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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 04 335 11263
MSC 08 291 11492 – APPEAL

Office: LEE'S SUMMIT

Date:

JAN 29 2010

IN RE:

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. 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 initially approved. Subsequently, the Director, Lee's Summit, Missouri, 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 shows that the applicant submitted conflicting information regarding his initial entry into the United States and his continuous unlawful residence in the country that undermined the credibility of the initial evidence relied upon by the director to grant the applicant temporary residence status on June 20, 2005. The director terminated the applicant's temporary resident status, finding that the applicant had failed to present sufficient credible evidence to show 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 425a.2(b)(1) and was, therefore, not eligible to adjust to temporary resident status.

On appeal, counsel asserts that the applicant did not receive the Notice of Intent to Terminate (NOIT) and was unable to address the inconsistencies cited by the director in the NOIT. Counsel requests that the appeal be granted and the NOIT mailed to the applicant so that he can respond to the discrepancies cited in the termination letter.

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 India who claims to have lived in the United States since May 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 30, 2004. The application was approved on June 20, 2005. Subsequently, the director, Lee’s Summit, Missouri, terminated the applicant’s temporary resident status.

In a Notice of Intent to Terminate (NOIT) dated February 22, 2008, the director noted that the applicant submitted conflicting information in the file that contradicted his prior statements and undermined the veracity of his claim that he had continuously resided in the United States from before January 1, 1982 through the requisite period. The applicant was granted 30 days to submit rebuttal evidence.

The applicant did not respond to the NOIT. On June 17, 2008, the director issued a Notice of Termination (NOT) terminating the applicant’s temporary resident status based on the grounds stated in the NOIT.

On appeal, counsel asserts that the applicant did not receive the Notice of Intent to Terminate (NOIT) and was unable to address the inconsistencies cited by the director in the NOIT. Counsel requests that the appeal be granted and the NOIT mailed to the applicant so that he can respond to the discrepancies cited in the termination letter.¹

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

¹ The record reflects that the NOIT as well as the NOT were mailed to the applicant’s address of record. The NOIT was mailed to the applicant at [REDACTED], which was the same address where the NOT notice was sent. The applicant acknowledged receipt of the NOT and denied receipt of the NOIT. There is no record that the applicant changed his address between the issuance of the NOIT and NOT. The only record of a change of address was completed by the applicant on June 10, 2009. Furthermore, there is no record that the NOIT was returned as undeliverable. Therefore, the AAO will consider the record as complete and will adjudicate this appeal based on the evidence in the record.

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 documentation submitted by the applicant in support of his application consists primarily of affidavits from individuals who claim to have employed or otherwise known the applicant in the United States during the requisite period.

The AAO has reviewed each document in its entirety to determine the applicant's eligibility.

The record reflects that on the Form I-687 the applicant completed on September 17, 1990, and the accompanying affidavit, the applicant indicated that he entered the United States in May 1981, resided continuously in the country through the requisite period except for one trip to Canada to visit friends, from July 15 to August 24, 1987. On the Form I-687 the applicant filed August 30, 2004, the applicant indicated that he was outside the United States once during the requisite period – a trip to Canada – lasting from July 15 to August 24, 1987. The applicant did not indicate any other trips outside the United States.

The record reflects however, that the applicant was issued a non immigrant visa at the United States Embassy in New Delhi, India, on June 22, 1990, which the applicant used to enter the United States on July 16, 1990. This information is corroborated by a copy of the Nonimmigrant Information System maintained by the then Immigration and Naturalization Services (INS). This information strongly suggests that the applicant was in India at the time he was issued the visa and calls into question the veracity of the applicant's claim that he entered the United States before January 1, 1982 and resided continuously in the country in an unlawful status through the requisite period. The applicant was notified of the contradiction and granted the opportunity to submit a rebuttal evidence and failed to do so. The applicant did not provide any objective evidence to establish that he entered the United States in May 1981. The absence(s) claimed by the applicant on the Forms I-687 he completed do not account for the applicant's presence in New Delhi, India, in June 1990, when he was issued the nonimmigrant visa.

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.

The affidavits in the record have minimalist or fill-in-the-blank format with very few details about the applicant's life in the United States and the nature and extent of their interactions with the applicant 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. The affidavits are not accompanied by any documentary evidence – such as photographs, letters, and the

like – of the affiants’ personal relationships with the applicant in the United States during the 1980s. Finally, the affiants did not submit any documentation to establish their identities and residence in the United States during the requisite period. For all the reasons discussed above, the AAO determines that the affidavits have little probative value. They are not persuasive evidence of the applicant’s continuous residence in the United States from before January 1, 1982 through the requisite period.

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

Based on the analysis of the evidence in the record, the AAO concludes that 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.

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