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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**

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[REDACTED]

FILE:

[REDACTED]

Office: HOUSTON

Date:

MSC 05 208 11301

MAY 27 2010

IN RE:

Applicant:

[REDACTED]

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:

[REDACTED]

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, Houston. The decision is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The case will be remanded.

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 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.

On appeal, counsel states that a complete copy of the file is needed to write a brief and show good cause. Counsel 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 November 19, 2009. (NRC2009042308). On the Form I-694, counsel indicated that a written brief or evidence would be submitted within 30 days of receipt of the record of proceedings. Counsel submitted a brief stating that the applicant submitted sufficient documentary evidence to prove his eligibility and did not spend 45 days or more out of the United States. No new evidence has been submitted with the brief.

The applicant claimed on his class determination form, and the initial Form I-687 application that the first time he entered the United States was without inspection through Brownsville, Texas, in June, 1981. The USCIS adjudication officer's notes reveal that the applicant gave the same response during the interview.

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 director stated that the applicant was absent from the United States for a period exceeding 45 days. The director stated that the record contains evidence that the applicant was issued a B1/B2 nonimmigrant visa from the American Consulate in Matamoros, Mexico, on January 23, 1984.<sup>1</sup> The

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<sup>1</sup> The record of proceeding contains a copy of the applicant's Mexican passport that was issued on January 13, 1984 in Brownsville, Texas, and a copy of the Mexican Border Crossing Identification

director states that the Department of State (DOS) requires an applicant to provide evidence that he resided in the country for 90 days prior to applying for the nonimmigrant visa. The director states that the 90 days the applicant would have to have been in Mexico to be eligible to receive the visa exceeds the maximum allowed 45 days, as no single absence from the United States can exceed 45 days, unless the applicant can establish that due to emergent reasons his return to the United States could not have been accomplished.

The applicant claimed in a statement and/or during his Form I-687 interview that he left the United States on January 5, 1984 and returned to the United States on January 30, 1984; left on February 10, 1984 and returned on March 6, 1984; left on July 10, 1985, and returned on August 3, 1985. Besides the aforementioned absences, the applicant included on his Form I-687 application that he left the United States on July 1, 1984 and returned July 29, 1984 and on June 2, 1987 and returned on June 23, 1987. These absences are corroborated by the applicant's Form I-687 application signed on April 2, 2001 and his current Form I-687 application signed on April 18, 2005. He claimed that all his trips were to visit family in Mexico with the exception of his grandmother's death in June, 1987.

The AAO finds that the applicant's statement that he was in the United States until January 5, 1984, when he left for Mexico, sufficiently rebuts the director's finding that the applicant was in Mexico for the 90 days preceding the application for the nonimmigrant visa. The evidence does not establish that the applicant disrupted any period of continuous residence he may have had in the United States by residing in Mexico for 90 days preceding January 23, 1984, the day he obtained the nonimmigrant visa and border crossing card. The AAO withdraws that finding by the director. The applicant, however, is inadmissible for fraud or misrepresentation in procuring the nonimmigrant visa, in that he misrepresented to the U.S. Consular officials that he resided continuously in Mexico in order to obtain the visa. The applicant is also inadmissible as he entered the United States as a nonimmigrant when he had the intention to continue residing permanently in the United States.

The AAO finds that the evidence submitted is sufficient 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.

Section 1104(c)(2)(B) of the LIFE Act states:

- (i) In General – The alien must establish that the alien entered the United States before January 1, 1982, and that he or she has resided continuously in the United States in an unlawful status since such date and through May 4, 1988. In determining whether an alien maintained continuous unlawful residence in the United States for purposes of this subparagraph, the regulations prescribed by the Attorney General

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Card and B1/B2 nonimmigrant visa issued on January 23, 1984 at the American Consulate, Matamoros, Mexico.

under section 245A(g) of the Immigration and Nationality Act (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

An applicant for permanent resident under section 1104 of the LIFE Act has the burden to establish by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States and is otherwise eligible for adjustment of status under this section. 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.12(e).

