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U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: NEW YORK

Date:

MAY 15 2009

MSC-05-208-11029

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 District 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 had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period.

On appeal, counsel addresses the inconsistencies in the record and asserts that the applicant has established his unlawful residence for the requisite time period.

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.

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 submits 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 consists of an employment attestation and several witness statements. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed. The AAO has reviewed each document in its entirety to determine the applicant’s eligibility; however, the AAO will not quote each witness statement in this decision.

The record contains an employment attestation from [REDACTED] dated January 13, 1992, which provides that the applicant was working for him from June 1980 to December 1987 at Red Star Grocery in Brooklyn, New York and from January 1988 to November 1990 at 7-Eleven in Patchogue, New York. 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.

attestation does not comply with the above cited regulation because it does not provide: the applicant’s address at the time of employment; the applicant’s position and duties with the respective companies; and whether or not the information was taken from official company records.

The attestation also fails to state [REDACTED] title, and how he was able to date the applicant's employment. It should be noted that the record contains a second attestation from [REDACTED], dated March 2005. The additional attestation from [REDACTED] states that he first met the applicant at an Indian grocery store in Queens in July 1981. It states that he visited the applicant at [REDACTED], Flushing, New York. However, this attestation does not supply any details on the frequency of [REDACTED] contact with the applicant during the requisite period. Nor does it state that the applicant was employed with him. Given these deficiencies, [REDACTED] attestations are of little probative value.

The record contains two witness attestations from [REDACTED] dated March 28, 2005. The attestation entitled, *Affidavit of Witness*, provides that [REDACTED] has personally known the applicant since March 1981. The attestation entitled, *Affidavit*, provides that [REDACTED] first met the applicant in Queens in January 1981. It states that from March 1981 to October 1987 he visited the applicant many times at [REDACTED], Flushing, New York. Neither of [REDACTED] witness statements provides concrete information to demonstrate a sufficient basis for reliable knowledge about the applicant's residence during the requisite period. The attestations fail to provide any details on the frequency of [REDACTED] contact with the applicant or explain his personal knowledge of the applicant's presence in the United States. Moreover, the affidavits contain contradictory information regarding the date that [REDACTED] first became acquainted with the applicant. This contradictory information undermines the credibility of [REDACTED]'s assertions as well as the applicant's claim of residence in the United States during the requisite period. Therefore, [REDACTED] attestations are deemed to be not credible and are of little evidentiary value.

The remaining evidence in the record consists of a form letter affidavit from [REDACTED] which states that [REDACTED] has knowledge of the applicant's residence in the United States since February 1980. Although [REDACTED] states that he has known the applicant since before January 1, 1982, his affidavit does not supply any details to lend credibility to his claimed relationship with the applicant. For instance, [REDACTED] does not indicate how he dated his initial meeting with the applicant and how frequently he had contact with the applicant during the requisite period. Nor does he explain his personal knowledge of the applicant's presence in the United States. Further, he does not provide information regarding where the applicant lived and was employed during the requisite period. Given these deficiencies, this affidavit is of little probative value.

Therefore, the applicant's evidence is, in totality, at best of minimal probative value in establishing his residence in the United States during the requisite period. Based upon this determination, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought.

In addition, the AAO affirms the director's finding that the applicant's claim of residence in the United States during the requisite period is inconsistent with documentation in the record of proceedings. The applicant's record contains the following conflicting evidence that contradicts critical elements of his claim of continuous residence in the United States during the requisite period:

