

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

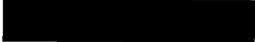


L1

DATE: DEC 06 2011

OFFICE: NEW YORK

FILE: 

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. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On November 7, 2005, the applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act). On January 9, 2007, the director of the New York office erroneously denied the I-687 application, finding that the applicant abandoned the application, pursuant to 8 C.F.R. § 103.2(b)(13), by failing to appear for scheduled interviews on April 26, 2006, and on October 19, 2006.¹ Because the director erred in denying the application based on abandonment, on September 29, 2010, the director of the National Benefits Center issued a notice advising the applicant of the right to appeal the decision to the Administrative Appeals Office (AAO).

On December 19, 2010, the applicant submitted a Form I-694, Notice of Appeal of Decision Under Section 210 or 245A. On October 31, 2011, the AAO issued the applicant a Notice of Intent to Deny (NOID) and provided the applicant 21 days in which to respond or to provide additional evidence in support of her claim. In response, the applicant submitted additional evidence in support of her claim. The director's decision will be withdrawn and the AAO will consider the applicant's claim *de novo*, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6).²

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

¹ On December 14, 2009, the United States District Court for the Eastern District of California ruled that United States Citizenship and Immigration Services (USCIS) may not apply its abandonment regulation, 8 C.F.R. § 103.2(b)(13), in adjudicating legalization applications filed by CSS class members. See, *CSS v. Michael Chertoff*, Case 2:86-cv-01343-LKK-JFM.

² 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).

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.

The issue in this proceeding is whether the applicant established she: (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. The evidence submitted in support of the applicant's claim to have arrived in the United States before January 1982 and to have resided in an unlawful status during the requisite period consists of attestations from four individuals claiming to know the applicant during the requisite period. The AAO has reviewed the document to determine the applicant's eligibility.

The affidavits from [REDACTED] and [REDACTED] are general in nature and state that the applicant resided in the United States for all, or a portion, of the requisite period. The statements do not provide concrete information, specific to the applicant and generated by the asserted associations with the applicant, which would reflect and corroborate the extent of those associations, and demonstrate that the affiants have a sufficient basis for reliable knowledge about the applicant's residence in the United States during the requisite period. The statements 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 affidavits have minimal probative value as evidence in support of the applicant's claim.

The declaration from [REDACTED] states that the applicant has been attending the temple for many years. However, the declaration fails to provide specific dates. The declaration does not conform to regulatory standards for letters from organizations as stated in the regulation at 8 C.F.R. § 245a.2(d)(3)(v). The declaration fails to show inclusive dates of membership, state the address where the applicant resided during membership period, establish how the author knows the applicant, and establish the origin of the information being attested to. It is also noted that in the applicant's Form I-687, at Question #31, where asked to list all affiliations or associations, clubs, organizations, churches, unions, businesses, etc. to which the applicant belongs or has belonged to, the applicant failed to list the above organization. For these reasons, the declaration provides minimal probative value as evidence in support of the applicant's claim.

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, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The applicant was given an opportunity to attempt to resolve this discrepancy. In response to the AAO's NOID, the applicant submitted a declaration from [REDACTED] chairman of the [REDACTED]. The declaration does not conform to regulatory standards for letters from organizations as stated in the regulation at 8 C.F.R. § 245a.2(d)(3)(v). The declaration fails to state the address where the applicant resided during membership period, establish how the author knows the applicant, and establish the origin of the information being attested to. As previously noted, in the applicant's Form I-687, at Question #31, where asked to list all affiliations or associations, clubs, organizations, churches, unions, businesses, etc. to which the applicant belongs or has belonged to, the applicant failed to list this organization as well. No explanation was provided for the omission of this organization or the Sikh Cultural Society, Inc. For these reasons, this declaration provides minimal probative value as evidence in support of the applicant's claim. The AAO finds that the applicant has failed to overcome the grounds for denial as stated in the NOID.

As stated in the NOID, the record reflects that the applicant did not reside continuously in the United States during the requisite period. In the applicant's Form I-687, at Question #32, where asked to list absences from the United States since entry, the applicant stated that she travelled to Mexico from March 1983 through July 1983, an absence of at least 92 days. 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). Here, the applicant's absence interrupted her claimed continuous residence in the United States. There is no evidence in the record that her return could not be accomplished due to emergent reasons. The applicant failed to address this issue in response to the AAO's NOID.

It is noted that, in response to the AAO's NOID, the applicant submitted additional evidence, such as a declaration, birth certificate and school records. The documentation indicates that the applicant resided in the United States after the requisite period. As the evidence is not probative of residence during the requisite time period, it shall not be discussed.

Upon a *de novo* review of all of the evidence in the record, the AAO finds that the applicant has not established that she is eligible for the benefit sought.

Based upon the foregoing, the AAO finds that the applicant has failed to establish by a preponderance of the evidence that she continuously resided in an unlawful status in the United States from before January 1, 1982 through 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.