

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



41

FILE:



Office: HOUSTON

Date:

JAN 29 2010

MSC-04 316 10102 – I-697
MSC-08 248 12756 – APPEAL

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:

SELF-REPRESENTED

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 J. Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status under Section 245A of the Immigration and Nationality Act (Act) was initially approved. Subsequently, the Director, Los Angeles, California, terminated the applicant's temporary resident status. The decision to terminate is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that subsequent investigation indicated that the applicant submitted conflicting information and documents in support of his application for temporary resident status under section 245A of the Immigration and Nationality Act (The Act). The director terminated the applicant's temporary resident status, finding that the applicant had failed to present sufficient credible evidence to establish that he entered the United States prior to January 1, 1982 and resided in a continuous unlawful status during the requisite period as required in 8 CFR 245a.2(b)(1) and was, therefore, not eligible to adjust to temporary resident status.

On appeal, the applicant asserts that he had submitted sufficient credible evidence in support of his application. The applicant further asserts that the director did not properly evaluate and give due weight to the documents he submitted to establish his continuous residence in the United States during the requisite period.

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).

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).

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). 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.2(d)(6).

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 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 (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.

The applicant, a native of Mexico who claims to have lived in the United States since October 1981, submitted a Form I-687, Application for Status as a Temporary Resident under section 245A of the Immigration and Nationality Act (Act), and Form I-687 Supplement, CSS/Newman Class Membership Worksheet on August 11, 2004. The application was approved on June 13, 2005. Subsequently, the director terminated the applicant’s temporary resident status.

In a Notice of Intent to Terminate (NOIT) dated March 26, 2008, the director noted that the applicant submitted conflicting statements and documents in support of his application. Specifically, the director noted that the birth of the applicant’s child in Mexico and the date of his marriage in Mexico directly contradicted his claimed entry into the United States in 1981 and his continuous residence in the United States during the requisite period. The applicant was granted 30 days to submit rebuttal evidence.

The applicant did not respond to the NOIT. On May 23, 2008, the director issued a Notice of Termination (NOT) terminating the applicant’s temporary resident status based on the grounds stated in the NOIT. The applicant claimed that he did not receive the director’s NOIT, although the record confirms the NOIT was mailed to the applicant’s address of record and there is no evidence that the NOIT was returned as undeliverable.

Notwithstanding, on December 8, 2009, the AAO mailed a copy of the directors NOIT to the applicant and granted him 30 days to respond to the NOIT. In response the applicant submitted copies of documents previously submitted into the record. The applicant did not submit new evidence and did not provide credible and plausible explanation for the evidentiary discrepancies cited in the NOIT. The AAO will consider the record as complete and will adjudicate the appeal based on the documentation in the record.

On appeal, the applicant asserts that he had submitted sufficient credible evidence in support of his application. The applicant further asserts that the director did not properly evaluate and

give due weight to the documentation he submitted to establish his continuous residence in the United States during the requisite period.

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he entered before January 1, 1982 and resided continuously in the United States in an unlawful status through the requisite period.

The record reflects that the applicant has submitted conflicting statements and documentation in support of his application. On a prior Form I-687 the applicant completed on July 6, 1993, and the accompanying Affidavit, the applicant indicated that he first entered the United States on October 15, 1981, and resided continuously in the country through the requisite period except for one brief trip to Mexico, within the month of August 1989. The applicant did not indicate any other trips outside the United States during the 1980s. On that same form, the applicant indicated that he has a son, [REDACTED] who was born on May 28, 1986 in Mexico. The applicant submitted a copy of his son's birth certificate to corroborate his statement. On the current Form I-687 the applicant filed on August 11, 2004, the applicant indicated that he traveled outside the United States to Mexico twice during the 1980s. The first trip was within the month of June 1988, and the second trip was within the month of August 1989. The applicant did not indicate any other trips outside the United States during the 1980s.

The record includes a copy of the applicant's marriage certificate showing that the applicant was married in Mexico on October 28, 1985. The marriage certificate and the birth of the applicant's child in Mexico in May 1986 strongly suggest that the applicant was in Mexico during those years and call into serious question the veracity of the applicant's claim that he entered the United States before January 1, 1982 and resided continuously in the country through the requisite period. The applicant did not submit any objective evidence to establish his entry on October 15, 1981 and his claimed absences from the United States in 1988 and 1989 do not account for the applicant's presence in Mexico in 1985 and 1986.

The contradictions also call into question the credibility and the reliability of the affidavits in the record from witnesses attesting to the applicant continuous residence in the United States during the 1980s. The director notified the applicant of the contradictions and granted him the opportunity to submit objective evidence to reconcile or explain the contradictions. The applicant failed to do so.

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 without competent objective 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 other evidence in the record. *See id.*

The record includes a series of affidavits from individuals who claim to have worked with or otherwise known the applicant in the United States during the requisite period. The affiants provided very few details about the applicant's life in the United States and the nature and extent of their interactions with him over the years. The affiants do not seem to have a direct personal knowledge of the events and circumstances of the applicant's residence in the United States during the requisite period. For example, affiants [REDACTED] and [REDACTED] claim they have knowledge that the applicant has been residing in Los Angeles, California since 1980. The affidavits are in direct conflict with the applicant's claimed entry in October 1981, and cast serious doubt on the credibility of the above affidavits as well as the credibility of the other affidavits attesting to the applicant's residence in the United States during the requisite period. As previously indicated, doubt cast on any aspect of the applicant's evidence also reflects on the reliability of other evidence in the record. *See id.*

Additionally, the affidavits are not supplemented by any documentary evidence – such as photographs, letters, and the like – demonstrating the affiants' personal relationships with the applicant in the United States over the years. The affiants did not provide documents to establish their identities, and residence in the United States during the 1980s. For all the reasons discussed above, the AAO determines that the affidavits have little probative value. They are not persuasive evidence that the applicant entered the United States before January 1, 1982 and resided continuously in the country in an unlawful status through the requisite period. Thus it must be concluded that the applicant has failed to establish his continuous residence in the United States for the requisite period.

As for the copies of W-2 Wage and Tax Statements from [REDACTED] for the years 1983 and 1984 issued under the assumed name of [REDACTED] they have marginal evidentiary weight. The applicant did not submit any evidence independent of his statement to establish that he was known as [REDACTED]. The applicant did not submit any credible document from [REDACTED] evidencing that the applicant and [REDACTED] are the same person and that the applicant was employed by the company during the years claimed. Even if the AAO accepted the copies of the Wage and Tax Statements as evidence that the applicant resided in the United States in 1983 and 1984, they are not sufficient to establish the applicant's continuous residence from before January 1, 1982 through the requisite period. Thus, the copies of the Wage and Tax Statements have limited probative value as credible evidence of the applicant's residence in the United States during the requisite period.

Upon a *de novo* review of all of the evidence in the record, the AAO concludes that the evidence submitted by the applicant has not established that he is eligible for the benefit sought.

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 on this basis.

The AAO notes that the applicant was arrested by South Gate, California, Police Department in 1993, East Los Angeles, California, Police Department in 1995 and Vernon, California, Police Department in 1996, for various crimes. The complete court records are not currently contained in the record and the applicant's criminal history will not be used as a basis for dismissing his appeal.

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