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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



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FILE:



Office: NEW YORK

Date:

JUN 24 2009

MSC 06 090 10174

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, New York. 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 failed to establish continuous residence in the United States throughout the requisite period due to an absence.¹

On appeal, counsel states that the central point of the denial was that the applicant stayed five days past the allowed time outside the United States. Counsel states that although the applicant's mother was sick since 1983, the director abused her discretion by mentioning in her decision that the applicant choose not to depart the United States until 1984. Counsel asserts that since all other criteria were met, the application should be approved.

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

¹ The AAO notes that the applicant is not a CSS/Newman class member, as he filed a Form I-687 during the original legalization period, which was denied. A subsequent appeal was dismissed by the AAO. The CSS/Newman class was open to those who attempted to file or were discouraged from filing during the initial period.

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.

An applicant shall be regarded as having resided continuously in the United States if, at the time of filing the application for temporary resident status, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c)(1)(i).

At issue in this proceeding is whether the applicant submitted sufficient credible evidence to meet his burden of establishing that he resided continuously throughout the statutory period and is otherwise eligible for temporary resident status.

The applicant stated at his Form I-687 application interview on March 28, 2006 that he entered the United States on October 18th or 19th, 1981 with a visa at JFK airport. This statement is corroborated in the record by a copy of the admission stamp showing that the applicant was admitted on October 19, 1981 in New York, New York.

The applicant stated further that he departed the United States for Malaysia on March 23, 1984 per Border Patrol instructions, and returned to the United States on May 12, 1984. The date of reentry is confirmed by the copy of the applicant's admission stamp when he was readmitted to the United States as a B-2, visitor for pleasure, on May 12, 1984 in Honolulu, Hawaii. Although the date of his exit is not documented, the AAO notes that the applicant was given a voluntary departure date of February 16, 1984 by the Immigration and Naturalization Service (INS) border agent (now Customs and Border Protection (CBP)).

By his own admission, the applicant had a break in continuous residence of more than 45 days and was found not eligible for status as a temporary resident. No explanation or evidence was provided with the Form I-687 application and during the interview to show that the applicant's absence from the United States was due to emergent reasons. Therefore, United States Citizenship and Immigration Services (USCIS) issued a Notice of Intent to Deny (NOID) giving the applicant an opportunity to present such evidence.

In response to the NOID, counsel states that in 1983, the applicant's mother suffered from chronic hepatic encephalopathy until her death on February 29, 1988. Counsel stated that when the applicant was about to leave to return to the United States, his mother became critically ill and was in danger of dying. Counsel stated that the applicant's mother survived and he was able to return to the United States. However, a letter dated September 21, 1988, typed on the letterhead of [REDACTED], states that in 1983, the applicant's mother, [REDACTED] was in critical condition due to cirrhosis of the liver. The letter goes on to state that her son, [REDACTED] having come to know about his mother's illness visited his ailing mother in 1984 at the General Hospital, [REDACTED], where she was hospitalized. The letter indicates that after a short visit of two months, the applicant, due to job constraints, returned to the United States in 1984.

The inconsistencies regarding the reason why the applicant delayed his return from Malaysia are material to the applicant's claim in that they have a direct bearing on whether the applicant's prolonged absence was due to emergent reasons, or whether the applicant's absence constitutes a break in his continuous 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).

A review of the decision reveals the director accurately set forth a legitimate basis for denial of the application. The applicant has not provided any evidence to establish that his 1984 absence from the United States for more than 45 days was due to an emergent circumstance. The applicant had a break in continuous residence and is not eligible for status as a temporary resident.

Therefore, based upon the foregoing, the applicant failed to establish continuous residence in the United States during the statutory period of January 1, 1982 to May 4, 1988. 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.