later in Dallas, Texas.
- An affidavit from [REDACTED], former manager of Emergency Track Repair, Inc., in El Reno, Oklahoma, who attested to the applicant's employment as a railroad laborer from June 1981 to August 1982.

At the time of his interview on July 25 2006, the applicant indicated that he lawfully entered the United States as a nonimmigrant student (F-1) in November 1980 and remained in the United States until May 1987. The applicant further indicated that he returned to the United States as a nonimmigrant student (F-1) in June 1987.

On December 27, 2006, the director issued a Notice of Intent to Deny, which advised the applicant that the evidence submitted failed to establish continuous residence in an unlawful status since before January 1, 1982 through the date he attempted to file his Form I-687 application. The applicant, in response, submitted:

- An affidavit from a brother, [REDACTED] of Miami, Florida, who attested to the applicant's presence in the United States since November 1980. The affiant asserted that "we have been interacting over the years through family reunions and or gatherings."
- An affidavit from [REDACTED] of Miami, Florida, who indicated that he has known the applicant since December 1980 and that throughout the years he and the applicant have interacted in social events and family gatherings.

The director, in denying the application, determined that the applicant was in a lawful status as a F-1 nonimmigrant student from August 23, 1982, through May 11, 1984, and from June 1987 and, therefore, had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date he attempted to file his Form I-687 application.

The AAO does not view the documents discussed above as substantive enough to support a finding that the applicant continuously resided in an unlawful status in the United States since before January 1, 1982, as he has presented contradictory and inconsistent documents, which undermines his credibility. Specifically:

1. The employment affidavit from [REDACTED] failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Under the same regulations, the affiant also failed to 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.
2. The employment affidavit raises questions to its authenticity as the applicant did not claim on his initial and current Form I-687 applications employment with Emergency Track Repair, Inc. The applicant claimed employment commencing in August 1982 on his current Form I-687 application and at McDonalds Restaurant on his initial application dated August 2, 1991.
3. The applicant has not provided any evidence to support his testimony that he entered the United States in November 1980 as a F-1 non-immigrant student. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The applicant, on his initial Form I-687 application, indicated at items 25 and 26 that he was issued a F-1 visa on May 27, 1982.
4. The remaining affiants failed to state the applicant's place of residence prior to 1982 and failed to provide the basis for their continuing awareness of the applicant's residence prior to 1982. 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 his claim.
5. At item 33 on his initial Form I-687 application the applicant indicated that he resided at [REDACTED], El Reno, Oklahoma from December 1979 to January

1984. However, on his current Form I-687 application, the applicant claimed residence at this address from 1982.

6. At item 36 on his initial Form I-687 application, the applicant claimed employment at McDonalds Restaurant from June 1980 to January 1984. However, on his current Form I-687 application, the applicant claimed employment at Kentucky Fried Chicken from August 1982 to June 1983 and at Anthony's Clothing Store from September 1983 to August 1984.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Pursuant to 8 C.F.R. § 245a.2(5e), 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 with minimal probative value and are contradicting in nature, it is concluded that the applicant has failed to establish continuous residence in an unlawful status in the United States prior to January 1, 1982. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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).

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulation provides relevant definition at 8 C.F.R. 245a.2(c)(1).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

In response to the Notice of Intent to Deny, the applicant submitted court dispositions from the district courts of New Hampshire and Massachusetts, which revealed the following misdemeanor offenses:

1. On March 3, 1988, the applicant was arrested by the State Police in Andover, Massachusetts for violating M.G.L. chapter 90, section 23, attaching plates assigned to

another motor vehicle. On May 18, 1988, the applicant was convicted of this offense.

2. On July 21, 1990, the applicant was arrested by the Nashua Police Department in New Hampshire of violating section 644.17, shoplifting. On September 5, 1990, the applicant was convicted of this offense.
3. On December 23, 1990, the applicant was arrested by the Lowell Police Department in Massachusetts for violating M.G.L. chapter 90, section 23, operation of motor vehicle after suspension or revocation of license. On May 7, 1991, the applicant was convicted of this offense.

The applicant is ineligible for temporary resident status because of his three misdemeanor convictions. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.

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