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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**

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FILE:



MSC 04 300 10932

Office: NEW YORK

Date:

APR 01 2010

IN RE: Applicant:



APPLICATION: Application for Temporary Resident Status under 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 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.

A handwritten signature in black ink, appearing to read "Perry Rhew".

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) on 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) on February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the director in New York City. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish that he resided continuously in the United States in an unlawful status from before January 1, 1982, and was continuously physically present in the United States from November 6, 1986, through the date of attempted filing during the original one-year application period for legalization that ended on May 4, 1988.

On appeal counsel asserts that the director did not properly consider the evidence of record and relied on erroneous information.

An applicant for temporary resident status under section 245A of the Immigration and Nationality Act (the Act) must establish his or her entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status from before January 1, 1982 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 his or her continuous physical presence 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 the regulation at 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 from May 5, 1987 to May 4, 1988. See CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

“Continuous unlawful residence” is defined at 8 C.F.R. § 245a.2(h)(1)(i), as follows: “[A]n applicant for *temporary resident status* shall be regarded as having resided continuously in the United States if, at the time of filing the application, 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.”

An applicant for temporary resident status 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. 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).

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 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.

The regulations provide an illustrative list of documents – which includes affidavits and “any other relevant document” – that an applicant may submit as evidence of continuous residence in the United States during the requisite period under section 245A of the Act. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant, a native of Bangladesh who claims to have entered the United States on December 28, 1980 and resided continuously in the country since then, filed his 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 July 26, 2004.

On August 2, 2008, the director issued a Notice of Intent to Deny (NOID), citing multiple contradictions in the information provided by the applicant about his place(s) of residence and absence(s) from the United States during the 1980s. The director referred to the applicant's interview on July 28, 2008, at which he claimed that his only absence from the United States between January 1, 1982 and May 4, 1988 was a trip to Bangladesh from June 26 to August 10, 1987 (a period of 45 days), and noted that these dates were inconsistent with those he provided on his Form I-687. In answer to Question 32 on that Form the applicant stated that he had been absent from the United States for a longer period of time – June to September 1987 – visiting family in Bangladesh. The director also cited the applicant's earlier application for permanent resident status – Form I-485, filed (and denied) in 2002 – on which he stated that he had a son born in Bangladesh on April 6, 1984, and noted that this information (together with the applicant's interview testimony that the child's mother was never in the United States) would

have placed the applicant in Bangladesh during 1983, which represented another inconsistency with his interview testimony that made no mention of any trip to Bangladesh that year. Further undermining the applicant's residential claim during the 1980s was the information he provided in the Form G-325A he filed with his Form I-485 in 2002. On that Form, dated May 29, 2002, the applicant stated that his last address outside the United States of more than one year was in Feni, Bangladesh, from October 1958 (his month of birth) until September 1986. This latter date, the director noted, accorded with the applicant's statement on his Form I-485 that he entered the United States on September 10, 1986, but conflicted with his interview testimony that his only absence from the United States between 1982 and 1988 was in the summer of 1987. The applicant was given 30 days to submit additional evidence.

In response to the NOID counsel for the applicant asserted that the conflicting information cited in the NOID had been "erroneously entered by the preparer" of the applicant's Forms I-485 and G-325A in 2002. As evidence that his son was not born in 1984, the applicant submitted a photocopied birth certificate which purports to show that his son was born on May 4, 1988, which would accord with the time frame the applicant claims to have visited Bangladesh the previous summer. The applicant did not address the inconsistency between the Form I-687 he filed in 2004 and his interview testimony in 2008 regarding the dates and duration of his absence from the United States on a visit to Bangladesh in the summer of 1987.

