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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE:



Office: SAN FRANCISCO, CA

Date: OCT 28 2009

MSC 05 259 11096

IN RE:

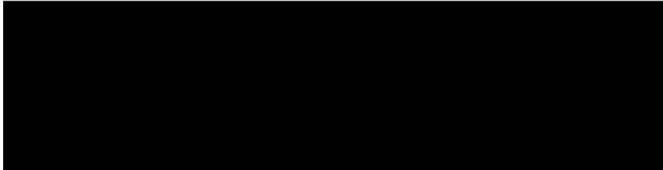
Applicant:



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 forwarded to the Citizenship and Immigration Services National Records 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 if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The Director, San Francisco, California denied the Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, filed 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). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The AAO maintains plenary power to review this matter 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 federal courts have long recognized the AAO’s *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.

The director determined that the applicant had failed to establish eligibility for temporary resident status and denied the application. The director did not specify what was lacking in the evidence of record.

On appeal, the applicant indicated through counsel that the evidence submitted such as the 1981 Form W-2, Wage and Tax Statement, as well as affidavits from former employers, churches and relatives establish that he resided unlawfully in the United States throughout the requisite period. The applicant indicated that he is also otherwise eligible to adjust to temporary resident status.

At the outset, the AAO notes that the director made statements in the notice of decision which suggest that the applicant does not qualify for CSS/Newman class membership. The director also adjudicated the Form I-687, Application for Temporary Resident Status Under Section 245A of the Immigration and Nationality Act, on the merits of that request and instructed the applicant to appeal the decision to the AAO by filing a Form I-694, Notice of Appeal. Thus, rather than denying the request based on a denial of the Class Membership Application and notifying the applicant of his right to seek review by a Special Master, the director adjudicated the application on the merits. Thus, the AAO will treat the application as if the director has found that the applicant has established class membership.¹

Under the CSS/Newman Settlement Agreements, USCIS shall adjudicate each Form I-687 under the provisions of section 245A of the Act, regulations and administrative and judicial precedents which the INS, now USCIS, followed in adjudicating the Forms I-687 timely filed during the Immigration Reform and Control Act of 1986 (IRCA) application period. *See* CSS/Newman Settlement Agreements.

¹ This office does not have authority to review denials of CSS/Newman Class Membership Applications.

For purposes of establishing residence and presence as defined at 8 C.F.R. § 245a.2(b), the term “until the date of filing” shall mean until the date the alien was “front-desked” or discouraged from filing the Form I-687 consistent with the definition of the CSS/Newman class membership. *See id.*

An applicant who files for temporary resident status pursuant to the CSS/Newman Settlement Agreements 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 through the date of filing the Form I-687 during the original application period or through the date that the applicant attempted to file but was dissuaded from doing so by an agent of the INS. *See id.* and § 245A(a)(2)(A) of the Act. An alien who applies for temporary resident status under the CSS/Newman Settlement Agreements 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. *See* CSS/Newman Settlement Agreements and § 245A(a) of the Act.

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).

Failure to provide evidence other than affidavits shall not be USCIS’ sole basis for finding that an applicant failed to meet the continuous residence requirement. *See* CSS/Newman Settlement Agreements. In evaluating the sufficiency of the applicant’s proof of residence, [USCIS] shall take into account the passage of time and other related difficulties in obtaining documents that corroborate unlawful residence during the requisite periods. *See id.*

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-*, 20 I&N Dec. 77 at 79. The applicant’s statements must not be the applicant’s only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

Documentary evidence may be in the format prescribed by USCIS regulations. *See id.* at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and “state the employer’s willingness to come forward and give testimony if requested.” *Id.* Letters from employers that do not comply with such requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a “relevant document” under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

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. *Id.* at 79-80. In evaluating the evidence, *Matter of E-M-* also states 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 or 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, 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, to deny the application or petition.

On June 16, 2005, the applicant filed the Form I-687 pursuant to the terms of the CSS/Newman Settlement Agreements. He also indicated on the CSS/Newman (LULAC) Class Membership Worksheet, Form I-687 Supplement, submitted with the Form I-687 in 2005, that he is a CSS or Newman (LULAC) class member.

The director indicated in the notice of decision that the applicant failed to respond to the notice of intent to deny. The AAO withdraws this point. According to the record, the director did not issue a notice of intent to deny in this matter.

The director suggested that the applicant has an obligation to provide documentary evidence of his entry without inspection into the United States during March 1981. The AAO also withdraws this point in the notice of decision. There is no statutory or regulatory requirement that a legalization applicant must, in all instances, submit documentary evidence of having made an entry prior to January 1, 1982 to establish residency throughout the relevant period.

