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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEW YORK

Date:

MSC 06 098 24734

MAY 08 2009

IN RE:

Applicant:



PETITION: 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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

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, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant had not established that he was eligible for class membership pursuant to the CSS/Newman Settlement Agreements. The director also determined the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that he attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now U.S. Citizenship and Immigration Services or USCIS) in the original legalization application period of May 5, 1987 to May 4, 1988. Therefore, the director determined that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and denied the application.

On appeal, counsel asserts that the director did not provide any information to the applicant relating to his right to seek review by a Special Master. Counsel asserts that the director also did not provide any evidence to support his claim that the 718 area code did not exist until 1984.

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 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 or her 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 since before January 1, 1982, through May 4, 1988, the applicant provided the following evidence:

- Affidavits from [REDACTED] and [REDACTED], who indicated that they met the applicant at the Jamaica Muslim Center Inc. Queens, New York in October 1981 and in 1984, respectively. [REDACTED] indicated that he sees the applicant three times a week and work out together at the Muslim center. [REDACTED] indicated that he and the applicant have participated in many social activities since that time.

- An affidavit from [REDACTED] who attested to the applicant's residence at [REDACTED] Long Island City, New York from January 1985 to October 1988. The affiant asserted that he was the lessee of the property.
- An affidavit from [REDACTED], who indicated that from October 1981 to December 1984, he and the applicant shared an apartment at [REDACTED] New York.
- An affidavit from [REDACTED], who attested to the applicant's residences in Elmhurst and Long Island City during the requisite period.
- A letter dated May 30, 1991, from the manager of Crafts and Fashions in Bogota, New Jersey, who indicated that the applicant applied for a job in December 1984, but was denied the job as he did not have a social security number or immigration papers.
- An affidavit from [REDACTED] of K&M General Constructor in Bronx, New York, who attested to the applicant's employment as a painter from November 1981 to 1986.
- Letters dated May 26, 1991 and April 15, 2002, from [REDACTED] and [REDACTED], respectively of Jamaica Muslim Center, Inc, in Queens, New York, who indicated that the applicant has been a musalee (worshiper) of the mosque since 1981.
- An affidavit from [REDACTED], who indicated that he met the applicant in 1982 at the office of K&M General Contractor and has remained in contact with the applicant since that time. The affiant indicated that the applicant also worked for his company, Kabir & Haque Contracting Co. Inc. during 1985 and 1986 as an on-call daily laborer.
- Two metered envelopes postmarked November 27, 1981, and August 13, 1987
- Two receipts dated April 4, 1982, and June 8, 1983.
- An affidavit from [REDACTED], who indicated that he has been acquainted with the applicant since 1981. The affiant indicated that he assisted the applicant in finding an apartment to reside and "some cash paying jobs with which he could support himself."
- An affidavit from [REDACTED], who indicated in 1984, the applicant was referred to him for a job by [REDACTED] however, he had no position open at the time and assisted the applicant in finding a daily labor job. The affiant indicated that the applicant would assist him in his restaurant from time to time.

On July 11, 2007, the director issued a Notice of Intent to Deny, which advised the applicant that no evidence of his entry into the United States with nonimmigrant visas in 1981 and 1984 were provided. The applicant was also advised that: 1) the affidavits submitted did not contain sufficient objective evidence to which they could be compared to determine whether the attestations were credible, plausible, or internally consistent with the record. No evidence was submitted demonstrating that the affiants had direct personal knowledge of the events testified to in their respective affidavits; and 2) the receipts were not credible as they listed a telephone number with the area code of "718 that was not established in New York City until 1984.

The applicant was granted 30 days in which to submit a response. The director, in denying the application, noted that no additional evidence had been submitted for consideration. On appeal, counsel asserts, in pertinent part:

The applicant responded to each question in great details and specificity. His answers were consistent, specific and provided sufficient information establishing his credibility. During the interview, the applicant testified that he never thought that he would be needing such old documents, going back to 1981, in support of any upcoming immigration program, otherwise he would have saved such documents. The applicant, however, filed numerous duly notarized affidavits, invoices, educational record, income tax returns and various other supporting documents.

The AAO does not view the documents discussed above as substantive enough to support a finding that the applicant continuously resided in the United States since before January 1, 1982, through May 4, 1988, as he has presented contradictory and inconsistent documents, which undermines his credibility.

A review of the Internet site, <http://areacode-info.com>, confirms that the 718 area code was created for use in three of New York City's five counties, Kings (also known as Brooklyn), Queens, and Staten Island, beginning on September 2, 1984. Prior to such date all five counties of New York City utilized the 212 area code with two counties, Manhattan and the Bronx, permanently retaining the 212 area code after December 31, 1984.

The letters from the Jamaica Muslim Center, Inc., has little evidentiary weight or probative value as they do not conform to the basic requirements specified in 8 C.F.R. § 245a.2(d)(3)(v). Most importantly, the affiants do not explain the origin of the information to which they attest. Furthermore, the applicant did not list any affiliation or association with a religious organization during the requisite period at item 34 on his initial Form I-687 application dated May 31, 1991.

The authenticity of the postmarked metered envelope can neither be confirmed nor denied.

The employment affidavits from 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 affiants 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. Further, the applicant did not claim on his Form I-687 application to have been employed by [REDACTED] of Kabir & Haque Contracting Co. Inc.,

Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I. & N. Dec. 582 (BIA 1988).

Counsel's remarks on appeal regarding the failure to provide the applicant the right to seek review by a Special Master are noted. However, a review of the CSS/Newman Settlement Agreements demonstrates that U.S. Citizenship and Immigration Services (USCIS) is only required to issue a Notice of Intent to Deny to an applicant in those cases where an application is to be denied for class membership. *See* Paragraph 7, page 4 of the CSS Settlement Agreement and paragraph 7, page 7 of the Newman Settlement Agreement. In the present case, the record shows that the applicant's Form I -687 application was denied because he failed to establish continuous unlawful residence in the United States since prior to January 1, 1982 through the date he attempted to file a Form I-687 application with the legacy Immigration and Naturalization Services in the original legalization application period between May 5, 1987 to May 4, 1988 as required by both section 245A(a)(3) of the Act and 8 C.F.R. § 245a.16(b). As the applicant's Form I-687 application was denied on the basis of his failure to maintain continuous residence in this country for the requisite period rather than his failure to establish a claim to class membership, such decision is not subject to the review of the Special Master. *See* Paragraph 9 and 11, pages 5 and 6 of the CSS Settlement Agreement and paragraph 9 and 11, pages 7-9 and pages 9-10 of the Newman Settlement Agreement. Therefore, counsel's contention that USCIS failed to follow the proper procedures in denying the applicant's Form I-687 application as specified in the CSS/Newman Settlement Agreements cannot be considered as persuasive.

Given the credibility issues arising from the documentation provided by the applicant, it is determined that the applicant has not met his burden of proof. The applicant has not established, by a preponderance of the evidence, that he entered the United States before January 1, 1982 and resided in this country in an unlawful status continuously from before January 1, 1982 through May 4, 1988, as required under section 245A(a)(2) of the Act. 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.