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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



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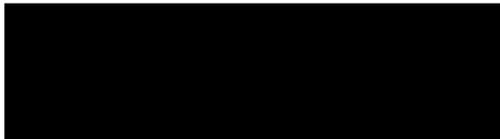
IN RE:

Applicant:



APPLICATION: Application for Temporary Resident Status under 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, or *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 of the Las Vegas office 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 (LULAC) Class Membership Worksheet. The director denied the application on the basis of reasons set forth in a Notice of Intent to Deny (NOID) the application, finding that there were inconsistencies between the applicant's testimony and the evidence in the record, regarding the dates of the applicant's absences from the United States during the requisite statutory period. Therefore, the director concluded that the applicant had not established that he resided continuously in the United States for the requisite period and was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements. However, the NOID was mailed to an incorrect address for the applicant.

On appeal, the applicant asserts that the evidence which he previously submitted establishes by a preponderance of the evidence that he continuously resided in the United States in an unlawful status for the duration of the requisite time period.¹ The applicant acknowledges that he received a copy of the NOID at an INFOPASS appointment on March 27, 2007. The applicant has not submitted any additional evidence on appeal.² The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.³

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).

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

¹ The AAO notes that the director erroneously instructed the applicant to submit a Form I-290B, Notice of Appeal, instead of a Form I-694, Notice of Appeal. The AAO accepts the applicant's appeal on a Form I-290B.

² The record reveals that the applicant's FOIA request, number [REDACTED] was processed on April 26, 2010.

³ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is filed 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.1(c)(1).

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 an "emergent reason". 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 has the burden of proving 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 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, 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).

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. *See* 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during

the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

Even if the director has some doubt as to the truth, if the applicant 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. 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. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA).

The record contains the applicant's passport number [REDACTED], which contains a visitor's visa obtained by the applicant on November 30, 1987 at the United States embassy in Nassau, and a New York entry stamp dated February 24, 1988, on pages 17 and 19 of the passport, respectively. Therefore, the evidence of record indicates that the applicant has one absence from the United States during the requisite period in excess of 45 days, from at least November 30, 1987 to February 24, 1988, an absence of 86 days.⁴

The applicant's absence from the United States from November 30, 1987 to February 24, 1988 is clearly a break in any period of continuous residence he may have established. On appeal, the applicant does not contend that there was an emergent reason why he could not return sooner. Since the applicant has not provided any evidence of an "emergent reason" for his failure to return to the United States in a timely manner, he has failed to establish by a preponderance of the evidence that he has 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.

Additional documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of witness statements. The AAO has reviewed each document in its entirety to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed.

⁴ The record does not reflect how long the applicant was absent from the United States before obtaining the visa in Nassau on November 30, 1987.

The applicant has submitted witness statements of [REDACTED] (the applicant's brother), [REDACTED]. The witness statements are general in nature and state that the witnesses have knowledge of the applicant's residence in the United States for all, or a portion of, the requisite period.

However, [REDACTED] during the requisite period and, therefore, did not have first-hand knowledge of the applicant's continuous residence in the United States during the requisite period. Therefore, these witness statements will be given no weight.

Although the remaining witnesses, [REDACTED] claim to have personal knowledge of the applicant's residence in the United States during the requisite period, the witness statements do not provide 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 in the United States during the requisite period. To be considered probative and credible, witness statements must do more than simply state that a witness 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 it probably did exist and that the witness, by virtue of that relationship, does have knowledge of the facts alleged. For instance, the witnesses do not state how they date their initial meeting with the applicant or specify social gatherings, other special occasions or social events when they saw and communicated with the applicant during the requisite period. The witnesses also do not state how frequently they had contact with the applicant during the requisite period. The witnesses do not provide sufficient details that would lend credence to their claimed knowledge of the applicant's residence in the United States during the requisite period. For these reasons the AAO finds that the witness statements do not indicate that their assertions are probably true.

The applicant has submitted an employment verification letter from [REDACTED] who states that the applicant worked for his import/export business in Miami, for one week to several weeks at a time, in 1982 through 1986. The witness states that the applicant's job duties were loading/unloading trucks, working in the receiving department and working in security surveillance.

The employment verification letter from [REDACTED] does not meet the requirements set forth in the regulations, which provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period of employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where records are located and whether the Service may have access to the records. If the records

are unavailable, an affidavit-form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F). The employment verification letter fails to comply with the above cited regulation because it lacks considerable detail regarding the applicant's employment. For instance, the witness does not state the applicant's daily duties, the number of hours or days he was employed, or the location at which he was employed. Furthermore, the witness does not state how he was able to date the applicant's employment. It is unclear whether he referred to his own recollection or any records he may have maintained. For these reasons, the employment verification letter is of little probative value.

