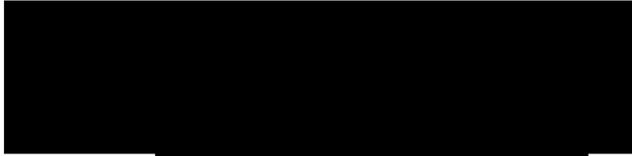




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FILE:



Office: LOS ANGELES

Date: APR 12 2010

SRC 01 123 52334

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status under section 245A of the Immigration and Nationality Act (“Act”) was approved on September 17, 2003. The applicant’s status was subsequently terminated on February 27, 2008, by the District Office in Los Angeles, California. That decision is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant’s temporary resident status was terminated on the ground that the evidence of record failed to establish his continuous residence in the United States in an unlawful status from before January 1, 1982 through the date of attempted filing during the original one-year application period for legalization that ended on May 4, 1988.

On appeal the applicant asserts that certain oral testimony was misinterpreted, and claims that he fulfilled the continuous residence requirement to be eligible for temporary resident status.

An applicant for temporary resident status under section 245A of 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).

“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.”

The regulation at 8 C.F.R. § 245a.2(u)(i) provides that “temporary resident status may be terminated [if] . . . [i]t is determined that the alien was ineligible for temporary residence under section 245A of this Act.”

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 Mexico who claims to have lived in the United States since January 1981, filed his application for temporary resident status (Form I-687) on March 12, 2001. This filing followed a determination on September 14, 2000, by the Director, Vermont Service Center, based on a “Legalization questionnaire” submitted by the applicant, that the applicant had attempted to file a Form I-687 during the original filing period in 1987-88, which was improperly rejected (“front-desked”) by the receiving office. On September 17, 2003, the Texas Service Center approved the application for temporary resident status.

On December 14, 2007, the Field Office Director (“director”) in East Los Angeles issued a Notice of Intent to Terminate the applicant’s temporary resident status. The director cited various discrepancies in the information provided by the applicant – in (1) his current Form I-687, a previous Form I-687 filed in 1990, and a Form for Determination of Class Membership in *CSS v. Meese* (“class membership determination form”) also filed in 1990; (2) interviews conducted in 1994 and 2007, and (3) affidavits submitted by friends in 1990 – regarding the applicant’s place of residence during the early 1980s as well as the number and duration of his departures from the United States between 1982 and 1987-88. The director advised the applicant that the inconsistencies in his documentation and testimony undermined his claim to have been continuously resident in the United States during the requisite years to qualify for temporary resident status. The applicant was granted 30 days to submit rebuttal evidence.

In response to the notice the applicant submitted a statement addressing the discrepancies cited by the director.

On February 27, 2008, the director issued a Notice of Termination. The director discussed the applicant's statement and determined that it failed to resolve the discrepancies in the record regarding the number of times the applicant was absent from the United States during the 1980s and the duration of those absences. In particular, the director noted the timeline of the applicant's story – that he departed Mexico after his wedding on August 12, 1985, that his daughter was born in Mexico on August 10, 1986, and that he met his wife and daughter in Tijuana in May 1987 to accompany them back across the border into the United States – and concluded that the applicant must have been in Mexico in November or December 1985 to conceive the child. Based on the record the director determined that the applicant had not established his continuous residence in the United States during the requisite years to qualify for temporary resident status under section 245A of the Act.

On appeal counsel submits a brief and the applicant submits another statement. Both of these documents address the discrepancies discussed by the director, and assert that the applicant's absences from the United States during the 1980s were not long enough, either singly or collectively, to disqualify him from the benefit of temporary resident status.

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).

