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

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FILE:

MSC-06-048-11800

Office: NEWARK

Date:

MAR 12 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.

Elizabeth McCormack

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, Newark. The decision 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 determined that for the reasons stated in the decision and in the Notice of Intent to Deny (NOID), 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 affidavits submitted were not credible. The director also noted the inconsistencies in the applicant's statements and testimony regarding his presence and absences from the United States. The director noted that the evidence of record demonstrated the applicant's presence in the United States since 1988. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not 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 improperly rejected affidavits and declarations submitted by the applicant. Counsel further asserts that the applicant submitted affidavits that are credible and amenable to verification. Counsel also asserts that in addition to the absences listed by the applicant in his Form I-687, the applicant made two short trips to Mexico¹ that were brief, casual and innocent and did not disrupt his continuous presence in the United States.

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.

¹ The applicant's child was born in Mexico in 1986. Counsel implicitly states that the applicant traveled to Mexico in 1985 to conceive the child and in May 1986 to register the child's birth. Neither of these absences are listed on the Form I-687.

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

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 in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The applicant submitted a photocopy of a pay stub from [REDACTED] that showed his salary for the week ending June 24, 1988. This document shows that the applicant was employed in the United States in June of 1988, after the requisite period.

The applicant submitted photocopies of his personal income tax records dated 1991 through 2004. The tax documents are dated subsequent to the requisite period and are therefore of no probative value.

The applicant submitted a letter dated April 19, 2005 from [REDACTED] of Cathedral of St. John the Baptist who stated that the applicant and his family are members of the church. The letter is inconsistent with the applicant's Form I-687 application at part #31 where he does not list any association or affiliation with any church or religious organization. In addition, the letter does not conform to regulatory standards for attestations by churches. Specifically, the letter does not specify the dates of the applicant's membership; the address where the applicant resided during the membership period; nor does it establish the origin of the information being attested to. 8 C.F.R. § 245a.2(d)(3)(v). The letter is not probative of the applicant's residence in the United States during the requisite period.

The applicant submitted the following evidence:

- Affidavits from [REDACTED] and [REDACTED] who stated that they met the applicant in late 1981 when he was working as a handyman at [REDACTED] in Paterson, New Jersey, and that they have been his acquaintance over the years.
- Affidavits from [REDACTED] and [REDACTED] who stated that they have known the applicant since 1981 and that they have maintained a relationship with him over the years.
- An affidavit from [REDACTED] who stated that he has known the applicant since the end of 1981 and that he met the applicant at [REDACTED] where the applicant lived.
- Affidavits from [REDACTED] and [REDACTED] who stated that they have known the applicant to be in the United States since November of 1981 when he crossed the border and that they have knowledge of the applicant's absence from the United States from June 1, 1985 to June 30, 1985; and from December 21, 1987 through January 13, 1988.
- Affidavits from [REDACTED] and [REDACTED] who stated that they have known the applicant since 1982.
- An affidavit from [REDACTED] who stated that she has known the applicant since 1984 when she met him at her parent's house in Passaic, New Jersey. She also stated that the applicant would frequent her parent's house performing odd jobs for them.
- An affidavit from [REDACTED] who stated that she has known the applicant since 1987, when she met him working as a helper at [REDACTED]
- A declaration from [REDACTED] who stated that the applicant has been his patient since 1987.

These affidavits fail to establish the applicant's continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; an applicant must provide evidence of eligibility apart from his or her own testimony; and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility.

None of the witness statements provides concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits and declarations. 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, individually and collectively, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

The applicant submitted the following employment attestations as evidence:

- An affidavit from [REDACTED] who stated that she employed the applicant as a handyman from December 1981 through March 1988.
- A letter dated January 26, 1990 from the manager of [REDACTED] who stated that the restaurant employed the applicant from August 1988 through to the present.
- An affidavit dated October 28, 2002 from [REDACTED] who stated that [REDACTED] employed the applicant since 1988.

The affidavits and declaration do not conform to regulatory standards for attestations by employers. Specifically, the affiants and declarant do not specify the address(es) where the applicant resided throughout the claimed employment period, the exact dates of employment or any period of lay offs and do not indicate whether the employment information was taken from company records. 8 C.F.R. § 245a.2(d)(3)(i). Neither has the availability of the records for inspection been clarified. 8 C.F.R. § 245a.2(d)(3)(i). The applicant does not list any employment on the current Form I-687 after arriving in the United States. Thus, these statements have minimal probative value.

In the instant case, the applicant has failed to provide sufficient credible and probative evidence to establish his continuous unlawful residence in the United States since prior to January 1, 1982, and throughout the requisite period. Counsel asserts that the applicant took two additional short trips to Mexico that were brief, casual and innocent and which did not disrupt his continuous residence in the United States. This evidence establishes that the applicant did not disclose all of his absences from the United States, and/or accurately describe the lengths of such absences. The evidence suggests that the applicant was absent from the United States from March 1986

through May 26, 1986, his daughter's date of birth in Mexico. The applicant admitted on his Form I-687 to being absent from the United States for 114 days. There are two additional undisclosed absences of uncertain length.

The applicant shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being." The applicant has not established that his absences from the United States did not exceed the aggregate of 180 days during the requisite period.

Continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless return could not be accomplished due to emergent reasons. 8 C.F.R. § 245a.2(h)(1)(i). "Emergent reasons" has been defined as "coming unexpectedly into being." *Matter of C*, 19 I&N Dec. 808 (Comm. 1988).

The applicant's absence from the United States for more that a period of 45 days during a single absence and a possible aggregate of 180 days during the requisite period, is clearly a break in any period of continuous residence he may have established.

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts 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 reliance on evidence that is lacking in detail and which has little probative value, it is concluded that 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.