

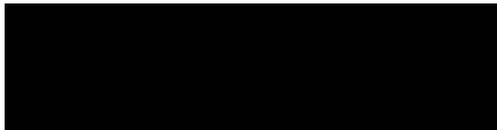
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: MSC 04 335 10901

Office: NEW YORK

Date: FEB 04 2010

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. 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.

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) 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, New York, New York. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had not established his continuous unlawful residence and continuous physical presence in the United for the duration of the requisite time periods.

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).

“Continuous unlawful residence” is defined at 8 C.F.R. § 245a.15(c)(1), as follows: “An alien shall be regarded as having resided continuously in the United States if *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, and May 4, 1988, 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.” (Emphases added.)

“Continuous physical presence” is described in section 1104(c)(2)(C)(i)(I) of the LIFE Act, 8 U.S.C. § 245A(a)(3)(B), and 8 C.F.R. § 245a.16(b), in the following terms: “An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of *brief, casual, and innocent absences* from the United States.” (Emphasis added.) The regulation further explains that “[b]rief, casual, and innocent absence(s) as used in this paragraph means *temporary, occasional trips abroad* as long as the purpose of the absence from the United States was consistent with the policies reflected in the immigration laws of the United States.” (Emphasis added.) 8 C.F.R. § 245a.16(b).

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).

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.

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). *See* 8 C.F.R. 245a.15(b). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant’s own testimony. 8 C.F.R. § 245a.12(f). Affidavits indicating specific, personal knowledge of the applicant’s whereabouts during the relevant time period are given greater weight than fill-in-the-blank affidavits providing generic information.

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 issue in this proceeding is whether the applicant has furnished sufficient evidence to demonstrate that he resided in the United States for the duration of the requisite period.

The record shows that the applicant submitted a Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, on August 30, 2004. On his Form I-687, the applicant indicated that he had resided in El Centro California from December 1981 through November 1987, and that from January 1982 through October 1987, he had been employed framing in the Imperial Valley area of California. The applicant also indicated on the form that he had departed the United States on the following occasions: to

visit family in India from May 20, 1985 to June 30, 1985, and from January 20, 1986 to February 25, 1986; for a social visit to Canada from December 20, 1986 to January 18, 1987; and to be united with family in India from November 1987 to November 1992. The applicant submitted no documentation in support of the Form I-687 to establish his continuous unlawful residence in the throughout the requisite time period.

The applicant was interviewed in connection with his application on June 16, 2005. At that time, he signed a sworn statement amending information contained on his Form I-687. He stated that he had departed the United States on February (not May) 20, 1985 and returned on June 30, 1985 (as previously attested to).

The director issued a Notice of Intent to Deny (NOID) the application on August 24, 2005 and a Notice to Deny (NOD) the application on May 1, 2007. The applicant filed an appeal (MSC 07 228 11886) from the director's denial decision on May 15, 2007, asserting that he had never received the director's NOID because his address had changed. Therefore, on November 3, 2009, the AAO provided the applicant with a copy of the NOID and an opportunity to respond. The applicant, through counsel, responded on November 30, 2009 with documentation in an attempt to establish that his absence from the United States from November 1987 to November 1992 was due to emergent reasons. Specifically, the documentation submitted establishes that the applicant's mother had been treated in India for asthma from November 1987 to December 1992 and frequently developed "status asthmaticus" (a life-threatening episode of airway obstructions considered a medical emergency); the applicant's brother lived far from the applicant's parents; the applicant's father died on January 17, 2000; and his mother died on June 2, 2000.

The applicant has provided a statement that he had to return to India to take care of his mother because he was the only child available to do so and that his father was also very ill due to a heart condition. There is no evidence in the record of how many siblings (or where they resided from 1987 through 1992 – other than for a brother living in India far from the parents) the applicant has, or any evidence that the applicant's father was unable to care for his wife. Although it is clear that the applicant's mother was being treated for asthma, it is also unclear as to how frequent her episodes of "status asthmaticus" were and whether or not, and for how long, she required hospitalization or treatment for those episodes. Therefore, it is concluded that the applicant has failed to establish that his lengthy absence from the United States, including the time period from November 1987 through May 1988 was either "brief, casual or innocent" or that his return to the United States within the requisite time-frame could not be accomplished due to emergent reasons.

It is further noted that there are discrepancies in the record regarding the applicant's claimed initial date of arrival in the United States. Although the applicant indicates that he has resided in the United States since December 1981, evidence in the record reflects that he first entered the United States on November 26, 1992 at John F. Kennedy (JFK) international airport in Jamaica, New York, with no documentation. Subsequent submissions by the applicant also indicate that he had resided in India until November 1992, prior to his flight to the United States that month.

Doubt cast on any aspect of the evidence as submitted may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, it is incumbent on the applicant to resolve any inconsistencies in the record by independent objective evidence; any 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. (Comm. 1988).

In summary, the applicant has provided no employment letters that comply with the guidelines set forth in 8 C.F.R. § 245a.2(d)(3)(i)(A) through (F), no utility bills according to the guidelines set forth in 8 C.F.R. § 245a.2(d)(3)(ii), no school records according to the guidelines set forth in 8 C.F.R. § 245a.2(d)(3)(iii), no hospital or medical records according to the guidelines set forth in 8 C.F.R. § 245a.2(d)(3)(iv), and no attestations from churches, unions, or other organizations that comply with the regulation at 8 C.F.R. § 245a.2(d)(3)(v). The applicant also has not provided documentation (including, for example, money order receipts, passport entries, children's birth certificates, bank book transactions, letters of correspondence, a Social Security card, Selective Service card, automobile, contract, and insurance documentation, deeds or mortgage contracts, tax receipts, or insurance policies) according to the guidelines set forth in 8 C.F.R. § 245a.2(d)(3)(vi)(A) through (K). The applicant has submitted no documentation in order to establish his entry into the United States prior to January 1, 1982,

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. Due to the fact that the applicant has submitted no documentation to support his claim of entry into the United States prior to January 1, 1982, and the discrepancies noted in the record, it is concluded that the applicant has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982, through the date he attempted to file a Form I-687 application 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.

Beyond the decision of the director, the applicant has failed to submit evidence to establish his identity, as required under the provisions of 8 C.F.R. § 245a.2(d)(1).

It is further noted that the applicant was ordered excluded and removed from the United States by an Immigration Judge on August 22, 1994. That order remains outstanding.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 245a.2(d)(5) of the Act.

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