

identifying data deleted to
prevent disclosure of unclassified
information of general privacy

PUBLIC COPY



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

U.S. Citizenship
and Immigration
Services

L1

FILE:

XDA-88-002-2013

Office: TEXAS SERVICE CENTER

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 was denied by the Director, Southern Service Center. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that on May 4, 1988, the applicant filed a Form I-687, Application for Status as a Temporary Resident, pursuant to section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a. The Director, Southern Service Center (now the Texas Service Center), initially denied the application on July 13, 1991 because the applicant failed to appear for three scheduled interviews and failed to submit sufficient documentary evidence to support his application. On April 20, 1992, the applicant filed a notice to appeal this denial. On May 26, 1992, the director *sua sponte* reopened the application and scheduled the applicant for another interview. The applicant appeared for his legalization interview on November 30, 1992. On October 28, 1996, the director issued another decision to deny the application. The director determined that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a benefit under the Act by fraud or willful misrepresentation of a material fact.

On appeal, counsel asserted that the applicant has met the burden of proof and established his eligibility for temporary resident status. Counsel stated that the director failed to give any consideration to the applicant's supporting documentation. Counsel asserted that the applicant's sworn statement is flawed because it is not in his wording and fails to provide the dates of his absences from the United States. Counsel contended that none of the evidence the applicant furnished in rebuttal to the Notice of Intent to Deny was considered by the director. Counsel maintained that the applicant should have been given the opportunity to supplement his application due to the delay in the adjudication of his application. Counsel requested the applicant's case to be remanded for a redetermination or reopened and reconsidered *sua sponte*.

The AAO reviewed the applicant's file and gave full consideration to counsel's requests. The AAO determined that remanding the matter to the director was not warranted in these proceedings. The AAO indicated that it would instead consider all of the evidence and issue a *de novo* decision based on the record and its assessment of the credibility, relevance and probative value of the evidence.¹

On March 17, 2009, the AAO issued a notice to the applicant and counsel regarding its *de novo* review of the record of proceedings. The AAO determined that the director's finding of inadmissibility under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), is not supported by the record. The AAO withdrew this finding of inadmissibility, and evaluated the merits of the application.

¹ 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 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 245(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).

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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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.

The issue in this proceeding is whether the applicant (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant initially submitted in support of his claim to have

arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consisted of letters from [REDACTED] and [REDACTED]

The letter from [REDACTED] of Shady Oaks Dairy, Sulphur Springs, Texas, states that he met the applicant in 1983 when the applicant was employed by another dairyman. [REDACTED] states that he employed the applicant from August 1991 to September 1992 and December 1992 to July 1993. This letter fails to indicate how [REDACTED] was able to date his initial meeting with the applicant in 1983. It also does not state how frequently he had contact with the applicant during the requisite period. Nor does it indicate that he had knowledge of the applicant's presence in the United States during the requisite period. Furthermore, this letter does not provide any information regarding where the applicant lived during the requisite period. Therefore, this letter is of minimal probative value as evidence of the applicant's residence in the United States in 1983. The AAO notes that the applicant's employment with [REDACTED] in 1991, 1992 and 1993 is not relevant to these proceedings since evidence of residence after May 4, 1988 is not probative of residence during the requisite time period.

The letter from [REDACTED], Sulphur Springs, Texas, is dated February 6, 1992. It provides that [REDACTED] has known the applicant for ten years. It states that the applicant was employed by him in 1980 for five months; 1983 and 1984 for twelve consecutive months; and 1987 for one month. It states that [REDACTED] has cancelled checks available to verify the applicant's employment on the farm.

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where the records are located and whether the Service may have access to the records. If the records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F).

[REDACTED] statement does not fully comply with the above cited regulation because it does not: provide the applicant's address at the time of employment; provide the applicant's exact periods of employment in 1980 and 1987; and describe the applicant's duties with the dairy company. Further, [REDACTED] stated that he has cancelled checks to verify the applicant's employment; however these documents are not contained in the applicant's record. Given these deficiencies, this letter is of minimal probative value in supporting the applicant's claims that he entered the United States before January 1, 1982 and continuously resided in the United States for the requisite period.

The AAO indicated in its March 17, 2009 notice to the applicant that the evidence submitted with his application did not demonstrate his eligibility for temporary resident status. The AAO stated that the applicant had not established by a preponderance of the evidence that he continuously resided in the United States for the duration of the requisite period. The AAO determined that the letters from [REDACTED] and [REDACTED] are of only minimal probative value as evidence of his residence in the

United States during the requisite period. The AAO further determined that the letters do not cover the entire requisite period. The AAO stated that based upon this determination, it intended to dismiss the applicant's appeal. Pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the AAO provided the applicant 30 days to submit additional evidence before rendering a final decision on the appeal.

On April 16, 2009, the AAO received a response to the request for additional evidence.² The applicant, through counsel, furnished an affidavit from [REDACTED] dated April 14, 2009. Mr. [REDACTED] states that the applicant was employed with him in 1980 for several months in Sulphur Springs, Texas. He states that the applicant subsequently was employed with [REDACTED] Dairies Incorporated in 1983, 1984 and 1987. [REDACTED] notes that he believes the applicant was employed with other employers in similar positions in Sulphur Springs during the time he was not employed at his corporation. [REDACTED] indicates that the applicant's employment responsibilities included milking of cows usually twice a day. He states that in 1980 he had three to four employees so he remembers the applicant very well. [REDACTED] states that during the applicant's employment in 1980 and beyond, the applicant lived for a while at an employee house on his farm located in Sulphur Springs, Texas.

The AAO has reviewed [REDACTED]'s affidavit and finds that it does not overcome the basis for denial. Although [REDACTED] states that the applicant resided at his farm, he does not specify whether this residence was during the requisite period. In addition, the applicant failed to provide farm address – [REDACTED] – on the residential history section of his Form I-687 application. Furthermore, [REDACTED]'s affidavit only reiterates that the applicant was employed with him in 1980, 1983, 1984 and 1987. [REDACTED]'s letter, dated February 6, 1992, clarifies that the applicant's employment in 1987 was for one month. This period of employment does not cover the entire requisite period. The applicant has failed to submit any additional evidence of his employment in the United States in 1982, 1985, 1986 and 1987.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and 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.

² The response states that the applicant is still in the process of contacting and obtaining a written statement from [REDACTED] Shady Oaks Dairy. Counsel requested a 30 day extension to submit additional documentary evidence. The AAO granted counsel's request for an extension. However, as of the date of this decision, counsel has not furnished a statement from [REDACTED] or any other additional evidence.