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



U.S. Citizenship
and Immigration
Services



Date: **MAY 21 2013**

Office: SEATTLE

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:

SELF-REPRESENTED

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.



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the Northwest Immigrant Rights Project (NWIRP) Settlement Agreements was denied by the director of the Seattle office. The decision 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, NWIRP Class Membership Worksheet. The director determined that the applicant had not established by a preponderance of the evidence that he entered the United States as a nonimmigrant prior to January 1, 1982, and that his authorized stay expired before such date or that he violated the terms of his nonimmigrant status in a manner known to the Government as of January 1, 1982. Further, the director found that the applicant had not established by a preponderance of the evidence that he entered the United States before January 1, 1982 and continuously resided in the United States in an unlawful status for the duration of the requisite period. Therefore, the director denied the application, finding that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

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 period. On appeal, the applicant submitted a copy of one additional envelope. The remaining documents submitted on appeal have previously been submitted into the record.¹ 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.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 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).

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 timely file during the original legalization application period of May 5, 1987 to May 4, 1988.

¹The AAO notes that the applicant's FOIA request, number [REDACTED] was processed on March 25, 2013.

²The 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).

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 (1) entered the United States before January 1, 1982 in nonimmigrant status and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The 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 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 time period, it shall not be discussed.

In the instant I-687 application, in a Form I-687 Supplement, NWIRP Class Membership Worksheet signed by the applicant and dated November 10, 2005, and in a "Declaration Letter" dated November 1, 2009, the applicant stated that he initially entered the United States with a B-2 nonimmigrant visitor's visa in 1976, but he offered no evidence in support of his assertion. The applicant has submitted statements from the following witnesses:

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 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. For instance, merely provide their contact information and state the year when they met the applicant. states that he and the applicant lived together in India, that he and the applicant arrived in the United States in 1974 and 1976, respectively, that the applicant has lived continuously in the U.S. since 1976 and that he and the applicant have met several times in the United States. states that he was in regular contact with the applicant in California during the period of time from January to May 1986, during which time he states the applicant worked as a farm laborer.

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 example, the witnesses do not state how they date their initial meeting with the applicant in the United States, or where he resided at that time. In addition, 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. 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.

In addition, [REDACTED] states that he first met the applicant in 1982, and that the applicant paid the witness rent to live in his house on [REDACTED] in Fremont from 1982 to 1984. However, the testimony of the witness is inconsistent with the testimony of the applicant in the instant I-687 and in the initial I-687 application filed in 2005, in which the applicant indicates he began residing on [REDACTED] in February 1978. Due to this inconsistency, the testimony of this witness has minimal probative value.

The applicant has submitted employment verification letters from [REDACTED] Fresno, California and [REDACTED] the owner of [REDACTED] San Leandro, California. [REDACTED] states that the applicant worked for him as a seasonal agricultural worker from January 22, 1986 to May 1, 1986, during which time he states the applicant was residing on [REDACTED] in Selma, California. In two letters [REDACTED] states the applicant worked as a manager for [REDACTED] from September 23, 1987 through at least October 1988, the dates of the letters.

The employment verification letters of [REDACTED] do 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 letters fail to comply with the above cited regulation because they lack considerable detail regarding the applicant's employment. For instance, [REDACTED] does not state the applicant's daily duties or the applicant's address at the time of employment. In addition, [REDACTED] 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, and where any records would be located. Further [REDACTED] does not state whether the Service may have access to the employment records he has maintained. Lacking relevant information, the letters regarding the applicant's employment fail to provide sufficient detail to verify the applicant's claim of continuous residence in the United States for the duration of the requisite statutory period. For these reasons, the employment verification letters are of little probative value.

The applicant submitted a letter dated December 29, 1990 from a representative of [REDACTED] Sun Valley Center Branch in Concord, California stating that the applicant became a customer of the bank in 1976. The applicant also submitted a letter dated June 16, 1987 from a representative of [REDACTED] Sun Valley Center Branch stating that the applicant opened his savings account with the branch in March 1986.

The record contains the applicant's California identification card and driver's license, dated February 11, 1986 and February 19, 1986, respectively, which indicated the applicant's residence address was [REDACTED] in Antioch, California. The record also contains a copy of police report dated March 10, 1986 from the Antioch, California police department, in which the applicant reported a theft of property in February 1986 in California. The police report indicated the applicant's address was [REDACTED] in Dublin. However, in the instant I-687 application, and in the initial I-687 application filed in 2005, the applicant failed to list a residence address on either [REDACTED] during the requisite period. The record also contains a copy of a paystub from a [REDACTED] Restaurant in Pleasant Hill, California for the pay period ending May 30, 1986. However, in the instant I-687 application the applicant indicates that he did not begin working for [REDACTED] until September 1986. There are inconsistencies as to when and where the applicant lived and worked during the requisite period.

