

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

L1



FILE:

MSC-05-291-11640

Office: NEW YORK

Date: **MAR 10 2010**

IN RE:

Applicant:



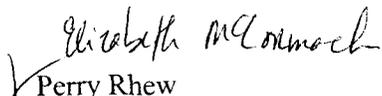
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. 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) 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director denied the application after determining that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. The director noted that the applicant's absence from the United States was not brief, casual, or innocent, and that contrary to the applicant's statements, K-2 Construction Company was not in business until 1984. The director denied the application, finding that the applicant had not met his burden of proof that he was eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, counsel asserts that the director's action in denying the application was an abuse of discretion and that the director used the wrong evidentiary standard in reviewing the evidence. Counsel further asserts that the applicant's absence from the United States was brief, casual, and innocent and therefore, insufficient to establish a break in his continuous physical presence in the United States. Counsel questions the authenticity of the information received by immigration officials from the K-2 Construction Company, creating a discrepancy in the applicant's employment history. Counsel also asserts that there is no material misrepresentation in either the applicant's testimony or the evidence he submitted. Counsel asserts that the affidavits submitted are credible and that the record contains sufficient documentation to establish the applicant's eligibility for temporary resident status.

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).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term "until the date of filing" in 8 C.F.R. § 245a.2(b) 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 of May 5, 1987 to May 4, 1988.

See CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

As noted above, the applicant must establish that he was continuously physically present from November 6, 1986 through May 4, 1988, or until he filed or attempted to file the Form I-687 application. 8 C.F.R. § 245a.2(b)(1). Any absence from the United States during this time period must be brief, casual and innocent.

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).

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.* at 80. 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, 431 (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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his burden of establishing continuous unlawful residence and continuous physical presence in the United States throughout the requisite period.

The applicant indicated in response to the Notice of Intent to Deny that he traveled to Canada seeking employment but was not intending to remain in that country. The applicant indicated on his Form I-687 at part #32 that he traveled to Canada from September 1987 to October 1987 "job seeking." The applicant indicated on his class membership application form that he was absent from the United States and traveled to Canada from September 1987 to October 1987 "looking for [a] job." The applicant testified under oath during his immigration interview that he went to Canada in 1987 to look for a job. Although the applicant claims on appeal that his absence from the United States in 1987 was brief, casual, and innocent and that his intent was not to remain in Canada, he has failed to establish that he has been continuously physically present in the United States from November 6, 1986 until the date of filing the application. The applicant has failed to present evidence to demonstrate that his absence from the United States in 1987 was brief, casual and innocent. Such absence thus interrupted any period of continuous physical presence that he had.

A legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. Section 245A(a)(3)(A) of the Act, 8 U.S.C. § 1255a(a)(3)(A). An absence during this period which is found to be brief, casual and innocent shall not break a legalization applicant's continuous physical presence. Section 245A(a)(3)(B) of the Act, 8 U.S.C. § 1255a(a)(3)(B). *See e.g. Espinoza-Gutierrez v. Smith, INS, et al.*, 94 F.3d 1270 (9th Cir. 1996). The *Espinoza-Gutierrez* court held that a legalization applicant's absence would not represent a break in continuous physical presence if it was found that the absence was brief, casual and innocent as defined by the court in *Rosenburg v. Fleuti*, 374 U.S. 449 (1963) *See also Assa'ad v. U.S. Attorney General, INS*, 332 F.3d 1321 (11th Cir. 2003)(which affirmed the portion of the holding in *Espinoza-Gutierrez* relied upon here, but disagreed with a different aspect of that holding).

The AAO finds that the applicant's absence from the United States in this case was not brief, casual and innocent in that the record indicates that the applicant's stated purpose in traveling to Canada was to find employment. *See Rosenberg, supra* (where the court looked to (1) the duration of the alien's absence; and (2) the purpose of the absence.

The applicant submitted four handwritten receipts, one receipt from the California Department of Motor Vehicles, and four postmarked envelopes dated 1981, 1982, and 1986. Two of the four envelopes contain illegible postmark dates and the receipt from the California Department of Motor Vehicles is dated subsequent to the requisite period. Although the other documents are some evidence of the applicant's presence in the United States during some part of the requisite period, they are insufficient to establish his continuous residence in the country throughout the requisite period.

The applicant submitted the following evidence:

- A letter of employment from the president of [REDACTED] who stated that the company employed the applicant from October 1981 through August 1982. This

statement is inconsistent with the applicant's previous and current Form I-687 where he stated under penalty of perjury at part #36 and part #33 that he was self-employed as an ice cream vendor from June 1981 through May 1989. In addition, the letter does not conform to regulatory standards for attestations by employers. Specifically, the letter does not specify the address(es) where the applicant resided throughout the claimed employment period, or the exact dates of employment. 8 C.F.R. § 245a.2(d)(3)(i). Here, the declarant fails to indicate whether the employment information was taken from company records. Neither has the availability of the records for inspection been clarified. 8 C.F.R. § 245a.2(d)(3)(i).

- A letter from [REDACTED] who stated that the applicant has regularly visited the Sikh Temple since 1981 and has worked as a volunteer in preparing food, serving food, cleaning utensils and the premises, organizing camps for children, and performing other religious services. The declarant's statement is inconsistent with the applicant's statement on his previous and current Form I-687 application, at part #31 and 34 where he was asked to list all associations or affiliations with clubs, religious organizations, churches, unions, or businesses, and he indicated "none." In addition, the declaration does not conform to regulatory standards for attestations by churches at 8 C.F.R. § 245a.2(d)(3)(v). Specifically, the declaration does not state the address where the applicant resided during that period, nor does it establish the origin of the information being attested to and thus its reliability.
- Affidavits from [REDACTED] and [REDACTED] who stated that they have known the applicant since 1981. Although the affiants state that they have known the applicant since before January 1, 1982, the statements do not supply enough details to lend credibility to an at least 24-year relationship with the applicant. For instance, the affiants do not indicate how they date their initial meeting with the applicant, how frequently they had contact with the applicant, or how they had personal knowledge of the applicant's presence in the United States. Further, the affiants do not provide information regarding the applicant's place of residence during the requisite period. Given these deficiencies, these affidavits have minimal probative value in supporting the applicant's claims that he entered the United States prior to January 1, 1982 and resided in the United States throughout the requisite period.
- An affidavit from [REDACTED] who stated that he has known the applicant since 1986. The affidavit fails to provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of his association and demonstrate that he has a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavit. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that

relationship, have knowledge of the facts alleged. Upon review, the AAO finds that, the affiant's statement does not indicate that his assertion is probably true. Therefore, it has little probative value.

In the instant case, the applicant has failed to provide sufficient, credible and probative evidence to establish his continuous residence or continuous physical presence in the United States throughout the requisite periods. The inconsistencies and contradictions found in the record cast doubt on the applicant's proof. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and 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 (BIA 1988). The applicant has failed to overcome the issues raised by the director. Based upon the applicant's own statement, he was absent from the United States in 1987 seeking employment in Canada and therefore, such absence was not brief, casual and innocent, and such *absence interrupted any period of continuous physical presence. The AAO notes further that the applicant submitted affidavits that are lacking in detail.*

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period and the inconsistencies noted above seriously detract from the credibility of this claim. 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. Given the applicant's absence from the United States to seek employment in Canada, the inconsistencies found in the record with regard to his employment history in the United States, and his reliance upon documents that are lacking in detail and of little probative value, he has failed to establish continuous residence in an unlawful status in the United States for the requisite period 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.