

identifying data deleted to
prevent clearly unwarranted
invasion of personal 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

[REDACTED]

L1

FILE:

[REDACTED]

Office: NEW YORK

Date:

MAY 13 2009

MSC-04-318-10417

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:

[REDACTED]

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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed or rejected, 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. 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 (together comprising the I-687 Application). The director denied the application, finding that the evidence submitted was not credible to support the applicant's claim that he had resided in the United States continuously throughout the requisite period. The director also found that the applicant was ineligible for the benefit sought due to his absence from the United States between December 1983 and February 1984 and because of his failure to disclose his entry into the United States on March 20, 1983.¹

On appeal, counsel for the applicant claims that the evidence presented is sufficient and credible to support the applicant's continuous residence in the United States for the duration of the requisite period. Counsel asserts further that the applicant has testified credibly during the interview that his absence from the last week of December 1983 to the first week of February 1984 was not more than 45 days. Lastly, the applicant through his counsel asserts that he was scared when he was stopped by a border patrol agent on January 28, 1996 and that he does not remember ever saying to the border patrol agent that he entered the United States on March 20, 1983.

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).

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.

¹ The applicant was apprehended by deportation officials in January 1996 and stated that he last entered the United States on March 20, 1983. When he appeared before the immigration court on July 2, 1996, he admitted the charge that he last entered the United States on March 20, 1983.

CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

The applicant shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

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).

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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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, "[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 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 (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 has furnished sufficient evidence to meet his burden of proving by a preponderance of the evidence that he has resided in the United States continuously since before January 1, 1982 and throughout the requisite period.

The applicant stated during his interview with a United States Citizenship and Immigration Service (USCIS) officer on August 10, 2005 that he had resided and worked in the United States continuously since September 1981. To show his continuous residence in the United States since September 1981, the applicant submitted three letters and fourteen affidavits from friends and former employers.

██████████ in an undated letter states that he has known the applicant since 1981 and that he has personal knowledge of the applicant's absence from the United States between September 11, 1987 and October 14, 1987. In an affidavit dated August 20, 2002, ██████████ further states that he resided with the applicant in 1983 at ██████████ in Bronx, New York. A review of the applicant's Form I-687 filed August 13, 2004, at part #32 where the applicant is requested to list all absences from the United States, reveals that the applicant did not leave the United States in September 1987 or return in October 1987. Nor did the applicant reside at 3520 ██████████ Bronx, New York in 1983. 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 applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application. *Id.* at 591.

██████████. in his affidavit dated September 11, 1996 claims that the applicant has been a patient at his New York office since January 17, 1989. However, in an affidavit dated June 28, 2002, ██████████ states that the applicant was treated at his office on September 30, 1985, February 25, 1986, and February 16, 1987. His inconsistent sworn statements are not probative as evidence of the applicant's residence in the United States during the requisite period.

The affidavit from Daisy Discount will not be considered since it states that the applicant was employed in 1989, after the requisite period. ██████████ indicates in his affidavit that the applicant worked at his grocery store initially in 1984 and again from 1998 to 1990 as a general manager. ██████████, manager of Express News Service Inc., writes in his sworn statement that the applicant worked at the store for nine months in 1988. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides specific guidelines that an author of an employment letter must follow. Specifically, to be considered probative and credible, the author must state the exact period of the applicant's employment with the company, the address or addresses of the applicant during his employment, the applicant's duties with the company, whether or not the information was taken from official company records, where such records are located, and

whether USCIS may have access to the records. Here, both employers fail to state the inclusive dates of the applicant's employment and his specific address or addresses during the employment. They both also fail to explain how they dated the applicant's employment with the company in 1984 and 1988. The sworn statements from [REDACTED] and [REDACTED] are not probative as evidence of the applicant's employment or residence in the United States throughout the requisite period. Further detracting from the credibility of the affidavits from [REDACTED] and [REDACTED] is the applicant's failure to list his employment on the current Form I-687 at part #33 with [REDACTED]'s grocery store and Express News Service, Inc. during the periods specified in the affidavits.

