

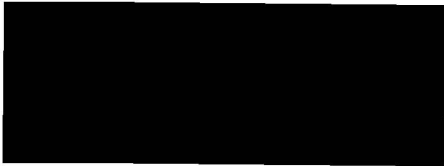


U.S. Citizenship
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FILE:



Office: CHICAGO

Date:

NOV 16 2009

MSC 06 145 13666

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, Chicago. 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, CSS/Newman Class Membership Worksheet. The director determined that the applicant disrupted his period of required continuous residence in the United States during the statutory period of January 1, 1982 through May 4, 1988 and denied the application.

On appeal, counsel states that the applicant has never traveled in 1988 and was never absent from the United States for a lengthy period. Counsel also states that the applicant has established by a preponderance of evidence that he has been physically present in the United States.

The United States Citizenship and Immigration Services (USCIS) adjudicating officer's notes reveal that during the Form I-687 application interview, the applicant claimed to have first entered the United States by air with a B-2 visitor's visa in 1980. The applicant does not submit a copy of any previous passport, Form I-94 Departure Record or other documentary evidence showing that he entered the United States with inspection prior to January 1, 1982. In his statement dated December 28, 1989, the applicant stated that he first entered the United States without inspection on September, 1980. The inconsistencies regarding the applicant's date and manner of entry into the United States are material to the applicant's claim in that they have a direct bearing on the applicant's continuous 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. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The adjudicating officer also noted on the applicant's Form I-687 application that the applicant went to India and traveled to Saudi Arabia on a pilgrimage from March 1988 to August 1988. During the applicant's I-687 application interview, the USCIS adjudicating officer's notes reveal that the applicant claimed to have traveled outside the United States in March, 1988, to India and to Saudi Arabia for a pilgrimage and returned to the United States in August, 1988. The adjudicating officer's notes reveal during the applicant's I-485 application interview that the applicant claimed he was in India for three or four months in 1987. The applicant's absence from the United States from March, 1988, to August, 1988, and/or for three or four months in 1987 establishes a break in his period of required continuous physical presence in the United States during the requisite period.

The applicant claims on his Form I-687 application that he was absent from the United States twice in 1989 and once in 1987, from January to February, 1987. Counsel states on appeal that the applicant did not travel in 1988 and that he was never absent from the United States for four or five months. Counsel asserts that the adjudicating officer erred regarding the dates the applicant traveled. However, the notations on the applicant's Form I-687 application in red ink are an indication that the application was reviewed with the applicant during the interview. Counsel has not provided credible evidence of the applicant's residence in the United States from March through August, 1988, to establish the applicant remained in the United States during this time period. Further, the applicant stated during his Form I-485 interview that his wife and son reside in India. The Form I-485 application indicates that the applicant's son, [REDACTED], was born in India on November 13, 1988. The record does not explain how the child was conceived in India in 1988 if the applicant did not travel in 1988. The applicant states that his wife came to the United States to visit for two or three months in 1991. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. See *Matter of Ho, supra*. Therefore, the applicant disrupted his period of required continuous physical presence in the United States during the statutory period of November 6, 1986 to May 4, 1988.

A legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. See Section 245A(a)(3)(A) of the Act, 8 U.S.C. § 1255a(a)(3)(A). An absence during this period which is found to be brief, casual and innocent shall not break a legalization applicant's continuous physical presence. Section 245A(a)(3)(B) of the Act, 8 U.S.C. § 1255a(a)(3)(B). See e.g. *Espinoza-Gutierrez v. Smith, INS, et al.*, 94 F.3d 1270 (9th Cir. 1996). The *Espinoza-Gutierrez* court held that a legalization applicant's absence would not represent a break in continuous physical presence if it was found that the absence was brief, casual and innocent as defined by the court in *Rosenburg v. Fleuti*, 374 U.S. 449 (1963) See also *Assa'ad v. U.S. Attorney General, INS*, 332 F.3d 1321 (11th Cir. 2003)(which affirmed the portion of the holding in *Espinoza-Gutierrez* relied upon here, but disagreed with a different aspect of that holding.) The AAO finds that the applicant's absence from the United States in this case was not brief, casual and innocent in that the record indicates: that he was absent from the United States for more than 60 days.¹ See *Rosenberg, supra* (where the court looked to (1) the duration of the alien's absence; (2) the purpose of the absence; and (3) the need for special documentation to make the trip abroad to determine whether the absence was a brief, innocent and casual or meaningfully disruptive of the alien's residence in the United States.)

¹ The regulation implementing the statutory requirement of "continuous unlawful residence" in the United States defines that term as no single absence from the United States exceeding 45 days and absences in the aggregate not exceeding 180 days. See, section 245A(a)(2)(A) of the Act, 8 U.S.C. § 1255(a)(2)(A) and 8 C.F.R. § 245a.1(c)(1)(i). The term "continuous physical presence" suggests that a shorter time frame should be applied to determine the permissible length of single and aggregate absences from the United States during the period from November 6, 1986 to May 4, 1988.

This application cannot be approved for another reason. The applicant has not submitted sufficient credible evidence to meet his burden of establishing that he (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 of time.