The record contains a copy of the applicant's marriage certificate, showing that the applicant was married on February 22, 1986 in [REDACTED] Nevada. The record also contains copies of two postmarked, stamped envelopes dated February 20, 1986 and April 15, 1986, respectively, sent to the applicant on [REDACTED] in Selma, California. The record further contains a copy of an Indian passport, number [REDACTED], issued to the applicant in San Francisco on October 13, 1986. These documents are some evidence in support of the applicant's residence in California for some part of 1986.

The applicant submitted a copy of a paystub from [REDACTED] for the period from January 12, 1987 to January 25, 1987. This document is some evidence in support of the applicant's residence in the United States in January 1987. The record contains a copy of a rent receipt from [REDACTED] in Concord, California dated August 4, 1987 for "Apartment [REDACTED] August to September." However, in the instant I-687 application the applicant lists his residence address from April to December 1987 as being on [REDACTED] in San Francisco.

The record contains copies of bank account statements from [REDACTED] Sun Valley Center Branch in Concord, California for January, February and April, 1988. The January 1988 bank statement indicates that the applicant's address is [REDACTED] in Concord, California. However, in the instant I-687 application the applicant indicates that he resided at that address from December 1986 to April 1987. In addition, the record contains an insurance identification card from [REDACTED] dated February 19, 1988.

While the documents listed above indicate that the applicant resided in the United States from February 1986 through the end 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 copies of the applicant's statements, the instant I-687 application, the initial I-687 application filed in 2005 and a Form I-589, application for asylum, signed by the applicant on June 16, 1986, and again on June 20, 1986. The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from

the applicant regarding the date and manner in which he first entered the United States during the requisite statutory period, the dates that he resided and worked at particular locations in the United States and the dates of his absences from the United States during the requisite period.

In the instant I-687 application, in a Form I-687 Supplement, NWIRP Class Membership Worksheet, signed by the applicant and dated November 10, 2005, and in a "Declaration Letter" dated November 1, 2009, the applicant stated that he initially entered the United States at San Francisco with a nonimmigrant visitor's visa on January 1, 1976. The applicant listed residences in California during the requisite period as follows: January 1976 to February 1978 on [REDACTED] in Concord; February 1978 to January 1984 on [REDACTED] in Fremont; January 1984 to June 1986 on [REDACTED] Selma; June 1986 to April 1987 on [REDACTED] in Concord; April to December 1987 on [REDACTED] in San Francisco; and January 1988 through the end of the requisite period on [REDACTED] in San Leandro. The applicant listed employment in California during the requisite period as follows: January 1976 to June 1986 doing farming, general labor and landscaping at various farms; from September to October 1986 as a pizza maker at [REDACTED] in Pleasant Hill; August 1987 to September 1987 as a manager at [REDACTED] in Pleasant Hills; and from September 1987 through the end of the requisite period as a manager at [REDACTED] Pizza Restaurant in San Leandro. The applicant listed absences from the U.S. during the requisite period as follows: June to August 1984 to visit friends in India; September to October 1985 to visit friends in Germany; December 1985 to January 1986 to visit friends in India; August to September 1987 to visit friends in Canada; and September 1987 to visit parents in Canada.

In the initial I-687 application signed by the applicant and dated May 7, 2005, the applicant indicated he was applying for temporary resident status as an alien who illegally entered the U.S. prior to January 1, 1982. The applicant listed residences in California during the requisite period as follows: February 1978 to January 1984 on [REDACTED] in Fremont; January to June 1986 on [REDACTED], Selma; June 1986 to April 1987 on [REDACTED] in Concord; April to December 1987 on [REDACTED] in San Francisco; and January 1988 through the end of the requisite period on [REDACTED] in San Leandro. The applicant listed employment in California during the requisite period as follows: 1976 to 1983 and January to June 1986 doing general labor and landscaping at various farms; from June to October 1986 as a pizza maker at [REDACTED] in Pleasant Hill; and August 1986 to September 1987 as a pizza maker at [REDACTED] in Pleasant Hill; and from September 1987 through the end of the requisite period as a manager at [REDACTED] in San Leandro. The applicant listed absences from the U.S. during the requisite period as follows: January 1984 to September 1985 to India³; May to July 1987 to Canada; and September 1987 to Canada.

³ On October 27, 2005, at the time of the interview on the initial I-687 application, the applicant amended the application to reflect the date of his absence from the United States to be from January 1984 to December 1985. Although the applicant has not produced copies of any passport with which he traveled during the requisite period, according to this version of the applicant's testimony, he had an absence from the United States of at least 670 days during the requisite 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 his continuous residence, unless he establishes that his prolonged absence was due to an emergent reason. 8 C.F.R. § 245a.2(h). "Emergent reasons" has been defined as "coming

The record contains a copy of Indian passport number [REDACTED], issued to the applicant on October 21, 1985 at Frankfurt, Germany. That passport indicates that the applicant previously travelled on Indian passport number [REDACTED] issued to the applicant at Frankfurt on October 4th, 1982, reported as lost. This document is inconsistent with the applicant's statements in the instant I-687 application, and the initial I-687 application filed in 2005, in which the applicant failed to list any absences from the U.S. in 1982.

