



U.S. Citizenship
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Services

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FILE:

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Office: DES MOINES

Date:

NOV 23 2009

MSC 04 322 10291
[REDACTED]

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. 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, or *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 in Des Moines, Iowa. The decision is now before the Administrative Appeals Office (AAO) on appeal. This appeal will be dismissed.

The applicant, a native of India who claims to have lived in the United States since August 1981, 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 on August 17, 2004. The director denied the application, finding (1) 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; (2) that the applicant is not a class member of the CSS/Newman (LULAC) lawsuits; and (3) that the applicant is a Canadian Citizen.

On appeal, counsel asserts that the applicant has submitted sufficient credible evidence to establish that he meets the continuous residence requirement to adjust status to a temporary resident. Counsel further asserts that the applicant's Canadian Citizenship has no bearing on the applicant's eligibility to apply for status as a temporary resident in the United States.

The AAO notes that the director adjudicated the application on the merits and presumptively found the applicant eligible for class membership under the Terms of the CSS/Newman Settlement Agreements. Thus, the director's decision to deny the application on the ground that the applicant did not establish that he is a class member of the CSS/Newman (LULAC) lawsuits will be withdrawn.¹

The AAO agrees with counsel that the applicant's Canadian Citizenship does not preclude the applicant's application for status as a temporary resident. Thus, the director decision to deny the application on the ground that the applicant is a Canadian Citizen will be withdrawn. The applicant however, has to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and resided continuously in the country through the requisite period.

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

¹ The record reflects that on June 24, 1997, the director issued a Notice of Intent to Revoke the applicant's class membership in one of the legalization class action lawsuits on the ground that the applicant was identified as an individual who paid bribe to an immigration officer in Salinas, California to obtain employment authorization. The applicant was granted 18 days to submit rebuttal evidence. The record further reflects that on August 11, 1997, the director issued a decision revoking the applicant's class membership and employment authorization.

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 AAO will evaluate the evidence in the record to determine whether the applicant meets the continuous residence requirement to adjust status under section 245A of the Act.

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).

"Continuous residence" is defined at 8 C.F.R. § 245a.1(c)(1)(i) as follows: "An alien shall be regarded as having resided continuously in the United States if 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."

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) 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 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. 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, 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).

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. See 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

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 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 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 AAO determines that the applicant has failed to meet his burden.

The record reflects that contrary to the applicant's claim that he entered the United States before January 1, 1982 and resided continuously in an unlawful status through the requisite period, other documents in the record indicate otherwise. On the Form I-687 the applicant completed on August 1990 as well as the accompanying form for determination of class membership in *CSS v. MEESE*, the applicant indicated that he first entered the United States on August 1981, resided continuously in the country through the requisite period except for one brief trip to Canada, from September 8, to October 13, 1987. The applicant did not indicate any other trips outside the United States during the 1980s. The applicant did not submit any credible evidence to establish that he entered the United States in August 1981.

On the Form I-485 (application to register permanent residence or adjust status) the applicant filed on May 14, 2002, the applicant indicated that he has a child – [REDACTED] – born in India, on October 9, 1984. The applicant did not indicate that he traveled outside the United States to India in 1984 that would have accounted for the conception of the applicant's child, and there is no evidence in the record that the applicant's wife was residing in the United States during the 1980s. Therefore, the birth of the applicant's child in India on October 9, 1984, strongly suggests that the applicant was in India at the time his child was conceived and /or born,

and casts considerable doubt on the veracity of the applicant's claim that he resided continuously in the United States from before January 1, 1982 through the requisite period.

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 without competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of other evidence in the record. *See id.*

The record includes a series of affidavits from individuals who claim to have resided with or otherwise known the applicant in the United States during the 1980s. The affidavits have minimalist formats with little input from the authors. For the length of time they claim to have known the applicant – in most cases since 1981 – the affiants provided very few details about the applicant's life in the United States and the nature and extent of their interaction with him over the years. Nor are the affidavits accompanied by any documentary evidence – such as photographs, letters, and the like – of the authors' personal relationships with the applicant in the United States during the 1980s. It appears that the affiants do not have a direct personal knowledge of the events and circumstances of the applicant's residency in the United States during the requisite period. The affiants did not provide documents to establish their own identities and residence in the United States during the requisite period.

██████████ claims that the applicant resided with him from September to October 1981, from January 1981 to March 1984, and from April 1984 to January 1990, at various locations in the United States. The affidavit by ██████████ appears to be suspect because while he claims that the applicant resided with him from January 1, 1981 to March 1984, the applicant indicated that he entered the United States in August 1981. Therefore, it is not possible that ██████████ would have been living with the applicant in the United States in January 1981. Also, ██████████ did not submit any documentation such as rental agreements, rent receipts or other documents addressed to him at any of the addresses he claims to have lived with the applicant, to establish that he resided in the United States during the periods claimed. As previously stated, doubt cast on any aspect of the applicant's evidence also reflects on the reliability of other evidence in the record. *See Matter of Ho, id.*

For all the reasons discussed above, the AAO finds that the affidavits have little probative value. They are not persuasive evidence of the applicant's continuous unlawful residence in the United States from before January 1, 1982 through the requisite period.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought.

Therefore, based upon the foregoing, the applicant has 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, 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.