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 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 documentation that the applicant submits in support of his claim to have arrived in the United States before January 1, 1982 and lived in an unlawful status during the requisite period consists of affidavits of relationship written by friends and other evidence. The AAO will consider all of the evidence relevant to the requisite period to determine the applicant’s eligibility.

The applicant submitted letters from [REDACTED] and [REDACTED] and several affidavits from [REDACTED] and [REDACTED] to establish his initial entry and residence in the United States during the requisite period. The witnesses generally attest to having personally known and being acquainted with the applicant and to their knowledge that the applicant resided in the United States in Chicago, Illinois, in the 1980’s. [REDACTED] has known the applicant resided in the United States since December, 1981, and in another affidavit, [REDACTED] states that he has known the applicant since 1980. [REDACTED] and [REDACTED] state that they have known the applicant since 1982. [REDACTED] states that they used to go shopping together. [REDACTED] declares that has known the applicant resided in the United States since December 1983 and states in another affidavit that he has known the applicant since 1981. [REDACTED] states that he has known the applicant since 1983 and they are close friends. [REDACTED] states that she has known the applicant since 1985. [REDACTED] and [REDACTED] state that they have known the applicant resided in the United States since March and August, 1986, respectively. [REDACTED] states that he has known the applicant since 1986 and they are good friends. [REDACTED] and [REDACTED] state that they have known the applicant resided in the United States since July and December, 1987, respectively. [REDACTED] states that he has known the applicant since 1987. [REDACTED] states that he has known the applicant since he was born and that they were friends in India. [REDACTED] also states that the applicant lived with him in the United States. [REDACTED] states he has known the applicant since 1982. The affiants also attest to the applicant’s good moral character but provide no other information about the applicant.

The affidavits and letters do not include sufficient detailed information about the claimed relationships and the applicant’s continuous residence in the United States since before January 1, 1982 and throughout the requisite period. For instance, none of the witnesses supplies any details about the applicant’s life, such as, knowledge about his family members, hobbies, and shared activities with the applicant. The affiants fail to indicate any other details that would lend credence

² [REDACTED] indicates that the applicant was a professional social worker in 1982. This evidence conflicts with other evidence of record stating that the applicant worked as a cashier in a laundromat from December, 1988 to July, 1990.

to their claimed acquaintance with the applicant and the applicant's residence in the United States during the requisite period.

The affidavits and letters 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 during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant 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 the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged.

The AAO finds that the affidavits and letters do not contain sufficient detail to establish the reliability of their assertions. The affidavits and letters are insufficient to establish the applicant's 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 requisite period. Therefore, the affidavits and letters have little probative value.

The applicant provided a letter signed by the sales manager, [REDACTED] of Globe International Enterprises, Addison, Illinois. The letter states that the applicant has been working with the company since September 1985. The applicant provided another letter from the manager of The Washing Well that states that the applicant worked as a cashier in the laundromat from January, 1981, to August, 1985. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant's employment must: provide the applicant's address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant's duties; 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. As the letters do not meet the requirements stipulated in the aforementioned regulation, they will be given nominal weight.

[REDACTED] of the Consultative Committee of the Indian Muslims in the United States of America states that the applicant is a very active member of the committee. The regulation at 8 C.F.R. § 245a.2(d)(3)(v) provides requirements for attestations made on behalf of an applicant by churches, unions, or other organizations. Attestations must (1) identify applicant by name; (2) be signed by an official (whose title is shown); (3) show inclusive dates of membership; (4) state the address where applicant resided during membership period; (5) include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery; (6) establish how the author knows the applicant; and (7) establish the origin of the information being attested to. The letter does not contain the aforementioned requirements and will be given nominal weight.

The applicant's remaining evidence consists of seven receipts from different proprietors; the DHL receipt is dated June 15, 1983; The Apple Vacations booking form is dated April 17, 1987; the dates on the three airline ticket receipts and the one receipt from Thybony Company are not legible; the

receipt from Erickson Jewelers is dated December 29, 1987. There is also a receipt for legal consulting in the amount of \$60.00 paid by the applicant and dated December 19, 1986. Although the receipts identify the purchaser and establish the applicant's presence in the United States on the dates of the receipts, the evidence does not establish the applicant's continuous residence in the United States throughout the requisite period.

An applicant applying for adjustment of status under this part has the burden of proving by a preponderance of evidence that he or she is eligible for adjustment of status under section 245A of the Act. 8 C.F.R. § 245a.2(d)(5). Given the lack of detail in the affidavits, and the unresolved inconsistencies noted above, the applicant failed to establish his continuous unlawful residence in the United States for the duration of the requisite period. The applicant has failed to submit sufficient evidence to overcome the director's denial. The insufficiency of the evidence calls into question the credibility of the applicant's claim of continuous unlawful residence in the United States throughout the requisite period. The evidence submitted is insufficient to establish the applicant's 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 requisite period.

Evidence of record indicates that the applicant was arrested and charged with writing a bad check. There is no court disposition of record indicating how this charge was resolved. Thus, the applicant has not established that he is admissible to the United States.

Therefore, 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, has been continuously physically present in the United States since November 6, 1986 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.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.