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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-05-071-10102

Office: LOS ANGELES

Date:

APR 08 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.

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's status as a temporary resident was terminated by the Director, Los Angeles. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was granted lawful temporary residence on July 25, 2005. On September 11, 2007, the applicant filed Form I-698, Application to Adjust Status from Temporary to Permanent Resident. A review of the file revealed that the evidence submitted by the applicant had not established that he had entered the United States prior to January 1, 1982, and thereafter continuously resided in the United States in an unlawful status for the duration of the requisite period. Therefore, on February 15, 2008, the director issued a Notice of Intent to Terminate (NOIT) and granted the applicant 30 days in which to submit evidence to overcome the reasons for the denial. The applicant submitted a letter from his attorney and medical records in rebuttal to the NOIT. As the applicant failed to overcome the reasons for the director's decision, the director issued a notice of termination (NOT) on April 18, 2008. In the NOT, the director denied the application, finding that the applicant had not established that he had entered the United States prior to January 1, 1982, and thereafter continuously resided in the United States in an unlawful status for the duration of the requisite period.

On appeal, counsel states that the objective evidence provided is more than adequate proof of the applicant's continuous residence in the United States since 1982.

Section 245A(b)(2) of the Act provides for termination of temporary residence status granted to an alien if it appears to the Attorney General, now Secretary, Department of Homeland Security (DHS) that the alien was in fact not eligible for such status, or the alien commits an act that makes the alien inadmissible to the United States as an immigrant, or the alien is convicted of any felony or three or more misdemeanors committed in the United States.

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 245(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 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. 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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 petitioner 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, deny the application or petition.

At issue in this proceeding is whether the applicant submitted sufficient credible evidence to meet his burden of establishing that he (1) entered the United States before January 1, 1982, and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1, 1982 and lived in an unlawful status during the requisite period consists of affidavits written by friends, a letter from an affiliated organization, a letter from a previous employer and other evidence. The AAO will consider all of the evidence relevant to the requisite period to determine the applicant’s eligibility; however, the AAO will not quote each witness statement in this decision.

The applicant claimed on his current Form I-687 application filed December 10, 2004 that he initially entered the United States without inspection. In the response to the Notice of Intent to Deny (NOID) the applicant’s Form I-485 LIFE application dated September 13, 2004, the

attorney of record stated that [REDACTED] entered the United States without inspection and was illegal for many years." In sworn statements dated May 9, 1991 and March 29, 1992 regarding his reentry into the United States at JFK Airport, New York, the class determination form and during an interview with the United States Citizenship and Immigration Services (USCIS) on February 14, 2005, the applicant claimed that he first entered the United States in May, 1981 through New York with a tourist visa.

The director states in his decision that the applicant departed the United States in July, 1983 because his sister was sick and later stated that he left the United States in July, 1983, because his mother was sick. The AAO finds that the record is consistent as to the applicant's claim of his sister's illness being the reason for his departure from the United States in July, 1983. However, a copy of the applicant's passport with a validity date of January 18, 1994 shows that the applicant previously traveled on passport No. [REDACTED] issued at New Delhi on January 19, 1984 which was reported lost. This January 1984 absence does not coincide with any of the absences shown on the applicant's initial and current Form I-687 applications.

On appeal, counsel claims that at the time the letter of September 13, 2004 was written which states the applicant entered without inspection, the applicant was being represented by a notary and that the statement is wrong. However, the record contains Form G-28 signed by the applicant showing that the person representing the applicant at that time was an attorney and a member in good standing of the Supreme Court, California. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The applicant's claim that he was previously misrepresented is not supported by any efforts undertaken by the applicant to remedy the misrepresentation as described in *Matter of Lozada*. The AAO does not accept counsel's assertion that statements made by prior counsel on behalf of the applicant were wrong.

Counsel also claims that the applicant cannot provide reliable testimony because he is disabled. The AAO accepts the evidence of record indicating that the applicant suffered a trauma in December 2006 which left him mentally impaired. However, the applicant's inconsistent statements noted by the director were prior to the injury.

The inconsistencies regarding the applicant's manner of initial entry into the United States are material to the applicant's claim in that they have a direct bearing on the applicant's continuous residence in the United States during the requisite period. No evidence of record resolves these inconsistencies. It is incumbent upon the applicant to resolve any inconsistencies in the record by

independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The applicant submitted letters from [REDACTED] and [REDACTED] to establish his initial entry and residence in the United States during the requisite period. The affiants generally attest to meeting and/or visiting with the applicant during the months of September, October, and November, 1981. The affiants generally attest to the applicant's good moral character and communicating with the applicant but provide no other information about the applicant.

In totality, the letters contained in the record do not include sufficient detailed information about the claimed relationship and the applicant's continuous residence in the United States throughout the requisite period. For instance, none of the witnesses supplies any details about the applicant's life, such as, knowledge about his family members, education, hobbies, employment or other particulars about his life in the United States. The witnesses fail to indicate any other details that would lend credence to the claimed acquaintance with the applicant and the applicant's residence in the United States during the requisite period.

The letters do not provide concrete information, specific to the applicant and generated by the asserted association with him, which would reflect and corroborate the extent of this association and demonstrate that the affiants had a sufficient basis for reliable knowledge about the applicant during the time addressed in their affidavits. To be considered probative and credible, witness affidavits 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. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Therefore, the letters have little probative value.

The letter signed by [REDACTED], Richmond Hill, New York states that the applicant has participated in the congregation since 1981, comes to Gurudwara (church) regularly, does service in the community kitchen and participates in community activities. The applicant does not list an association with [REDACTED] on either his initial or current Form I-687 applications. The author attests to the applicant's good moral character but provides no other information concerning the applicant's entry and residence in the United States. Further, the regulation at 8 C.F.R. § 245a.2(d)(3)(v) provides requirements for attestations made on behalf of an applicant by churches, unions, or other organizations. Attestations must (1) identify applicant by name; (2) be signed by an official (whose title is shown); (3) show inclusive dates of membership; (4) state the address where applicant resided during membership period; (5) include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery; (6) establish how the author knows the applicant; and (7) establish the origin of the information being attested to. The

letter from [REDACTED] does not contain most of the aforementioned requirements and will be given nominal weight.

The record also contains a letter signed by [REDACTED], Jersey City, New Jersey. The letter states that the applicant was employed part-time as a salesman from May, 1981 to November, 1981. The employer attests to the applicant's good moral character but provides no other information about the applicant or any evidence to verify the applicant's employment. Further, 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. As the letter does not meet most of the requirements stipulated in the aforementioned regulation, it will be given nominal weight.

The remaining evidence consists of two receipts and three envelopes. The postmark date on one of the envelopes is illegible and the other is subsequent to the requisite period. The evidence has minimal value. The evidence does not establish the applicant's continuous residence throughout the requisite period.

An applicant applying for adjustment of status under this part has the burden of proving by a preponderance of evidence that he or she is eligible for adjustment of status under section 245a of the Act. 8 C.F.R. § 245a.2(d)(5). In the instant case, the applicant has failed to submit sufficient evidence to overcome the director's denial. The insufficiency of the evidence and the inconsistencies noted call into question the credibility of the applicant's claim to have entered the United States in May, 1981 and his continuous unlawful residence in the United States throughout the requisite period. The evidence submitted is insufficient to establish the applicant's 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 requisite period.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and 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.

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