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). Moreover, doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

On both the Form I-687 and the class membership determination form filed in 1990, as well as on the later Form I-687 filed in 2001, the applicant listed just one absence from the United States since January 1, 1982 – a 12-day vacation in Mexico from October 22 to November 2, 1987. This information, the director indicated, did not correlate with that provided by the applicant at an interview on July 11, 1994, where he acknowledged another absence from the United States during May 1987. At a later interview on November 5, 2007,¹ the applicant signed a statement that he "left the United States 2 times" – once for five days in August 1985 to get married (in Mexico), and the second during the aforesaid time period of October 22 to November 2, 1987.

¹ This interview was conducted at the East Los Angeles Legalization Office in the course of the applicant's attempt to adjust to permanent resident status. The applicant filed a Form I-698, Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA), on December 22, 2006. The record does not indicate that any decision has been issued on this application.

The information about getting married in Mexico in August 1985 actually represented a third absence from the United States, since the applicant neglected to include the information (first provided in his 1994 interview) about the May 1987 absence from the United States.

In the statement he submitted in response to the Notice of Intent to Deny, dated January 10, 2008, the applicant indicated that he did not previously acknowledge the August 1985 absence because it only lasted five days and only happened because his wife's father insisted that the wedding take place in Mexico rather than in Los Angeles, where (according to the applicant) his wife lived. In this same statement the applicant acknowledged the third departure from the United States in May 1987, when the applicant met his wife and daughter, born in Mexico on August 10, 1986, in Tijuana, Mexico, to accompany them across the border into the United States. According to the applicant, he was in Tijuana for less than a day, and thus he did not feel it was necessary to report the trip as an absence from the United States.

In the statement he submitted on appeal, dated March 2, 1988, the applicant addressed the issue discussed by the director in his termination decision regarding the whereabouts of the applicant and his wife during the time frame of August 1985 to May 1987. According to the applicant, he was not in Mexico in late 1985 because his wife returned with him to the United States after the wedding in August 1985 and they conceived their daughter in Los Angeles late that year. Then, according to the applicant, his wife returned to Mexico in April 1986 to bear her child because her mother was there and the "doctors are better" in Mexico. According to the applicant, therefore, he maintained continuous residence in the United States during this time period.

In his appeal brief counsel reiterates much of the information provided by the applicant, and also contends that any mistakes in the applicant's forms may be due to the preparer, [REDACTED], because the applicant's English is limited and he may not have caught the errors. The AAO notes, however, that only the initial Form I-687, dated in 1990, identifies a preparer other than the applicant – and that person was [REDACTED] (not [REDACTED]). The later Form I-687 filed in 2001, which is the subject of the current appeal, is signed by the applicant and does not identify any other person as the preparer. Therefore, counsel's claim that the applicant should not be held accountable for any mistakes and omissions in the document has little weight.

In addition, the applicant's continually changing story about the number and circumstances of his absences from the United States casts doubt upon the credibility of his claim to have maintained continuous residence in the United States during the requisite period under section 245A of the Act. In particular, the applicant did not offer the story about his wife accompanying him back to the United States after their wedding in Mexico until the director concluded in his Notice of Termination that the applicant must have been in Mexico in late 1985 to conceive the child that was born in August 1986. The applicant has submitted no documentary evidence of his presence in the United States during the latter half of 1985 and the first half of 1986 aside from a few vague affidavits from individuals who claim to have employed, worked with, or otherwise known the applicant during a span of years that includes 1985 and 1986. None of these affidavits offered any specific information about the applicant during the years 1985 and 1986.

Based on the evidence or record, the AAO concludes that the applicant has failed to establish that he maintained continuous residence in the United States from before January 1, 1982 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. In particular, the applicant has failed to establish that his absence (or absences) from the United States during the period between his marriage in Mexico in August 1985 and the birth of his daughter in Mexico in August 1986 did not exceed the 45-day maximum for a single absence and the 180-day maximum for aggregate absences from the United States, as prescribed in 8 C.F.R. § 245a.2(h)(1)(i). Accordingly, the applicant is ineligible for temporary resident status under section 245A of the Act.

The appeal will be dismissed. The director's decision to terminate the applicant's temporary resident status is affirmed.

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