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.

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 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 record contains declarations from [REDACTED] and [REDACTED] who attest to the applicant’s inability to file an amnesty application. The record also contains declarations from [REDACTED] and [REDACTED] who attest to the applicant residing with them in 1988, and from 1985 to 1987, respectively.

The applicant provides declarations from [REDACTED] and [REDACTED] to establish his initial entry and residence in the United States during the requisite period. The affiants state that they have known the applicant since the 1980's. [REDACTED] states that the applicant was her tenant from June, 1981 to June, 1985, at [REDACTED]

The letter signed by [REDACTED] states that the applicant was employed from 1981 through January 18, 1983. [REDACTED] states in his declaration that the applicant worked for him as a laborer doing construction work from April, 1988 through May, 1990. [REDACTED] states in his declaration that he employed the applicant as a laborer for [REDACTED] from February, 1983 through March, 1988

The remaining evidence consists of pay stubs from [REDACTED] dated in October 5<sup>th</sup> and 12<sup>th</sup> 1985, and the applicant's Texas identification card issued December 15, 1981.

The contemporaneous documents submitted by the applicant are relevant, probative and credible. The affidavits are consistent with the applicant's claim of entry into and residences in the United States since June, 1981.

The information on the many supporting documents in the record is consistent with the applicant's testimony and with the claims made on his Form I-485 and I-687 applications. As stated in *Matter of E-M-*, 20 I&N Dec. at 80, when something is to be established by a preponderance of the evidence, the proof submitted by the applicant has to establish only that the asserted claim is probably true. That decision also states that, under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence. *Id.* at 79. The documents that have been furnished in this case may be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of residence in the United States for the requisite period.

The applicant has established by a preponderance of the evidence that he entered the United States before January 1, 1982 and maintained continuous, unlawful residence for the duration of the requisite period. Consequently, the applicant has overcome the particular basis of denial cited by the director.

The application will be remanded for further action by the director, however, as the evidence establishes that the applicant is inadmissible to the United States. Section 245A(a)(4)(A) of the Immigration & Nationality Act (the Act), 8 U.S.C. § 1255a(a)(4)(A), requires an alien to establish that he or she is admissible to the United States as an immigrant in order to be eligible for adjustment to permanent resident status under the LIFE Act.

The applicant obtained a Mexican Border Crossing Identification Card and B1/B2 nonimmigrant visa issued on January 23, 1984 at the American Consulate, Matamoros, Mexico. The applicant is inadmissible for fraud or misrepresentation in procuring the nonimmigrant visa, in that he misrepresented to the U.S. Consular officials that he resided continuously in Mexico in order to

obtain the visa. The applicant is also inadmissible as he entered the United States as a nonimmigrant when he had the intention to continue residing permanently in the United States.

An alien is inadmissible if he seeks through fraud or misrepresentation to procure an immigration benefit under the Act. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Thus, the applicant is inadmissible and ineligible for legalization benefits.

Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), the cited grounds of inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The AAO notes that the applicant has filed a Form I-690 Application for Waiver of Grounds of Excludability relating to the misrepresentation. The director denied the application, but did not provide the applicant with written reason for the denial and did not give the applicant the right to appeal the denial, as required by regulation. *See* 8 C.F.R. § 103.3(a)(1)(i) and 8 C.F.R. § 103.3(a)(1)(iii). The case will be remanded in order for the director to properly adjudicate the Form I-690. The director shall reopen the Form I-690 and provide the applicant with the opportunity to submit materials in support of the application. Should the director deny the Form I-690, he should provide the reason(s) for the denial and provide the applicant with appeal rights.

As the grounds of inadmissibility have not been waived, the application is hereby remanded to allow the director to adjudicate the pending Form I-690 in accordance with this decision.

**ORDER:** The director's decision is withdrawn and the case is remanded for the adjudication of the Form I-690 Application for Waiver of Grounds of Excludability and further action consistent with the decision.