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U.S. Citizenship
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Services

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FILE: [REDACTED]
MSC 06 095 13729

Office: LOS ANGELES

Date:

JUN 10 2009

IN RE: Applicant: [REDACTED]

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, Los Angeles. 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 (Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director denied the application, finding that the applicant had not provided credible evidence to establish that he continuously resided in the United States in an unlawful status for the duration of the requisite period.

On appeal, counsel states that the affidavits provided by the applicant in support of his claim have not been properly examined and therefore, the director's decision is contrary to law and administrative policy. Counsel also states that the minor discrepancies in the applicant's application, testimony and evidentiary material do not make him ineligible. Finally, counsel asserts that the director's final decision was erroneously issued without first sending a notice of intent to deny.

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).

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)(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 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). 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.

At issue in this proceeding is whether the applicant submitted sufficient credible evidence to meet his burden of establishing that he (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 submits in support of his claim to have arrived in the United States before January 1, 1982 and lived in an unlawful status during the requisite period consists of affidavits of relationship written by friends and other evidence. The AAO will consider all of the evidence relevant to the requisite period to determine the applicant’s eligibility.

The United States Citizenship and Immigration Services (USCIS) adjudication officer’s notes reveal that during the applicant’s Form I-687 application interview on August 18, 2006 and the Form I-485, Application to Register Permanent Resident or Adjust Status under the Legal Immigration Family Equity (LIFE) Act application interview on June 6, 2002, the applicant claims to have entered the United States in September 1981 without a visa at San Ysidro, California.

The applicant submitted two affidavits to establish his initial entry and residence in the United States during the requisite period. In his affidavit, [REDACTED] states that he worked with the applicant at Target Mailing Services, Arcadia, California, from 1981 to 1983. [REDACTED] states in his affidavit that from 1983 to 1988, the applicant worked as a technician trainee at Stereo Components, Fullerton, California. However, on his Form I-687 application, the applicant does not claim to have worked at Target Mailing Services and Stereo Components. Instead, the applicant claims that from September 1981 to February 1995 he performed handy man jobs and worked as a farm worker for different seasonal employers located in Fullerton, Anaheim and other cities. The applicant further contradicted himself during his Form I-485 interview where he claimed that from October 1981 to November 1983, he worked for Target Mailing in Irwindale, California, and from February 1984 to December 1987, he worked for [REDACTED] doing repair of radios and small electronics.

In his Form I-687 interview, the applicant stated that he lived at [REDACTED] in the city of Arcadia in an apartment for two years. He also stated that he moved to Fullerton and stayed from

1983 to 1988. However, on his Form I-687 application, the applicant claims that he lived at [REDACTED] Westchester, California from September 1981 to February 1990.

The inconsistencies are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States during the requisite period. No evidence of record resolves these inconsistencies. 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 petitioner submits competent objective evidence pointing to where the truth lies. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The affidavits do not include sufficient detailed information about the claimed relationship of more than 25-27 years and the applicant's continuous residency in the United States since before January 1, 1982 and throughout the requisite period. For instance, the affiants claim to have met with the applicant on and off but neither of the witnesses supplies any details about the applicant's life, such as, knowledge about his family members, education, hobbies, social gatherings and other special occasions or social events where they saw and communicated with the applicant during the requisite period and the date and manner he entered the United States. The affiants fail to indicate any other details that would lend credence to their claimed acquaintance with the applicant and the applicant's residence in the United States during the requisite period.

The affidavits do not provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged.

The affidavits do not contain sufficient detail to establish the reliability of their assertions. The affidavits are insufficient to establish the applicant's 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 requisite period. Therefore, the affidavits have little probative value.

On appeal, counsel faults the director for failing to issue a notice of intent to deny (NOID). However, according to the settlement agreements, the director shall issue a NOID before denying an application for class membership. Here, the director adjudicated the Form I-687 application on the merits. As a result, the director is found not to have denied the application for class membership. Therefore, the director was not required to issue a NOID prior to issuing the final decision in this case.

The applicant's remaining evidence consists of two receipts for room rent in the amount of \$250 from February 1, 1984 to March 1, 1984 and May 1, 1984 to June 1, 1984. However, the rental address is not written on the receipts. The applicant also submits a copy of a money order in the

amount of \$395 for the rent of [REDACTED], Temple City from February 5, 1988 to March 5, 1988. However, the applicant does not claim to have ever resided at the aforementioned address in 1988. Considering all the evidence of record, the AAO finds that the applicant has not established that he resided in the United States for the requisite period. Given the lack of detail in the affidavits, and the inconsistencies regarding the applicant's employment and residence in the United States, the applicant has failed to submit sufficient evidence to overcome the director's denial. The evidence calls into question the credibility of the applicant's claim of continuous unlawful residence in the United States throughout the requisite period. The evidence submitted is insufficient to establish the applicant's 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 requisite period.

The director also found that the applicant had disrupted his period of required continuous physical presence. The record establishes that the applicant disrupted his period of continuous physical presence in the United States during the statutory period of November 6, 1986 to May 4, 1988.

A legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. *See* Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). An absence during this period which is found to be brief, casual and innocent in accordance with the guidelines set forth in *Rosenburg v. Fleuti*, 374 U.S. 449 (1963) shall not break a legalization or LIFE legalization applicant's continuous physical presence. *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 *Fleuti*. *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.) Applying the *Fleuti* doctrine to the facts in this matter, the AAO finds that the applicant's 51 day absence from the United States was not brief, casual and innocent in that the record indicates: that he was absent from the United States for more than 45 days; that he left the United States to be with family in India, and that advance permission from USCIS was required in order to reenter the United States legally to resume permanent residence. *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963)(where the Court looked to (1) the duration of the alien's absence; (2) the purpose of the absence; and (3) the need for special documentation to make the trip abroad to determine whether the absence was a brief, innocent and casual absence or whether it was a meaningful disruption of the alien's residence in the United States.)

The USCIS adjudicating officer's notes reveal that during the applicant's Form I-485 LIFE interview, he claims to have left the United States on December 12, 1987 and returned on February 1, 1988 to visit his sick mother in India. This information was reiterated by the applicant in his Form I-687 application interview and both of his Form I-687's show an absence from the United States from December 1987 to February 1988. The applicant's absence from the United States from December 1987 to February 1988 establishes a break in his period of continuous physical presence in the United States during the requisite period.

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.

The record reveals that the applicant was arrested and charged with obscene matter and lewd conduct on June 27, 2005. The applicant did not submit final court dispositions indicating the resolutions of these arrests. Therefore, the applicant has not proved that he is admissible to the United States and for this reason as well, is not eligible for temporary residence in the United States.

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