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FILE:



Office: SACRAMENTO

Date:

FEB 23 2010

consolidated herein]
MSC 04 329 22966

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 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 Sacramento, California. 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 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 misapplied the law and did not properly evaluate the evidence in the record.

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.

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(d0)(3)(vi)(L).

The applicant, a native of India who claims to have lived in the United States since August 1981, 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, in August 2004.

On October 6, 2006, the director issued a Notice of Intent to Deny (NOID) citing various items of evidence and information in the record that were inconsistent with the applicant’s claim of continuous residence and continuous physical presence in the United States during the requisite periods under the Act. For example, the director noted that the applicant had three children born in India between August 1982 and June 1986 (and a fourth in July 1990) – a fact which the applicant did not acknowledge on an initial Form I-687 he filed in June 1990. In addition, a Form I-601 (Application for Waiver of Grounds of Excludability) filled out in November 1997 (but not filed) by the applicant and his new wife stated that the applicant first arrived in the United States sometime in 1990. The director also referred to passport stamps in the record showing that the applicant had previously traveled on a passport issued in India during 1987, though the applicant claims never to have been in India that year. The applicant was granted 30 days to submit additional evidence.

Counsel responded with a letter challenging one of the director’s legal interpretations and vouching for the applicant’s credibility.

On April 11, 2007, the director issued a Notice of Decision denying the application. The director found that the applicant’s response to the NOID did not overcome the grounds for denial and determined that the applicant had failed to establish his continuous unlawful residence in the United States for the requisite time period under the Act.

Counsel filed a timely appeal (Form I-694) reiterating the arguments he made in response to the NOID. No further evidence was submitted.

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

The AAO agrees with the director's findings that multiple items of evidence, as discussed in the NOID, contradict the applicant's claim to have been continuously resident in the United States during the years 1981-1988. The explanations offered by the applicant, unsupported by any documentation, do not assuage our doubts.

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

In addition to the evidentiary discrepancies discussed above, the AAO notes that the only evidence in the record of the applicant's residence in the United States during the 1980s are two affidavits prepared at the time of the applicant's initial Form I-687 in June 1990. One was by [REDACTED], stating that he was a roommate of the applicant from September 1987 to the present (on [REDACTED] in Tracy, California) and that he knew of a trip the applicant made to Canada in November-December 1987. The other affidavit was by [REDACTED] stating that he had known the applicant since 1981 and knew that he resided on [REDACTED] in Live Oak, California, from August 1981 to September 1987 (with the affiant), and on [REDACTED] in Tracy, California, from September 1987 to the present. Both affidavits are minimalist documents with little personal input by the affiants. Neither affiant offers any details about how he met the applicant, where the affiant worked during the 1980s, and the nature and extent of their interaction with the applicant during the 1980s, aside from sharing an abode. One of the affiants, [REDACTED], does not claim to have known the applicant before 1987, and therefore cannot personally attest that the applicant resided in the United States from 1981 onward. Nor has either affiant provided any documentary evidence – such as photographs, letters, and the like – of their personal relationship with the applicant in the United States during

the 1980s. In view of these substantive shortcomings, the two affidavits in the record have little probative value. They are not persuasive evidence of the applicant's continuous unlawful residence in the United States during the years 1981-1988.

Based on the foregoing analysis, the AAO determines that the applicant has failed to establish that he resided continuously 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 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.