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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



U.S. Citizenship
and Immigration
Services

41

FILE:

[REDACTED]

Office: DALLAS

Date:

SEP 30 2009

MSC 06 091 11508

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. The file has been returned to the National Benefits Center. 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.

for 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, Dallas, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant had not established that he resided in the United States in a continuous 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, counsel for the applicant states that the applicant responded timely to the director's notice of intent to deny, and asserts that the director erroneously based the denial on grounds that the applicant had failed to respond to the notice requesting additional evidence. Counsel submits a U.S. Postal Service Track and Confirm computer printout indicating delivery, to the Dallas district office, of a package on September 27, 2007, which counsel states contained the applicant's response to the notice; and, a copy of the contents of the applicant's response to the NOID.

An applicant for temporary resident status – under section 245A of the Immigration and Nationality Act (the Act) – 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. *See* 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. *See* 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. *See* 8 C.F.R. § 245a.2(b)(1).

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)(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 of May 5, 1987 to May 4, 1988. *See* 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 period, 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).

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.* 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 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, 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, deny the application or petition.

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 regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant’s employment must: provide the applicant’s address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant’s duties; declare whether the information was taken from company records; and 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 applicant is a native of Kenya who claims to have resided in the United States since October 1981, and he filed an 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 30, 2005.

In the Notice of Intent to Deny (NOID), dated August 30, 2007, the director stated that the applicant failed to submit sufficient evidence demonstrating his continuous unlawful residence, and continuous physical presence, in the United States during the requisite period. The director noted various discrepancies in the evidence, including affidavits provided. The director granted the applicant thirty (30) days to submit additional evidence.

In the Notice of Decision, dated October 3, 2007, the director denied the instant application based on the reasons stated in the NOID. The director noted that the applicant failed to provide evidence requested in the NOID.

As noted above, on appeal counsel provides evidence that the applicant’s timely response to the NOID. Counsel submits evidence of delivery of the response to the NOID to the district office; and,

has provided a copy of the response. It is noted that the evidence provided consists of a statement from the applicant; a copy of a death and funeral announcement for the applicant's father; and, birth certificates for [REDACTED], and [REDACTED]. The AAO, therefore, will review this matter *de novo*.

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.¹

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he continuously resided 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 that ended on May 4, 1988. After reviewing the entire record, the AAO determines that he has not.

The evidence provided by the applicant consists of the following:

Affidavits

- 1) Filled-in form declarations from [REDACTED], [REDACTED], and [REDACTED], attesting to having known the applicant to have resided in the United States prior to 1982. [REDACTED] also attests that the applicant, her boyfriend, sent her birthday cards. [REDACTED] also attests that he is applicant's elder brother and that the applicant always called home to find out about the family, especially before his grandparents died. [REDACTED] also attests that the applicant communicated through mail, and his sister stayed with the applicant for a few days while on a visit to attend a wedding. [REDACTED] also attests that the applicant kept in touch with him through mail and "once in a while" the applicant called him on the phone, and he received "some" Christmas gifts from the applicant. The affiants, however, do not provide details, such as how they date their knowledge of when the applicant came to the United States; when and how frequently they had communications with the applicant. It is also noted that the affiants reside in Kenya, and their affidavits do not indicate whether they ever resided in the United States and, whether and how they were aware that the applicant resided in the United States during the requisite period. Therefore, these affidavits are deemed not probative.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- 2) A declaration from [REDACTED], attesting that he was first introduced to the applicant at a church retreat in Wichita, Kansas, when the applicant was introduced as a recent visitor from Kenya. [REDACTED] also attests that the applicant visited him in Dallas “a couple of times.” The affiant, however, does not provide details, such as, how, if at all, he and the applicant developed a relationship so as to warrant the applicant visiting him in Dallas, whether and how frequently he had contact with the applicant, and during what periods the applicant visited him.

Contrary to counsel’s assertion, the applicant has failed to submit sufficient evidence to establish his continuous residence. As discussed above, the evidence provided, consisting of five declaration letters and affidavits, lack essential details. As such, the evidence provided is insufficient to establish the requisite continuous residence. The applicant has not submitted any additional evidence in support of his claim that he entered the United States prior to January 1, 1982, and he had resided continuously in the United States during the entire requisite period.

In addition, the applicant’s application and declarations provided in support of his application are questionable. The applicant indicated on his Form I-687 application, that since his entry in October 1981, he first departed the United States in January 1987, to attend a funeral, and returned to the United States in February 1987. Also, the applicant testified during his interview before an Immigration Officer, on January 23, 2007, that he married in Kenya, in 1988, and that his wife ([REDACTED]) first came to the United States in 1999. However, he also testified that he has a child, [REDACTED] born in Kenya, on January 11, 1985. The applicant now claims that the child, [REDACTED], is his stepson who was born to his wife prior to their marriage, and that he had adopted the child. The birth certificate for [REDACTED], however, lists the applicant as the father, and there is no evidence that the child had been adopted.

This discrepancy, between the applicant’s travel history, and the birth record for this child, casts doubts on whether the affidavits provided are genuine, and whether the applicant has resided in the United States since prior to January 1, 1982 as he claims. 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The applicant has failed to submit any objective evidence to explain or justify the discrepancies in his testimony and in the record. Therefore, the reliability of the remaining evidence offered by the applicant is suspect and it must be concluded that the applicant has failed to establish that he continuously resided in the United States in an unlawful status during the requisite period.

As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality. 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 documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982, through May 4, 1988.

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant has failed to establish his continuous unlawful residence in the United States throughout the requisite period. Thus, the record does not establish that the applicant entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from that date 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) the Act.

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