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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**



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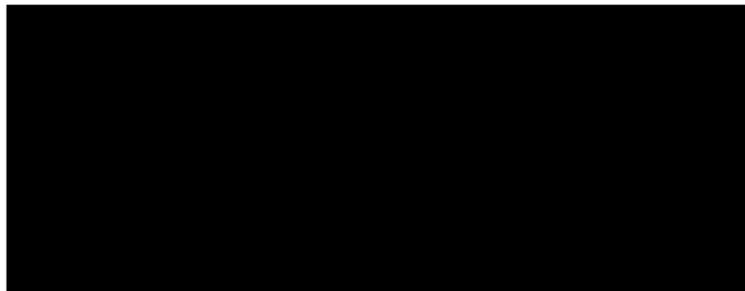
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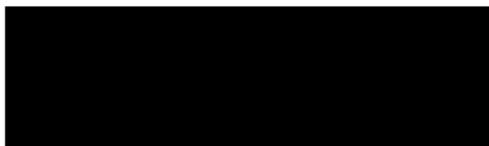
Applicant:



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

On September 14, 2007, the director 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 a scheduled interview on September 12, 2007.¹ Because the director erred in denying the application based on abandonment, on September 29, 2010, the director issued a notice advising the applicant of her right to appeal the decision to the AAO. On August 1, 2011, the AAO withdrew the director's decision. The matter is now before the AAO on appeal.

On August 1, 2011, the AAO sent the applicant a notice of intent to deny (NOID) the I-687 application, and requested that the applicant provide additional evidence. Specifically, the applicant was asked to provide evidence that she entered the United States before January 1, 1982, and that she continuously resided in the United States in an unlawful status since such date for the duration of the requisite period. In addition, the NOID noted that the applicant's testimony indicates that she may have had one or more absences from the United States that exceeded 45 days, and/or her absences from the United States during the requisite period may have exceeded 180 days in the aggregate. The NOID noted that the applicant had not asserted that any emergent reason prevented her timely return to the United States at the time of these absences, nor had the applicant submitted any evidence in support of an emergent reason preventing her. The NOID noted that to meet her burden of proof, the applicant must provide evidence of eligibility apart from her own testimony.

In response to the AAO's request, the applicant has submitted additional witness statements and documents.² The applicant also requested, and was granted, an additional 30 days to submit further evidence on appeal. Counsel has not submitted any further evidence on appeal.³ The

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 Some of the documents that the applicant has submitted in response to the AAO's request are dated after the requisite statutory period. However, because evidence of residence after May 4, 1988 is not probative of residence during the requisite period, these additional documents shall not be discussed.

³ Also on appeal, the applicant alleges ineffective assistance of prior counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if

AAO has 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.⁴

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 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).

not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The applicant has not submitted any of the required documentation to support an appeal based on ineffective assistance of counsel. Furthermore, United States Citizenship and Immigration Services (USCIS) is not responsible for the action, or inaction, of the applicant's counsel.

⁴ 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).

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 issue in this proceeding is whether the applicant has established that she (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status throughout the requisite period. The documentation that the applicant submits in support of her 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 and documents. The AAO has reviewed each document in its entirety to determine the applicant's eligibility. 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 period, it shall not be discussed.

The record contains witness statements from [REDACTED] (the applicant's uncle), [REDACTED] and [REDACTED]. The 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.

Although the witnesses 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 her, 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 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 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, or where she resided during that 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.

On appeal, the applicant has submitted the witness statement of [REDACTED], who states that he met the applicant in the United States in January 1982, and was subsequently visited by her in Tulsa, Oklahoma on several occasions from 1982 to 1984, and in 1986. The witness also states that he visited the applicant in Dallas in 1988. The testimony of the witness is some evidence in support of the applicant's presence in the United States for some part of 1982 to 1984, 1986 and 1988.

The applicant submitted a copy of a receipt dated October 21, 1980, for a savings deposit withdrawal from a bank in Maryland. She also submitted a copy of a receipt dated December 27, 1980 from a store in Maryland. However, these receipts fail to provide any information that would serve to link them to the applicant, such as her name and address. Therefore these documents will be given no weight.

The record contains a copy of a stamped envelope with a postmark dated August 5, 1981, mailed to the applicant at a post office box in Tulsa, Oklahoma. However, in the I-687 application, the applicant did not list a residence address in Oklahoma during the requisite period. Due to this inconsistency, this document will be given no weight.

The applicant submitted a copy of a telephone bill dated October 13, 1983. However, since this bill fails to provide any information that would serve to link it to the applicant, such as her name and address, this document will be given no weight.

The record contains three photographs of the applicant dated 1981. However, since the locations depicted in the photographs cannot be identified, the photographs are not evidence in support of the applicant's continuous residence in the United States throughout the requisite period.

On appeal, the applicant submitted a copy of an Alitalia Airline itinerary and airline ticket issued December 10, 1980. This document is some evidence of the applicant's presence in the United States for some part of 1980.

The applicant has submitted, on appeal, a copy of passport number 1075407, issued to the applicant in Lagos on August 25, 1982. However, at the time of completing the I-687 application, and in her statement on appeal, the applicant failed to list any absences from the United States in August 1982. In addition, page seven of the passport appears to contain a New York entry stamp dated November 26, 1982, a New York entry stamp dated July 24, 1983, and a B-2 nonimmigrant visitor's visa issued to the applicant in Lagos in November 1983. However, at the time of completing the I-687 application, and in her statement on appeal, the applicant failed to list any absences from the United States in November 1982 or in 1983. These documents are some evidence in support of the applicant's presence in the United States for some part of 1982 and 1983.

