



U.S. Citizenship
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FILE:

MSC 06 062 10614

Office: LOS ANGELES

Date: NOV 25 2009

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. 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.

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) 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, Los Angeles, California, and 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 determined 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. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, counsel asserts that the applicant was confused about the date of his initial entry into the United States. Counsel asserts that the applicant was trying to recall 20 year old events from the time the applicant was nine years of age. Counsel asserts that the applicant acknowledges that he made errors when entering dates on his documents. Counsel asserts, "it is likely that the fixation appellant had on the 1985 time frame originates with his initial unsuccessful application in 1987" under the Special Agricultural Workers program. Counsel submits affidavits from the applicant's brothers and acquaintances in support of his claim of entry prior to January 1, 1982.

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 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 record reflects that on April 23, 2001, the applicant, filed a Form I-485, Application to Register Permanent Residence or Adjust Status. The applicant listed his employment in the United States from April 1, 1988, and his residence in Santa Maria, California from March 1984 to March 1989 at [REDACTED]. Accompanying the Form I-485, is a Form G-325A, Biographic Information signed by the applicant on April 18, 2001. The applicant indicated on the Form G-325A to have resided in his native country, Mexico, from November 1972 to May 1985.

The record also reflects that on May 6, 2002, the applicant filed a Form I-485, Application for Permanent Resident Status under the Legal Immigration Family Equity (LIFE) Act. Accompanying the Form I-485, is a Form G-325A, Biographic Information, signed by the applicant on February 29, 2001.¹ The applicant indicated on the Form G-325A to have resided in his native country, Mexico, from November 1972 to February 1984. The applicant listed his employment in agriculture from 1985. The applicant indicated that he had “school permission” to work for [REDACTED].

¹ The year should have been stated as 2002 not 2001.

In an attempt to establish continuous unlawful residence in the United States since prior to January 1, 1982, the applicant submitted:

- A wage and tax statement for 1988 from [REDACTED]
- A social security statement reflecting the applicant's earnings since 1988.
- A letter dated December 29, 2004, from [REDACTED] pastor of St. John Neumann Church in Santa Maria, California who indicated that according to the church records the applicant has been a member of the parish since May 1986.
- A letter dated August 7, 2003, from [REDACTED] and [REDACTED] who indicated that the applicant was in their employ as an agricultural worker from May 1, 1986 through September 1987. The affiants indicated that the applicant received his wages in cash.

The director determined that based on the information contained in the Forms G-325A, the applicant had failed to meet his burden of proof by a preponderance of the evidence that he was in the United States before January 1, 1982, and that he resided in a continuous unlawful status since that date through the date he attempted to file his application. Accordingly, on May 6, 2006, the director denied the application.

On appeal, counsel submits an affidavit from the applicant, who asserts that in 1981 he was sent to live with his brothers in Santa Maria, California and each day he would help his brother in the fields. The applicant also asserts, in pertinent part:

When I was 15 years old, I originally applied for an amnesty program where I needed to show that I had been in the United States since 1985.² The 1985 date was the date that stuck in my head as my arrival date, probably because for many years that was the beginning date I had to prove I was here. Also, I was very young at the time. In the past I have filled out immigration forms where I used a 1984 or 1985 arrival date. That was a mistake. After my application for Temporary Residence was denied, I talked to my brothers about the problem. From them I learned that my actual date of arrival from Mexico was in 1981. I have continued to work and live with my oldest brother, [REDACTED], every year from the date of my arrival in 1981 to the present.

Counsel also submits copies of documents that were previously submitted along with:

- Affidavits from the applicant's brothers, [REDACTED] and [REDACTED], who indicate in 1981 the applicant was sent from Mexico to live and work with them. The affiants indicate that in 1981 they and the applicant worked at [REDACTED]. [REDACTED] indicates that the applicant has resided in Santa Maria, California since 1981. [REDACTED] indicates that the applicant has always resided with him at various addresses in Santa Maria, California since November 1981.

² The applicant filed a Form I-700, Application for Temporary Resident Status as a Special Agricultural Worker under section 210 of the Act.

- An affidavit from [REDACTED] who indicated in 1981, the applicant came to the United States to reside with his brothers, [REDACTED] and [REDACTED]. The affiant indicates that the brothers would bring the applicant to the fields on a daily basis. The affiant indicates that he worked with the applicant and the brothers in the fields from 1981 to 1989.
- A letter from [REDACTED] written in the Spanish language.
- A letter dated January 1, 2005, from [REDACTED] who indicated that the applicant resided with his brother, [REDACTED] at [REDACTED] from 1984 through 1989.

The letter from [REDACTED] cannot be considered as it was not accompanied by the required English translation. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. 103.2(b)(3).

The statements issued by the applicant and counsel have been considered. However, the evidence of record submitted does not establish with reasonable probability that the applicant was in the United States before January 1, 1982.

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 record contains documentation which reflects that on January 10, 1998, the applicant was detained by immigration officials at the Los Angeles International Airport. On the same date, the applicant, in a sworn statement, admitted that he first entered the United States in 1986.

[REDACTED] attested to the applicant's residing at [REDACTED] from 1984 through 1989. However, on his Form I-687 application, the applicant claimed to have resided at Hotel Fountain from 1985 to 1989 and listed a different address for the hotel.

The Forms G-325A undermines the credibility of the applicant's claim to have resided in the United States from before January 1, 1982. On his Form I-687 application, the applicant only claimed employment and residence in the United States from 1985.

These factors tend to establish that the applicant utilized documents in a fraudulent manner in an attempt to support his claim of residence in the United States prior to January 1, 1982. By engaging in such an action, the applicant has irreparably harmed his own credibility as well as the credibility of his claim of continuous residence in the United States for the requisite period.

Even in cases where the burden of proof is upon the government, such as in deportation proceedings, a previous sworn statement voluntarily made by an alien is admissible, and is not in violation of due process or fair hearing. *Matter of Pang*, 11 I&N Dec. 213 (BIA 1965). Furthermore, in the absence of exceptional circumstances, a challenge to the voluntariness of an admission or confession will not be entertained when first made on appeal. *Matter of Stapleton*, 15 I. & N. Dec. 469 (BIA 1975).

Therefore, based upon the foregoing, 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.

Finally, the record reflects that on January 29, 1993, the applicant was arrested by the Santa Maria Police Department and subsequently charged with petty theft, a violation of section 488(a) PC, a misdemeanor. On March 2, 1993, the applicant was convicted of this offense and was sentenced to serve five days in jail and was placed on probation for two years. Case no. 930614. This single misdemeanor conviction does not render the applicant ineligible pursuant to 8 C.F.R. § 245a. (c)(1).

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