The AAO issued a notice of intent to dismiss in this matter on October 13, 2009. In that notice, this office stated at issue in this proceeding is whether the applicant has submitted consistent evidence to meet his burden of establishing continuous unlawful residence in the United States throughout the requisite period.

The AAO stated in the notice of intent to dismiss that the record includes the following adverse or inconsistent evidence regarding this point:

1. The notes from the applicant's March 27, 2000 asylum interview in which the applicant testified that his wife had never been to the United States.²
2. The Form I-687 that the applicant signed under penalty of perjury on October 29, 1989 on which the applicant indicated at item 32 where he was required to list all his children, that he has a daughter, [REDACTED], who was born on April 16, 1987 in Mexico, and he has a daughter, [REDACTED], who was born on December 31, 1985 in Mexico. On that same form, at item 35, where the applicant was to list all his absences from the United States since January 1, 1982, the applicant stated that he was absent only twice: once during March 1985 and once during December 1987.
3. The legalization class membership application which the applicant signed under penalty of perjury on November 2, 1989 on which he indicated that he has been absent from the United States on only two occasions since January 1982, and that one absence occurred during March 1985 and one during December 1987.
4. The Form I-687 which the applicant filed on June 16, 2005 on which he stated at item 32 that his only absences since January 1, 1982 were during March 1985, December 1986/January 1987 and September/October 1996.
5. An employment verification letter from Aaron Metals, Oakland, California which seems to have been altered. It apparently originally indicated that the applicant was employed at Aaron Metals from May 12, 1988 through August 20, 1988. These dates were modified to read May 12, 1985 through August 20, 1986.
6. The 1989 Form I-687 on which the applicant stated at item 33 that he resided on [REDACTED] from March 1981 through September 1988 and on [REDACTED] from September 1988 through the date that he signed that form in 1989.
7. The 2005 Form I-687 on which the applicant stated at item 30 that he resided on [REDACTED] from March 1981 through May 1986 and on [REDACTED] from May 1986 through August 1994.

The record indicates that the applicant's wife never entered the United States until after the requisite period. The record also suggests that the applicant's daughter [REDACTED] was conceived during March or April 1985 and that his daughter [REDACTED] was conceived during July 1986. According to the record, the applicant visited Mexico, where his wife resided, during the month of March 1985.

² The record indicates that subsequent to this, the applicant's wife did enter the United States and adjusted to Lawful Permanent Resident Status.

However, there is no indication in the record that the applicant was absent from the United States at all during 1986 or during 1987, until December 1987 several months after [REDACTED] birth. Evidence meant to place the applicant in the United States during the period that [REDACTED] was apparently conceived in Mexico, the Aaron Metals employment verification letter, appears to have been altered to indicate that the applicant was working in Oakland, California from 1985 through 1986, rather than during 1988, as originally stated on that letter. Also the applicant did not provide a consistent account of where he resided in the United States from May 1986 through September 1988.

The AAO stated in the notice of intent to dismiss that these discrepancies cast serious doubt on the authenticity of all the evidence of record, including the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

Such inconsistencies in the record may only be overcome through independent, objective evidence of the applicant's claim that he resided continuously in the United States throughout the statutory period.

This office stated in the notice of intent to dismiss that the statements and affidavits which the applicant has submitted into the record are not independent, objective evidence. As such they are not sufficient to overcome the discrepancies in the evidence which have been summarized here, and they are not probative in this matter.

The applicant did provide a copy of the Industrial and Metal Workers Health and Welfare Trust Fund Prescription Drug Program card issued to him in the United States during March 1985. He also provided copies of his Forms W-2 for 1981, 1982, 1983 and 1984. The notice of intent to dismiss pointed out that this contemporaneous evidence is not sufficient to overcome discrepancies in the record related to the applicant's claim that he resided continuously in the United States throughout 1986 as well as the rest of the requisite period.

The AAO stated in the notice of intent to dismiss that the applicant had failed to provide contemporaneous evidence that might be considered credible, independent, objective evidence of having resided in the United States from a date prior to January 1, 1982 and through May 4, 1988 which is sufficient to overcome the inconsistencies in the evidence of record. Thus, the applicant had failed to establish continuous residence in an unlawful status in the United States throughout the statutory period.

The applicant did not respond to the notice of intent to dismiss.

The applicant is not eligible to adjust to temporary resident status because he has not established continuous, unlawful residence throughout the relevant period.

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