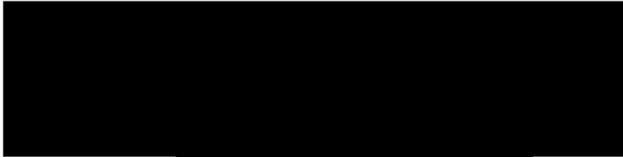




U.S. Citizenship
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FILE:

MSC 06 031 14179

Office: NEW YORK

Date:

JAN 28 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.

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 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.

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 Ecuador who claims to have entered the United States on June 6, 1981 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 October 31, 2005.

On March 14, 2006 the applicant was interviewed. In a sworn statement he signed on that date the applicant acknowledged that he had four children – aged 18, 20, 23, and 25 – who were born in Ecuador, and that his former wife (the mother of these children) first entered the United States in 1999. The record already included photocopied birth certificates of the four children, showing that they were born in Ecuador on September 20, 1981, October 24, 1983, February 14, 1986, and February 5, 1988.

On March 15, 2006, the director issued a Notice of Intent to Deny (NOID), indicating that the documentation described above was inconsistent with the applicant's claim to have been continuously resident in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. Rather, he appeared to have been raising a family in Ecuador during that time period. The applicant was given 30 days to submit additional evidence.

In response to the NOID the applicant submitted an affidavit stating that he was the biological father of the first child, born in September 1981, but that he was not the biological father of the three children born in 1983, 1986, and 1988. According to the applicant, he consented to have his name appear on their birth certificates, in place of the actual father, because he did not want to “disgrace” his wife.

On June 27, 2006, the director issued a Notice of Decision denying the application. In the director’s view, the applicant’s affidavit denying his parentage of the children born in Ecuador between 1983 and 1988 was not credible. The director also reviewed various documentation submitted by the applicant as evidence of his continuous residence in the United States during the years 1981-1988 and determined that it lacked credibility.

The applicant filed a timely appeal (Form I-694), submitting copies of several documents already in the record, and asserted that the director did not properly consider the evidence of record.

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 that the applicant’s denial that he fathered the three children born in Ecuador in October 1983, February 1986, and February 1988, lacks credibility. The applicant is identified on each of the birth certificates as the father, and he has submitted no documentary evidence in support of his assertion that the children were actually fathered by someone else.

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.*

While the applicant has submitted assorted documentation as evidence of his residence in the United States during the 1980s – including some letter envelopes, merchandise and travel agency receipts, as well as affidavits and letters from individuals who claim to have lived with, employed, or otherwise known the applicant in New York during the 1980s – this evidence has limited evidentiary weight in view of the applicant’s failure to show that he had no connection to the three children born in Ecuador between 1983 and 1988. Even if the AAO were to accept, *arguendo*, the applicant’s unsubstantiated claim to have entered the United States initially in June 1981, the children born in 1983, 1986, and 1988 indicate that he made multiple trips back to Ecuador for stays that may well have exceeded the 45-day maximum for a single absence from

the United States and the 180-day maximum for aggregate absences from the United States, as specified in 8 C.F.R. § 245a.2(h)(1)(i).

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 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