

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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**

[REDACTED]

L1

DATE: JUL 23 2012

OFFICE: HOUSTON

FILE: [REDACTED]

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Houston office terminated the temporary resident status of the applicant, finding the applicant failed to establish his eligibility for temporary resident status. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO’s *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.

On April 5, 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 October 27, 2005, the application was approved. On June 10, 2007, the applicant submitted a Form I-698, Application to Adjust Status from Temporary to Permanent Resident. On February 9, 2012, the director terminated the applicant’s temporary resident status pursuant to 8 C.F.R. § 245a.2(u), finding the applicant failed to establish by a preponderance of the evidence that he entered the United States prior to January 1, 1982 and resided in a continuous unlawful status until he filed for legalization.

On appeal, counsel, on behalf of the applicant, asserts that the director erred by terminating the applicant’s temporary resident status. Counsel contends that the applicant submitted numerous affidavits and other documents in support of his claim and has met his burden of proof beyond a doubt. 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).¹

The regulations at 8 C.F.R. § 245a.2(u) states:

The temporary resident status may be terminated upon the occurrence of any of the following:

- (i) It is determined that the alien was ineligible for temporary residence under section 245A of this Act;
- (ii) The alien commits an act which renders him or her inadmissible as an immigrant, unless a waiver is secured pursuant to § 245a.2(k)(2).
- (iii) The alien is convicted of any felony, or three or more misdemeanors;

¹ 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).

- (iv) The alien fails to file for adjustment of status from temporary resident to permanent resident on Form I-698 within forty-three (43) months of the date he/she was granted status as a temporary resident under § 245a.1 of this part.

The director terminated the applicant's temporary resident status, finding that he applicant failed to establish by a preponderance of the evidence that he entered the United States prior to January 1, 1982 and resided in a continuous unlawful status until he filed for legalization.

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 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 issue in this proceeding is whether the applicant has established that he has continuously resided in the United States throughout the requisite period. The evidence submitted in support of the applicant's claim consists of affidavits from witnesses claiming to know the applicant during the period in question, two employment letters, the applicant's own affidavit/testimony, postmarked envelopes, and pay stubs. The AAO has reviewed the evidence to determine the applicant's eligibility.

The declarations/affidavits from [REDACTED]

[REDACTED] are general in nature and state that they have known the applicant in the United States for all, or a portion, of the requisite period. The affiant fails to 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 the affiants have a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the statement. For example, the affidavits from [REDACTED] and [REDACTED] state that to their knowledge the applicant has continuously resided in the United States since 1961 and that their families have had a close relationship; however, they fail to provide additional details regarding the circumstances of the applicant's residence during the requisite period, including the applicant's address(es) of residence, employment, absences from the United States, etc. Lacking specific details, the affidavit shall be afforded little weight as evidence in support of the applicant's claim.

The record contains two employment letters, which reflect that the applicant was employed in the United States prior to and in 1983 and for about one month in April 1985. The declarations do not conform to regulatory standards for letters from employers as stated in the regulation at 8 C.F.R. § 245a.2(d)(3)(i). The employment letters fail to provide the applicant's address at the time of employment, 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. Lacking relevant details, the declarations will be given minimal weight as evidence in support of the applicant's claim.

In the Notice of Termination (NOT), the director noted that applicant's testimony in the record contained numerous discrepancies regarding his absences from the United States. The record contains two Forms I-687 signed by the applicant on November 6, 1990 and on March 2, 2005. On the first Form I-687, the applicant indicated that he was absent from the United States for one month from July 1987 to August 1987 due to a family emergency in Mexico; whereas, in the second Form I-687, he indicated two absences to Mexico to visit family in July 1987 for three months and in 1985 for 2 months. Moreover, during his interview on July 5, 2005, the record reflects the applicant stated that he left the United States in January 1985 and lived continuously in Mexico until 1987. The applicant's statements are inconsistent and seriously detract from the credibility of his claim.

In an attempt to reconcile the discrepancy, the applicant submitted his own affidavit, stating "I do not recall ever saying that I lived continuously in Mexico from 1985 to 1987. I was in Mexico when my daughter was born but did not live there for three years." Counsel indicated that the applicant was an older man and thus he has forgotten many dates due to his age. However, counsel also submitted a psychological exam indicating the applicant is well oriented to time, person and place. In his own affidavit, dated September 27, 2010, the applicant stated that his only departure from the United States since 1982 was in 1986 for one month for the birth of his daughter. On appeal, counsel fails to address the director's statement that the applicant was younger during previous interviews/testimonies but he did not remember he was in Mexico for the birth of his child during those interviews. However, in light of counsel's assertion that the applicant is "an older man and thus he has forgotten many dates due to his age," he recants his previous testimonies and claims to have only one absence in 1986.

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 AAO finds that the applicant has failed to reconcile the discrepancies and, therefore, his testimony lacks credibility regarding the number and length of his absences from the United States. Overall, the evidence in the record regarding the applicant's absence(s) is insufficient to establish his claim of continuous residence during the requisite period.

The record contains letters postmarked in March and May 1985 with the applicant's name and address. This evidence will be given some weight.

The record also contains two pay stubs dated in June and July 1986 with no names indicated on the stubs. Lacking specific details linking the pay stubs to the applicant, these documents provide no probative value as evidence in support of the applicant's claim.

Based on the totality of the evidence, the record establishes the applicant's presence and residence in the United States for portions of the requisite period, specifically prior to May 1985. However, the record fails to establish his continuous residence in the United States from June 1985 through 1987. Given this, the applicant has not met his burden of proof to establish his claim.

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. Accordingly, the AAO affirms the director's decision to terminate the applicant's temporary resident status, finding that the applicant is ineligible for adjustment from temporary to permanent resident status under section 245A of the Act.

Beyond the director's decision, the record reflects that the applicant was placed in deportation proceedings on multiple occasions in 1961, 1962, 1963, and 1968. The record reflects that the applicant was granted voluntary departure on three occasions.

ORDER: The appeal is dismissed.