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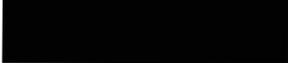
U.S. Citizenship
and Immigration
Services

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FILE:



Office: MIAMI

Date:

MAY 27 2010

MSC 05 237 14577

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.

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, Miami. 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 denied the application, finding that the applicant had not provided credible evidence to establish that he had entered the United States prior to January 1, 1982, and thereafter continuously resided in the United States in an unlawful status for the duration of the requisite period.

On appeal, the applicant states that he provided enough evidence to support his claim of living in the United States since 1981. The applicant requested a copy of the record of proceedings under the Freedom of Information Act (FOIA). The record reflects that the FOIA request was completed on June 29, 2009. (NRC2008039991). On the Form I-290B, the applicant indicated that a written brief or evidence would be submitted within 30 days. No additional evidence or brief has been received into the record. Accordingly, a decision will be rendered based on the evidence of record.

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 245(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).

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)(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 of May 5, 1987 to May 4, 1988. 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). To meet his or her burden of proof, 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. 8 C.F.R. § 245a.2(d)(6).

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 submitted sufficient credible evidence to meet his burden of establishing that he (1) entered the United States before January 1, 1982, and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1, 1982 and lived in an unlawful status during the requisite period consists of affidavits written by friends and other evidence. The AAO will consider all of the evidence relevant to the requisite period to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision.

The applicant claimed on his class determination form and during his Form I-485 interview that he first entered the United States without inspection through Brownsville, Texas, in December, 1981.

The applicant submitted affidavits from [REDACTED] and [REDACTED] and [REDACTED] to establish his initial entry and residence in the United States during the requisite period. The affiants attest to personally knowing and being acquainted with or residing with the applicant in the United States since the 1980s. The affiants attest to the applicant's good moral character but provide no other information about the applicant.

█ claims that she rented the applicant a room in her apartment located at █ from January, 1981. However, the applicant claimed that he did not enter the United States until December, 1981.

█ state that the applicant has been residing with them at █ since 1987. However, the applicant claimed on his current Form I-687 applicant that he resided at the aforementioned address from February, 1988. On two other Forms I-687 received October 9, 1990 and February 26, 2002, the applicant claimed that he resided at █ from December, 1981 to January, 1987.

█ states that he has known the applicant for many years. He does not state when and where he met the applicant.

█ states that the applicant was employed by the company as a messenger from January, 1982, to December, 1986. The employer attests to the applicant's good moral character but provides no other information about the applicant. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant's employment must: provide the applicant's address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant's duties; declare whether the information was taken from company records; and, identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable. As the affidavit does not meet most of the requirements stipulated in the aforementioned regulation, it will be given nominal weight.

The applicant also submits his 1988 Form W-2 Wage and Tax Statement from █ showing wages earned for the year as \$1,605.94. This is corroborated by the applicant's social security statement which reflects his earnings for 1988 as \$1,605 and the other years he worked in the United States. The earning record does not reflect any years worked prior to 1988.

In totality, the affidavits contained in the record do not include sufficient detailed information about the claimed relationship and the applicant's continuous residency in the United States throughout the requisite period. For instance, none of the witnesses supplies any details about the applicant's life, such as, knowledge about his family members, education, hobbies, employment or other particulars about his life in the United States. The affiants fail to indicate any other details that would lend credence to the claimed acquaintance with the applicant and the applicant's residence in the United States during the requisite period.

The affidavits do not provide concrete information, specific to the applicant and generated by the asserted association with him, which would reflect and corroborate the extent of this association and demonstrate that the affiants had a sufficient basis for reliable knowledge about the applicant during the time addressed in their affidavits. 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. Therefore, the affidavits have little probative value.

An applicant applying for adjustment of status under this part has the burden of proving by a preponderance of evidence that he or she is eligible for adjustment of status under section 245a of the Act. 8 C.F.R. § 245a.2(d)(5). In the instant case, the applicant has failed to submit sufficient evidence to overcome the director's denial. The insufficiency of the evidence and the inconsistencies noted call into question the credibility of the applicant's claim to have entered the United States in December, 1981, and his continuous unlawful residence in the United States throughout the requisite period. The evidence submitted is insufficient to establish the applicant's 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 requisite period.

The AAO also finds that the applicant disrupted any period of required continuous residence and physical presence in the United States during the statutory period of November 6, 1986 to May 4, 1988.

An applicant shall be regarded as having resided continuously in the United States if, at the time of filing the application for temporary resident status, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c)(1)(i).

The applicant stated during his Form I-485 interview that he went to Colombia in January, 1987, and came back in June, 1987. This statement is corroborated by the applicant's initial Form I-687 that indicates he went to Colombia because of the death of his aunt. The record also contains a copy of the applicant's passport showing that it was issued on April 29, 1987 in Barranquilla, Colombia. By his own admission, the applicant has disrupted any period of continuous residence in the United States during the statutory period of January 1, 1982 to May 4, 1988 and has not shown emergent reasons for the length of the absence.

A legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. See 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 he was absent from the United States for at least five months.¹ See *Rosenberg, supra* (where the court looked to (1) the duration of the alien's absence; (2) the purpose of the absence; and (3) the need for special documentation to make the trip abroad to determine whether the absence was a brief, innocent and casual or meaningfully disruptive of the alien's residence in the United States.)

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*. Further, the applicant disrupted his period of required continuous residence and physical presence in the United States during the statutory period of November 6, 1986 to May 4, 1988. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act.

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

¹ The regulation implementing the statutory requirement of "continuous unlawful residence" in the United States defines that term as no single absence from the United States exceeding 45 days and absences in the aggregate not exceeding 180 days. See, section 245A(a)(2)(A) of the Act, 8 U.S.C. § 1255(a)(2)(A) and 8 C.F.R. § 245a.1(c)(1)(i). The term "continuous physical presence" suggests that a shorter time frame should be applied to determine the permissible length of single and aggregate absences from the United States during the period from November 6, 1986 to May 4, 1988.