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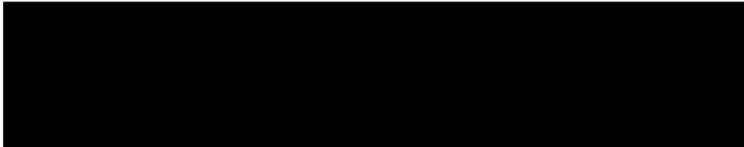


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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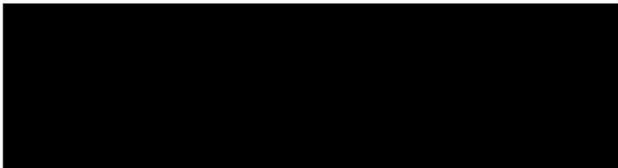
consolidated herein]
MSC 06 066 14032

IN RE: Applicant:



APPLICATION: Application for Temporary Resident Status under 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.

Perry Rhew
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) on 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) on February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the director in Chicago, Illinois. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish that he maintained continuous residence in the United States in an unlawful status from before January 1, 1982 through the date of attempted filing during the original one-year application period that ended on May 4, 1988.

On appeal the applicant asserts that he was continuously resident in the United States during the requisite period and that his only extended absence from the country was due to his mother's illness.

An applicant for temporary resident status under section 245A of the Immigration and Nationality Act (the Act) must establish his or her entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status from before January 1, 1982 through the date the application is filed. See section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish his or her continuous physical presence in the United States since November 6, 1986. See section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term "until the date of filing" in the regulation at 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 from May 5, 1987 to May 4, 1988. See CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

"Continuous unlawful residence" is defined at 8 C.F.R. § 245a.2(h)(1)(i), as follows: "[A]n applicant for *temporary resident status* shall be regarded as having resided continuously in the United States if, at the time of filing the application, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed."

An applicant for temporary resident status has the burden to establish 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).

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 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.

The regulations provide an illustrative list of documents an applicant may submit – which includes affidavits and “any other relevant document” – as evidence of continuous residence in the United States during the requisite period under section 245A of the Act. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant, a native of Mexico who first came to the United States in 1960, filed his application for temporary resident status under section 245A of the Act (Form I-687), together with a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet, on December 5, 2005.

On September 26, 2007, the director issued a Notice of Decision, denying the application on the ground that the documentation submitted by the applicant did not show that he was physically present in the United States during the years 1982, 1987, and 1988. The director also cited the applicant’s absence from the United States from June 1987 to April 1988 – documented in the records of U.S. Citizenship and Immigration Services (USCIS) and acknowledged by the applicant – which exceeded both the 45-day limit for a single absence and the 180-day limit for aggregate absences allowed under the regulations. The director concluded that the applicant had failed to establish that he was continuously resident in the United States during the requisite period for adjustment of status under section 245A of the Act.

On appeal the applicant submits some additional documentation as evidence of his residence in the United States during the years 1980 to 1983, and explained that his ten-month absence from the United States in the period from June 1987 to April 1988 was due to his mother’s illness in Mexico and her need for his care during that time. The applicant concludes, therefore, that he

did not interrupt his continuous residence in the United States during the years 1981 to 1988 and has established his eligibility for temporary resident status.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The salient issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he resided continuously in the United States in an unlawful status from before January 1, 1982 through the date he attempted to file a Form I-687 during the original one-year application period for legalization that ended on May 4, 1988. The AAO determines that he has not.

The record includes extensive evidence of the applicant's residence in the United States during the years 1983-1986, consisting of original documentation dated in those years. But there is no such documentation for the years 1980-1982 or the years 1987-1988. The applicant's Social Security Statement in 2002 lists earnings for the years 1960-1979, 1983-1987 (only \$81 in that latter year), and 1989-2001.

As evidence that he was not absent from the United States during the years 1980-1982, the applicant cites a letter in the record from [REDACTED] of Tower Garden Restaurant & Banquet Pavilion, dated February 14, 1990, stating that the applicant had been employed as a maintenance man from November 1970 through June 1987 (and had been rehired in the same capacity in September 1989). On appeal the applicant declares that he received no wages for the years 1980-1982 because the business was not making much money, which explains the fact that he had no earnings listed for those years on his Social Security Statement. Instead, the applicant states that he was compensated in the form of room and board. The applicant also submits a notarized letter from [REDACTED], dated October 14, 2007, stating that she has known the applicant since the spring of 1980, when he offered to do some yardwork at her house in Scheller Park, Illinois, and that the applicant worked for her in the years 1981, 1982, and 1983.

With regard to the 1990 letter from [REDACTED], the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant's employment must (1) provide the applicant's address at the time of employment; (2) identify the exact period of employment; (3) show periods of layoff; (4) state the applicant's duties; (5) declare whether the information was taken from company records; and (6) 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.

The letter from [REDACTED] does not meet all of these criteria. It does not provide the applicant's address at the time of employment. The letter does not state whether the information about the applicant was taken from company records and whether such records are available for review. Nor does the letter address the anomalous years of 1980-1982, in which the applicant clearly received no wages. It does not confirm the applicant's story that he was paid in kind for those years – with room and board. Due to the infirmities discussed above, the letter from [REDACTED] has limited probative value. It is not persuasive evidence of the applicant's continuous residence in the United States during the years 1980-1982.

The 2007 letter from [REDACTED] is also substantively deficient. She does not state where the applicant lived in the early 1980s, his exact period of employment and periods of layoff in the years 1981-1983, or his specific duties. [REDACTED] provides no pay statements or other documentary evidence of compensation to the applicant. Due to these infirmities the [REDACTED] letter has little probative value. It is not persuasive evidence of the applicant's continuous residence in the United States during the years 1981 and 1982.

Even if the AAO did accept the foregoing evidence, *arguendo*, as sufficient to establish that the applicant's residence in the United States was not interrupted in the years 1980-1982, the applicant has still not adequately accounted for his 10-month absence from the United States in 1987-1988. The applicant implies that the duration of his absence (June 1987 to April 1988) was due to an "emergent reason"¹ within the meaning of 8 C.F.R. § 245a.2(h)(1)(i), which therefore did not interrupt his continuous residence in the United States. The applicant asserts that he had to stay in Mexico for ten months to help care for his ill mother. He has submitted no corroborative documentation, however – such as medical records, doctor's letters, and the like – to support this claim. In fact, the applicant has not even explained the nature of his mother's illness.

Thus, the applicant's absence from the United States from June 1987 to April 1988 exceeded both the single absence limit of 45 days (as well as the aggregated absence limit of 180 days), prescribed in 8 C.F.R. § 245a.2(h)(1)(i), and the applicant has not shown that any "emergent reason" within the meaning of the regulation prevented his return to the United States within the requisite 45 days.

Accordingly, the applicant has not demonstrated his continuous residence in the United States at either the beginning or the end of the requisite period under section 245A of the Act to qualify for adjustment to temporary resident status.

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant has failed to establish that he resided continuously in the United States in an unlawful status from before

¹ While the term "emergent reasons" is not defined in the regulations, there is some pertinent case law. In *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), the Board of Immigration Appeals held that *emergent* means "coming unexpectedly into being."

January 1, 1982 through the date he attempted to file a Form I-687 during the original one-year application period that ended on May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A(a)(2) of the Act.

The appeal will be dismissed, and the application denied.

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