On August 28, 2008, the director issued a Notice of Decision denying the application. The director once again cited the Form G-325A, filed in 2002, on which the applicant stated that he had lived in Bangladesh from 1958 to 1986, and noted that this Form (as well as the Form I-485) was signed by the applicant under penalty of perjury without any evidence that it had been prepared by someone else. (Indeed, the Form I-485 has a space for the signature of a preparer other than the applicant, which was blank.) Accordingly, the director gave "no weight" to counsel's assertion that the above cited information was "erroneously entered by the preparer." The director also cited an employment application (Form I-765) filed by the applicant at the same time as his Forms I-485 and G325A in 2002, on which he yet again stated that he entered the United States on September 10, 1986 – a date which conflicts with his claim on the Form I-687 he filed in 2004 and his interview testimony in 2008 that he was never absent from the United States during the year 1986. In view of these multiple conflicts, the director concluded that the applicant had failed to establish his continuous residence and physical presence in the United States during the requisite periods to be eligible for temporary resident status under section 245A of the Act and the CSS/Newman Settlement Agreements.

Counsel filed a timely appeal (Form I-694), referring to previously submitted affidavits (and letters) by individuals who claim to have known the applicant in the United States during the 1980s, and asserts that the director did not properly consider that evidence. With respect to the Forms G-325A, I-485, and I-687, counsel repeats his contention that the "erroneous information" therein was "entered by an individual who helped [the] applicant" in filling out the forms, and has been rebutted. According to counsel, the director acted in "bad faith" by "chos[ing] to use erroneous information and ignor[ing] correct information" provided in the affidavits (and letters)

in the record. In counsel's view, the affidavit evidence shows the applicant to have been continuously resident and physically present in the United States during the requisite years from 1981 to 1988.

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 AAO agrees with the director's detailed analysis and conclusion that the conflicting information provided by the applicant on his Forms I-687, I-325A, and I-485, and in his interview in the summer of 2008, with regard to his place(s) of residence during the 1980s and the duration of his absence(s) from the United States undermines his claim to have been continuously resident and physically present in the United States from December 28, 1980 onward.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). With the exception of the photocopied birth certificate of his son, submitted in response to the NOID, the applicant has not submitted any evidence to resolve the myriad inconsistencies discussed by the director in the NOID and the Notice of Decision. There is no evidence that anyone other than the applicant prepared the Forms I-687, I-325A, and I-485. No such person has been identified, and the signature spaces for such a person on Form I-485 and Form I-687 are both blank.

Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See Matter of Ho, id.* While the applicant has submitted assorted affidavits and letters as evidence of his residence in the United States during the 1980s, they have limited evidentiary weight in view of the applicant's failure to resolve the conflicting information which goes to the heart of his credibility. The applicant has submitted no convincing rationale for the AAO to conclude that the information provided on his Form G-325A -- that he resided in Bangladesh until September 1986 -- is erroneous.

Even if the AAO did accept counsel's claim that this information is incorrect, the applicant clearly stated on his Form I-687 that his absence from the United States in the summer of 1987, visiting family in Bangladesh, lasted from June to September -- a period in excess of the 45-day limit for a single absence prescribed in 8 C.F.R. § 245a.2(h)(1)(i). An absence of this duration would interrupt the applicant's continuous residence in the United States unless he could provide evidence that he was prevented from returning to the United States within 45 days due to an

“emergent reason”¹ within the meaning of 8 C.F.R. § 245a.2(h)(1)(i). No such evidence is in the record. For this reason as well, therefore, the applicant has not demonstrated his continuous residence in the United States during the requisite period under section 245A of the Act to qualify for adjustment to temporary resident status.

Based on the foregoing analysis, the AAO concludes that the applicant has failed to establish that he resided continuously in the United States in an unlawful status from before January 1, 1982, and that he was continuously physically present in the United States from November 6, 1986, through the date he attempted to file a Form I-687 during the original one-year application period for legalization that ended on May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A of the Act.

The appeal will be dismissed, and the application denied.

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

¹ While the term “emergent reasons” is not defined in the regulations, there is some pertinent case law. In *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), the Board of Immigration Appeals held that *emergent* means “coming unexpectedly into being.”