The applicant has also submitted, on appeal, a copy of a 1985 pay stub and a 1985 Form W-2 from Phillips Petroleum in Oklahoma. However, at the time of completing the I-687 application, the applicant failed to list this company as an employer during the requisite period. Due to these inconsistencies, these documents have minimal probative value.

Page six of the applicant's Nigerian passport number 1075407, submitted on appeal, contains a United States entry stamp dated October 1986. This document is some evidence in support of the applicant's presence in the United States for some part of 1986.

On appeal the applicant has submitted a copy of her marriage certificate, showing that she was married in Texas on February 23, 1987. This document is some evidence in support of the applicant's residence in the United States for some part of 1987.

On appeal the applicant has submitted a copy of a 1988 Form W-2 from Kelly Services, Inc. However, at the time of completing the I-687 application, the applicant failed to list this company as an employer during the requisite period. Due to this inconsistency, this document has minimal probative value. The applicant has also submitted several blank Bank of America deposit slips regarding a bank account which she states was opened in March 1988. However, the deposit slips list addresses for the applicant on [REDACTED], respectively, and the applicant does not list these addresses as residences during the requisite statutory period. Due to these inconsistencies, these documents have minimal probative value.

While some of the above documents indicate that the applicant resided in the United States for some part of the requisite period, considered individually and together with other evidence of record, they do not establish the applicant's continuous residence for the duration of the requisite period.

The remaining evidence in the record is comprised of the applicant's statement on appeal and the I-687 application, signed by the applicant on November 30, 2005. The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding the dates she resided and worked at particular locations in the United States, as well as the dates of her absences from the United States during the requisite statutory period. In addition, counsel's assertion that prior counsel is responsible for any erroneous information on the I-687 application is not persuasive, since the applicant signed the I-687 application, certifying that the information contained therein is true and correct.

At the time of filing the I-687 application, the applicant listed one residence on Timber Glen Drive in Dallas from November 1980 through the end of the requisite period. The applicant listed employment in Dallas from December 1980 to November 1987 as a cashier at a McDonald's, and from January 1988 through the end of the requisite period as a cashier at a Showbiz Pizza. The applicant also listed five absences from the United States during the requisite period as follows: from February to March 1982; from July to August 1984; from May to June 1986; from September to October 1986; and in November 1987. The NOID noted that the applicant's testimony indicates that she may have had one or more absences from the United States that exceeded 45 days, and/or her absences from the United States during the requisite period may have exceeded 180 days in the aggregate. The applicant did not assert that any emergent reason prevented her timely return to the United States at the time of these absences.

In a statement on appeal, the applicant listed residences in the United States as follows: from January to March 1981 in Oklahoma City; from March 1981 to December 1982 in Tulsa; from January to August 1983 in Oklahoma City; for six months in Arlington, Texas; from 1984 to 1985 in Tulsa; from October to December 1986 in Carrollton, Texas; from January to April 1987 in Fort Worth, Texas; from April to November 1987 in Arlington, Texas; and, from December 1987 through the end of the requisite period in Arlington and Carrollton, Texas. The applicant listed employment as follows: in March 1981 babysitting at [REDACTED] in April 1981 as a cashier at Phillips 66 gas station, although the applicant did not list the location of her employment; and, from February to August 1983 as a cashier at [REDACTED] station, although the applicant did not list the location of her employment. The applicant listed two absences from the United States during the requisite period, from May to June 1986, and from August to October 1986, for a period of approximately 90 days to visit her sick father.⁵

⁵ According to this version of the applicant's testimony, she was outside the United States for 90 days during the requisite statutory period, and is thus ineligible for the benefit. An applicant may not have been absent for more than 45 days in a single period in order to maintain her continuous residence, unless she establishes that her prolonged absence was due to an emergent reason. C.F.R. § 245a.2(h). On appeal, the applicant has not submitted any evidence in support of an emergent reason preventing her timely return. As noted above, to meet her burden of proof, the applicant must provide evidence of eligibility apart from her own testimony.

The applicant has failed to provide probative and credible evidence of her continuous residence in the United States for the duration of the requisite period. The inconsistencies regarding the dates the applicant resided and worked at particular locations in the United States, as well as the dates of her absences from the United States during the requisite statutory period are material to her claim, in that they have a direct bearing on her 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.

Upon a *de novo* review of all of the evidence in the record, the AAO finds that the evidence submitted by the applicant has not established that she is eligible for the benefit sought. The various statements currently in the record which attempt to substantiate the applicant's residence 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 she maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

The record reveals that on April 24, 1989, deportation proceedings were initiated against the applicant. On January 8, 1990, an immigration judge ordered that the applicant be deported from the United States pursuant to section 241(a)(2) of the Immigration and Nationality Act (Act), based upon the applicant having entered the United States without inspection.⁶ On March 23, 1990, the applicant's motion to reopen proceedings was denied. On September 27, 1994, an administrative final removal order was entered against the applicant. The record of the applicant's deportation proceedings can be found in administrative file, or A-file, number A26 714 423. Although this ground of inadmissibility is waivable, even if the applicant were to be granted a waiver she remains ineligible for failure to establish her continuous unlawful residence.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that she 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.

⁶ In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). The former section 241 of the Act was re-designated as section 237 by section 305(a)(2) of IIRAIRA.