

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

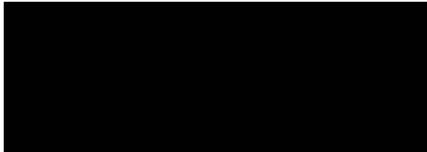
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, D.C. 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

41



FILE:



Office: FRESNO

Date: SEP 08 2009

MSC 06 077 12894

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.

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 Director, Fresno, 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 (the 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 she 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 her burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements. The director also found the applicant inadmissible under sections 212(a)(6)(C)(i) and (ii) of the Act,

On appeal, counsel puts forth a brief disputing the director's findings.

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.

On January 11, 2003, the applicant applied for admission into the United States at the Nogales, Arizona Port of Entry and falsely represented herself to be a resident alien of the United States for purpose of gaining entry. According to the Record of Sworn Statement, Form I-831, dated January 11, 2003, the applicant was asked, “How long have you live in the United States?” The applicant replied “ten years.” The applicant was served with Form I-860, Notice and Order of Expedited Removal, and was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act.¹

On January 12, 2003, the applicant again applied for admission into the United States at the Nogales, Arizona Port of Entry and falsely represented herself to be a citizen of the United States for purpose of gaining entry. According to the Record of Sworn Statement, Form I-831, dated January 12, 2003, the applicant was asked, “Why did you leave your home country or country of residence?” The applicant replied “I wanted to return to California where my daughter and I have been living for the past 13 years.” The applicant was served with Form I-860, Notice and Order of Expedited Removal, and was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act.

¹ The applicant was assigned alien registration number [REDACTED], and documents from each removal proceedings have been consolidated into [REDACTED]

In an attempt to establish continuous unlawful residence in the United States since prior to January 1, 1982, the applicant submitted an affidavit from [REDACTED], who attested to the applicant's entry into the United States on August 23, 1981. The affiant indicated that the applicant resided in his home at [REDACTED] from August 1981 to December 1985. The affiant attested to the applicant's residence from 1986 to 1988 at [REDACTED] and to her employment and wages earned with [REDACTED] and [REDACTED] from 1986 to 1988.

The director, in denying the application, noted that it was unclear how [REDACTED] would have such detailed personal information regarding the applicant's residence and employment subsequent to the applicant residing in his home, and that the affidavit from [REDACTED] contradicted the applicant's sworn statement of January 12, 2003. The director determined that based on the applicant's sworn statement taken on January 12, 2003, the applicant was not residing in the United States during the requisite period and did not meet the requirements set forth in the CSS/Newman Settlement Agreements. The director concluded that the applicant was inadmissible under sections 212(a)(6)(C)(i) and (ii) of the Act, because she had made a false claim to permanent residence and United States citizenship.

On appeal, counsel asserts, in pertinent part:

The Service denied [the applicant] any opportunity to rebut its findings or submit additional documentation. Moreover, the Service has not presented any evidence establishing that [REDACTED] presented false documentation in connection with attempted entries into the United States.

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 brief issued by counsel, on appeal, has been considered. However, the AAO does not view the affidavit discussed above as substantive enough to support a finding that the applicant entered the United States prior to January 1, 1982, and resided since that date through the date she attempted to file his application.

The evidence must be evaluated not by the quantity of evidence alone but by its quality. Mr. [REDACTED] affidavit does not provide detailed accounts of an ongoing association establishing a relationship under which the affiants could be reasonably expected to have personal knowledge of the applicant's residence, activities and whereabouts throughout the duration of the requisite period. To be considered probative, an affiant's affidavit must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. The affidavit must contain sufficient detail, generated by the asserted contact with the

applicant, to establish that a relationship does in fact exist, how the relationship was established and sustained, and that the affiant does, by virtue of that relationship, have knowledge of the facts asserted. The affidavit from [REDACTED] does not provide sufficient detail to establish that he had an ongoing relationship with the applicant that would permit him to know of the applicant's whereabouts and activities throughout the requisite period.

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of her claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the applicant's reliance upon documentation with minimal probative value, it is concluded that the evidence submitted fails to establish continuous residence in an unlawful status in the United States during the requisite period.

The regulation at 8 C.F.R. 103.2(b)(16)(i) states if a decision will be adverse to the applicant and is based on derogatory information considered by the Service and of which the applicant is *unaware*, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before a decision is rendered. However, in this particular case, the applicant was apprehended, fingerprinted and subsequently removed from the United States pursuant to her misrepresentation on two separate occasions thus, she was *aware* of the derogatory information.

Counsel cites no statute or regulation that compels the director to provide the applicant with copies of documents pertaining to her sworn statements and removal proceedings without a request for a review of the Record of Proceeding or the filing of a Form G-639, Freedom of Information Act/Privacy Act Request.

The fact that the applicant was removed under sections 212(a)(6)(C)(i) and (ii) of the Act, and then reentered without permission under section 212(a)(9) of the Act, renders her inadmissible. Such grounds of inadmissibility may be waived pursuant to section 245A(d)(2) of the Act; 8 C.F.R. § 245a.2(k)(1). However, given her failure to credibly establish continuous residence in the United States during the requisite period, the applicant is ineligible for temporary residence and, therefore, the issuance of an application for waiver of inadmissibility is moot.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that she 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.

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