In the Form I-589, application for asylum, filed by the applicant in 1986, the applicant indicated that he entered the United States without inspection on foot from Mexico on January 21, 1986. In a Form G-325A, biographic information sheet, signed by the applicant and dated June 16, 1986, and filed contemporaneously with the Form I-589, the applicant lists his residences as follows: from birth to September 1985 in India; from September 1985 to November 1985 in Frankfurt, Germany; from November 1985 to January 21, 1986 in India; from January 1986 to April 1986 on Gentry Town in Antioch, California; from May 1986 to June 1986, the date of the Form G-325A, on [REDACTED] in Concord, California. The record also contains a transcript of the applicant's sworn testimony at a deportation hearing conducted on June 2, 2003 in Seattle, Washington, at which the applicant testified on cross-examination that he was deported from Germany back to India, where he obtained a visa to travel to Mexico. He then entered the United States illegally from Mexico. (See June 2, 2003 Transcript of Hearing, pp 44-45.)

In a Form EOIR-40, application for suspension of deportation, at numbers 17, 19, 20, 21 and 24, the form states that the applicant first entered the United States without inspection at Calexico, California on January 21, 1986.⁴

unexpectedly into being." *Matter of C*, 19 I&N Dec. 808 (Comm. 1988). The applicant's admitted absence from the United States for a period of at least 670 days is clearly a break in any period of continuous residence he may have established.

In rebuttal to the notice of intent to deny (NOID) the initial I-687 application, the applicant stated he had to go to India from January 1984 to December 1985 "because my mother had become disabled from a stroke. . . During that time I was also arrested by the Punjab Police for political reasons. I was in jail for 59 days. These are two emergent reasons for my longer stay in India." First, the applicant has not submitted any medical reports from doctors that may have treated his mother, or other persons who can attest to his mother's illness. As noted above, to meet his burden of proof the applicant must provide evidence of eligibility apart from his own testimony, and in this case he has failed to do so. Second, the applicant has not submitted evidence in support of his contention that his mother's disability, if proven, was an emergent reason that prevented his timely return to the U.S. By his own admission, the applicant knew of his mother's condition before leaving the United States. Therefore, his mother's disability was not an emergent reason that prevented the applicant's timely return to the United States. Third, in the Form I-589, application for asylum, at number 38 the applicant indicates that his 59-day period of incarceration began on June 5, 1984. The applicant has not explained why he was unable to return to the U.S. in a timely manner prior to that date. Since the applicant has not established that an "emergent reason" prevented his 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*. Therefore, according to this version of the applicant's testimony, the applicant is ineligible for temporary resident status under section 245A of the Act on this basis.

⁴ The Form EOIR-40 is not signed or dated. The Immigration Judge heard the application and denied it on June 2, 2003.

In a declaration in support of a motion to reopen deportation proceedings, signed by the applicant and dated December 21, 2009, the applicant stated "I first entered the United States in January 1986 . . . I left the United States on one occasion . . . and was only outside the country for 1 month. I went to visit my parents who were very ill."

In the applicant's "Declaration Letter" dated November 1, 2009, the applicant offered an explanation for inconsistencies in his testimony regarding the dates he resided at particular locations in the U.S., stating "In reference to address's (sic) listed on some of my documents I can only explain that during the early years of living in this country I was living in temporary locations, using friends (sic) address to have as a mailing address." In a letter in rebuttal to the NOID, dated December 29, 2006, the applicant stated that some documents in the record contain his wife's address on [REDACTED] which the applicant states he used "when I was residing and working at [REDACTED] in Selma, California." However, the applicant does not explain at what specific locations he resided for the duration of the requisite period. In addition, the applicant has not provided a reasonable explanation for the remaining inconsistencies in the record regarding the date and manner in which he first entered the United States, the dates that he worked at particular locations in the United States, and the dates of his absences from the United States during the requisite period.

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 in the record regarding the date and manner in which he first entered the United States during the requisite statutory period, the dates that he resided and worked at particular locations in the United States, and the dates of his absences from the United States during the requisite period 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.

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.

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.

The record reflects that the applicant was arrested on April 11, 2001 for a violation of the Seattle Municipal Code, section 12A.06.010, *assault*. On April 12, 2001, the applicant pleaded not guilty to the charge. On May 13, 2003, the case was dismissed with prejudice. (State of Washington, County of King, case number 400934)

The AAO notes that deportation proceedings were initiated against the applicant on December 11, 1986 pursuant to section 241(a)(2) of the Immigration and Nationality Act (Act), based upon the applicant having entered the United States without inspection at Calexico, California on January 21, 1986.⁵ On June 2, 2003, the Immigration Judge ordered the applicant to be deported should he not voluntarily depart by August 2, 2003, which date was subsequently extended to September 24, 2004 by the Board of Immigration Appeals (BIA). On February 28, 2013 the motion to reopen BIA jurisdiction was denied.

Based upon the forgoing, 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.

⁵ 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.