[REDACTED] in a sworn statement dated July 1, 1996 states that the applicant has been an active member of Masjid-E-Quba since 1990. In an affidavit dated August 21, 2002, [REDACTED] claims that the applicant has attended the prayer meeting every Friday since 1986, inconsistent with his previous statement. Further damaging the credibility of [REDACTED] statement is the lack of detailed information concerning the applicant's membership and residence in the United States during the requisite period as prescribed by the regulations at 8 C.F.R. § 245a.2(d)(3)(v). For instance, Mr. [REDACTED] fails to disclose the inclusive dates of the applicant's membership, the address or addresses where he resided during his membership period, and further fails to establish how he knows the applicant and where he acquired the information relating to the applicant's membership in the organization. Because the affidavits provide inconsistent information and because they fail to include most of the critical information about the applicant's membership as required by the regulations, they can only be accorded minimal weight as evidence of the applicant's claim of eligibility for the benefit sought.

The remaining affidavits generally state that the affiants have known the applicant since 1984, 1985, 1986, or 1987 but provide no concrete information about how they first met the applicant, how they date their acquaintance with him, where the applicant resided in the United States during the period specified in their affidavits, or whether they have personal and direct knowledge of the events and circumstances of the applicant's life in the United States during the requisite period. Because these affidavits lack relevant detail, they lack probative value and have only minimal weight as evidence of the applicant's residence in the United States throughout the requisite period.

On appeal, counsel claims that the applicant's absence between December 1983 and February 1984 does not break the applicant's continuous residence in the United States during the requisite period. Under the regulations, the applicant for temporary resident status is required to maintain continuous residence in the United States from before January 1, 1982 until the date of filing, which means until the date he filed or attempted to file the application. If the applicant left the United States for more than 45 days during that period, his residence in the United States would not have been continuous and he would not be eligible for the benefit sought, unless his return could not have been accomplished due to emergent reasons. Here, in response to the director's notice of intent to deny, the applicant through his counsel stated that he left the United States on December 29, 1983 and returned on February 3, 1983. On appeal, counsel further indicates that

the applicant clearly stated during the interview that his trip outside the United States was from the last week of December 1983 to the first week of February 1984. Based on these facts, counsel asserts that the applicant's absence between the last week of December 1983 and the first week of February 1984 does not break the continuity of his residence in the United States.

However, a review of the applicant's Form I-687 filed on May 3, 1990 reflects that the applicant only listed an absence between September 11, 1987 and October 14, 1987 during the requisite period, inconsistent with his Form I-687 application filed on July 6, 2004 which lists three absences in 1983, 1985 and February 1987. On the Form EOIR-40, Application for Suspension of Deportation, the applicant indicated that he returned to India in 1983 to get married and returned in March 1984. Contrary to the applicant's later assertions, an absence from December 1983 to March 1984 is an interruption in the applicant's continuous residence. Neither the current nor the previous Forms I-687 list the applicant's entry on March 20, 1983 as stated to the immigration court on July 2, 1996. The inconsistencies concerning the applicant's absences from the United States during the requisite period seriously damage his credibility and claim that he has resided in the United States continuously throughout the requisite period.

Further damaging the credibility of the applicant is the applicant's testimony during the interview that he had two daughters born in India in December 1985 and October 1987. No explanation has been offered to indicate how the applicant fathered these children or how they were conceived in India during the time when the applicant claims he was living in the United States. According to the applicant's EOIR-40, the applicant was in the United States continuously from March 1984 through September 1987. Further, the applicant stated during the interview that his wife did not arrive in the United States until 1992. The evidence submitted, when considered together with the applicant's testimony, does not establish by a preponderance of the evidence that the applicant has resided in the United States continuously throughout the requisite period.

The noted inconsistencies, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, and the lack of detail in the record detract from the credibility of his claim. 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 amenability to verification. Given the inconsistencies in the record and the lack of credible supporting documentation, it is concluded that the applicant has failed to establish by a preponderance of the evidence that he has 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.

Beyond the decision of the director, the applicant is ineligible for temporary resident status because of his failure to voluntarily leave the United States as ordered by the immigration judge on June 24, 1998. A review of the record reveals that the applicant's request for suspension of deportation under section 240A(b) of the Act was withdrawn on June 24, 1998, and the

immigration judge ordered him to voluntarily leave the United States on or before April 24, 1999 with an alternate order of deportation should the applicant fail to depart as required. The applicant failed to voluntarily leave the United States as ordered by the immigration judge, and therefore, the AAO finds that the applicant is inadmissible, and thus ineligible for temporary resident status. Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii); Section 245A(a)(4) of the Act, 8 U.S.C. § 1255a(a)(4). The application may not be approved for this additional reason.

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