- The record contains a copy of the applicant's expired passport issued in New York on January 31, 1991. The observation page of this passport provides that the applicant previously held a passport dated August 3, 1983 issued in Bhawalpur, Pakistan. However, the applicant failed to list his absence from the United States in 1983 on his Form I-687 application. At part 32 of the application, where applicants are asked to list their absences from the United States since entry, the applicant showed his first absence as travel to Pakistan and Mexico in September 1987. This contradiction is material to the applicant's claim in that it has a direct bearing on his continuous residence in the United States during the requisite period.
- The record reveals that on October 30, 1998, the applicant was detained upon his arrival to the United States at John F. Kennedy International Airport in New York. An immigration officer took a sworn statement from the applicant in regard to his application for admission to the United States. The sworn statement reflects that when the applicant was asked about the date he first came to the United States, he responded "in 1990." The sworn statement further reflects that when the applicant was asked if he would be harmed if he returned to his home country or country of last residence, he responded, "Yes, my brother was murdered but they never threatened me because I left Pakistan in 1990." This sworn testimony is in conflict with the applicant's claim of residence in the United States during the requisite period. The contradiction is material to the applicant's claim because it indicates that he first entered the United States after January 1, 1982, and did not reside in the United States during the requisite period.
- The record reveals that on March 13, 1999, the applicant was detained at Dulles International Airport in Washington, D.C. An immigration officer took a sworn statement from the applicant in regard to his application for admission to the United States. The sworn statement reflects that the applicant was asked, "Have you ever been to the United States prior to this visit." The applicant responded, "I first came in 1990 to Los Angeles with a tourist visa and I never left." This sworn testimony is also in conflict with the applicant's claim of residence in the United States during the requisite period. The contradiction is material to the applicant's claim because it further indicates that he first entered the United States after January 1, 1982, and did not reside in the United States during the requisite period.
- The record reveals that on February 18, 2006, a Customs Border Protection Officer took a sworn statement from the applicant who was detained at the Elizabeth Detention Center in Elizabeth, New Jersey. The sworn statement reflects that the officer asked the applicant about the date of his first entry into the United States. The applicant responded, "In 1981, I lived for three months and then went to Mexico." The applicant was then asked to explain the reason he went to Mexico, and he responded that he visited friends. This claimed absence is in conflict with the applicant's Form I-687 application. As stated previously, at part 32 of the application, where applicants are asked to list their absences from the United States since entry, the applicant showed his first absence as travel to Pakistan and Mexico in September 1987. This contradiction is material to the applicant's claim in that it has a direct bearing on his continuous residence in the United States during the requisite period.

The foregoing contradictions undermine the applicant's credibility as well as his claim of continuous residence in the United States during the requisite period. Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Id.*

The director informed the applicant of the aforementioned inconsistencies in a Notice of Intent to Deny (NOID), dated March 21, 2006. In rebuttal to the NOID, counsel asserted that the applicant's response that he first came to the United States in 1990 was in reference to the first time the applicant had come back since he left for Pakistan to get married two years earlier. Counsel noted that the applicant has been asked to reconstruct a timeline of each entry and departure from the United States over the course of the past 26 years. Counsel asserted that some of the dates on the Form I-687 may have proven to be inaccurate, but this does not negate the credibility of the applicant's entire testimony and the information that was provided in good faith. Counsel contended that the applicant has proven by a preponderance of the evidence his continuous residence in the United States for the requisite period.

On March 31, 2007, the director denied the application based on the findings in the NOID. The director determined that the applicant failed to establish by a preponderance of the evidence his eligibility for temporary residence.

On appeal, counsel asserts that the applicant has furnished a number of credible documents that prove by a preponderance of the evidence his continuous residence in the United States for the requisite period. Counsel reiterates that any minor discrepancies, in the midst of a 26 year timeline, are not convincing evidence of the applicant's bad faith or his lack of credibility. Counsel notes that the applicant's omission that he traveled in 1983 is only a consequence of a brief, casual and innocent departure which occurred long ago. Counsel reiterates that the applicant's response that he first came to the United States in 1990 was in reference to the first time the applicant had come back since he left for Pakistan to get married two years earlier.

The AAO finds that counsel's assertions do not overcome the basis for denial. As stated previously, it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92. The applicant in this case failed to provide any independent objective evidence to resolve the inconsistencies in the record. The AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The absence of sufficiently detailed supporting documentation, the existence of conflicting evidence that contradicts critical elements of the applicant's claim of residence, and the existence of derogatory information establishes that the applicant used documents in a fraudulent manner and made material misrepresentations in order to procure temporary residence.

Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), provides:

Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

By engaging in such an action, the applicant has seriously undermined his own credibility as well as the credibility of his claim of continuous residence in the United States during the requisite period. Because the applicant has made material misrepresentations, the AAO cannot accord any of his claims any weight. Therefore, the AAO finds that the applicant 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 ineligible for temporary resident status under section 245A of the Act on this basis.

In addition, the AAO finds that the applicant has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact, a ground of inadmissibility under Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). The applicant has failed to provide any independent and objective evidence to overcome this finding. Therefore, a finding of fraud is entered into the record, and the matter will be referred to the U.S. Attorney for possible prosecution, as provided in 8 C.F.R. § 245a.2(t)(4).

**ORDER:**

The appeal is dismissed with a finding of fraud. This decision constitutes a final notice of ineligibility.