The remaining evidence in the record is comprised of copies of the applicant's statements, the instant I-687 application, the applicant's initial I-687 application filed in 1991 to establish the applicant's CSS class membership, and an I-485 application to adjust to permanent resident status under the Legal Immigration Family Equity (LIFE) Act.

The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding the date of his initial entry into the United States, his absences from the United States during the requisite statutory period, and his residences and employment in the United States during the requisite period.

At the time of his interview on the instant I-687 application, the applicant stated that he first entered the United States in December 1981.

In the instant I-687 application, the applicant listed residences in the United States beginning in December 1981 in Miami as follows: from December 1981 to April 1982 at [REDACTED]

[REDACTED] The applicant listed employment in Miami beginning in 1982 as follows: from 1982 to 1987 self-employment assisting a [REDACTED] from 1982 to 1986 with [REDACTED]

[REDACTED] In the instant I-687 application, and at the time of his interview, the applicant listed 5 absences from the United States during the requisite period to travel to Turkey as follows: March 1984 for 7 days; August 1984 for 10 days; August to September 1985 for 21 days; May to June 1987 for 14 days; and, December 1987 to February 1988 for 60 days.

In a class member worksheet, filed contemporaneously with the initial I-687 application and dated October 29, 1991, the applicant states that he first entered the United States in November 1981. In the initial I-687 application, the applicant listed residences in the United States beginning in November 1981 in Florida as follows: from November 1981 to August 1987 at [REDACTED] from August 1987 through the end of the requisite period at [REDACTED] The applicant listed self-employment in Florida from November 1981 through the end of the requisite period. In the initial I-687 application the applicant listed 3 absences from the United States during

the requisite period to travel to Turkey as follows: August to September 1984; December 1985 to January 1986; and, January to February 1988.

The record reflects that at the time of his interview on the initial I-687 application, the applicant stated that his first entry into the United States was in 1984.

The record reflects that at a bond hearing on November 14, 1991, the applicant stated that he has been in the United States since 1984. The applicant stated that, although he signed the initial I-687 application with a date of 1981, that this was not correct.

In a statement dated May 31, 2002, the applicant lists his initial entry into the United States as December 2, 1981, and his absences from the United States as follows: March 2, 1984 to March 15, 1984; May 27, 1987 to June 5, 1987; July 9, 1987 to July 30, 1987; and, November 29, 1987 to December 9, 1987.

On March 27, 2007, the applicant received a copy of the NOID, in which the director of the Las Vegas office cited some of the aforementioned inconsistencies. The applicant has not offered any further evidence or legal argument in rebuttal to the NOID.

The applicant has failed to provide probative and credible evidence of his continuous residence in the United States for the duration of the requisite period. The inconsistencies regarding the dates the applicant first entered into or was absent from the United States, as well as when he resided and worked at a particular location in the United States, are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States during the requisite period. No evidence of record resolves these inconsistencies. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence pointing to where the truth lies. 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. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA). These contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

As stated previously, to meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony, and the sufficiency of all the evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6). The applicant has failed to provide probative and credible evidence of his continuous residence in the United States for the duration of the requisite period. The applicant's evidence lacks sufficient detail, and there are material inconsistencies in the record.

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. The various statements currently in the record which attempt to substantiate the applicant's residence and employment in the United States during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

The AAO notes that on March 1, 1996, the applicant was charged with one count of violating section 784.021(1)(a) of the Florida State Statutes (FSS), *Aggravated Assault with a Dangerous Weapon (Automobile)*. On May 29, 1996, the charge having been reduced to a violation of section 316.1935(1)(FSS), *Fleeing or Attempting to Elude a Law Enforcement Officer*, applicant pleaded not guilty to the charge and the case was dismissed. (Dade County Court, Traffic Division, case [REDACTED]) In addition, on May 29, 2003, the applicant was charged with a violation of section 796.07(2)(b)(FSS), *Offering to Procure Another for Prostitution*. On August 15, 2003, the applicant pleaded *nolo contendere* to the charge, and adjudication was withheld. On May 25, 2005, the applicant's motion to vacate the sentence was granted. The AAO notes that a conviction for solicitation of prostitution is a potential crime involving moral turpitude (CIMT). The final disposition of this matter is unclear.

The AAO also notes that on October 29, 1991, deportation proceedings were instituted against the applicant based upon the applicant being inadmissible to the United States and excludable as an immigrant without an immigrant visa. See Section 212(a)(7)(A)(i)(I) of the Act. On November 17, 1992, an immigration judge ordered that the deportation proceedings be terminated.

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*. 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.