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FILE:

MSC 06 096 11261

Office: BOSTON

Date: JUN 02 2009

IN RE:

Applicant:

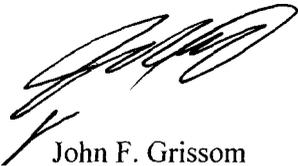
APPLICATION:

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. 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. 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, and a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet. The director denied the application because the applicant did not establish that he continuously resided in the United States for the duration of the requisite period. The director noted that the fact that the applicant was issued a "B-2" nonimmigrant visa at the American Embassy in Rio De Janeiro, Brazil, on January 26, 1987 was an indicator that the applicant had not maintained the required physical presence and illegal status in the United States during the requisite period.

On appeal, the applicant states that while it is true that he was issued a nonimmigrant visitor visa at the American Embassy in Rio De Janeiro in January 1987, all transactions took place through his lawyer and he never had to go to the embassy in person. He asserts that at that time, it was common for visas to be issued without personal interviews in Brazil. The applicant further states that he disagrees with the director's finding that the evidence of the B-2 visa stamp contained in his passport contradicted his sworn testimony.

Counsel states that the applicant was assisted in his application by an individual who represented himself as an experienced immigration attorney and that person submitted a largely incomplete and incorrect application on behalf of the appellant. Counsel argues that unfortunately, the individual who helped the applicant file his initial application grossly prejudiced his case by filing erroneous information and failing to submit sufficient supporting documentation to prove his claim. Counsel submits additional evidence to support her client's application and correct any mistakes on the record.

In the *Matter of Compean, Bangaly and J-E-C-, et al.*, 24 I&N Dec. 710 (A.G. 2009), the Attorney General held that the Constitution affords no right to counsel or effective assistance of counsel to aliens in immigration proceedings under the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *Id.* at 711-27. Although the Immigration and Nationality Act and accompanying regulations do not afford aliens a right to effective assistance of counsel, United States Citizenship and Immigration Services may, in its discretion, reopen proceedings based on the deficient performance of an alien's prior attorney. *Id.* at 727. Although *Compean* addresses deficient performance of counsel claims in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review. *Id.* at 728 n.6.

For claims pending prior to January 7, 2009, as in this case, the alien is not required to meet the six new documentary requirements expressed in *Compean*. However, he must still comply with

requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *Lozada* requires an alien to submit: 1) an affidavit attesting to the relevant facts, detailing the agreement that was entered into, what actions were supposed to be taken and what the attorney did or did not do; 2) evidence that former counsel was informed of the allegations, given an opportunity to respond and former counsel's response, if any; and 3) evidence that a complaint has been filed with the appropriate disciplinary authorities regarding such representation or an explanation of why such a complaint was not filed *Id.* at 638-39.

The applicant has submitted an affidavit in support of his claim. However, he has not submitted evidence confirming that former counsel has been notified of the incompetence claim, or evidence demonstrating that a complaint, based upon the allegations, has been filed with the appropriate disciplinary authorities. To the extent that the applicant has failed to produce evidence sufficient to substantiate an ineffective assistance of counsel claim, the AAO will review the record applying standard statutory and regulatory eligibility requirements and burdens of proof.

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).

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. 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).

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 the evidence

for relevance, probative value, and credibility, within the context of the totality of the evidence, to determine whether the facts to be proven are 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, 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.

The pertinent evidence in the record is described below.

1. A “CSS/LULAC Legalization and Life Act Adjustment Form to Gather Information for Third Party Declarants,” from [REDACTED] who states she knows the applicant has resided in the United States since September 1981.
2. Unnotarized statements purported to be affidavits from [REDACTED] and [REDACTED] who state they know the applicant to have resided in the United States since 1982.
3. An undated letter from [REDACTED] who states that her son came to Brazil on March 25, 1987 for a short visit to pick up his passport and left to go back to America in April.
4. A letter dated September 27, 2005, from [REDACTED], general manager of Carmel Movers in Hyde Park, Massachusetts, who states he has known the applicant since sometime in July 1981 and that he worked for the company until sometime in 1987. He further states that in July 1995 he was reemployed by the firm and that he is currently working as a driver.

The notarized statements have been reviewed (Items # 1 and # 2 above) in juxtaposition to the other material in the record. These statements are not sufficiently probative to establish the applicant's continuous residence in the United States since before January 1, 1982 through the requisite time period. Additionally, [REDACTED] (Item # 1) states that she first met the applicant at a birthday party in Fall River in November 1982. However, she also states that she was born on May 16, 1983.

On his Form I-687, filed on January 4, 2006, he states that his only absence from the United States after his first entry in 1981 was a family visit in April 1987 and he returned in the same month. However, his mother (Item # 3) states he returned to Brazil on March 25, 1987. Also, as noted by the director, the record reflects applicant was issued a B-2 nonimmigrant visitor visa at the American Embassy in Rio De Janeiro, Brazil, on January 26, 1987. The applicant acknowledges he was issued a nonimmigrant visitor visa by the American Embassy in Rio De

Janeiro in January 1987, but asserts that all transactions took place through his lawyer and he never had to go to the embassy in person. However, absent evidence to the contrary, it is determined the applicant was in Brazil on January 26, 1987 when he received his nonimmigrant visa and not residing in the United States on that day as claimed.

On his Form I-687, the applicant stated that he worked for Burger King, Fire King Bakery and Isaac Moving during the period from 1981 until sometime in 1987. He did not claim that he worked for Carmel Movers (Item # 4) at any time during those years. Additionally, the employment verification letter from Carmel Movers does not identify the location of company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable as is required of employment letters by 8 C.F.R. § 245a.2(d)(3)(i).

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. Further, the applicant must resolve any inconsistencies in the record with competent, independent, objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). These inconsistencies cast doubt not only on the evidence containing the conflicts, but on all of the applicant's evidence and all of his assertions.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate entry into the United States prior to January 1, 1982, and continuous residence during the requisite period. The applicant's asserted employment absence and residential histories on his Form I-687 are accompanied by inconsistent evidence.

The evidence must be evaluated not by the quantity of evidence alone but by its quality. 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 its amenability to verification. Given the absence of credible supporting documentation, the applicant has failed to meet his burden of proof and failed to establish continuous residence in an unlawful status in the United States during the requisite period. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act. The application was correctly denied on this basis, which has not been overcome on appeal. Consequently, the director's decision to deny the application is affirmed.

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