

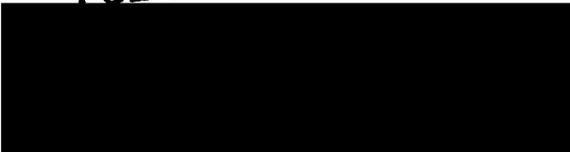
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
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FILE: [REDACTED]
MSC-05-249-14030

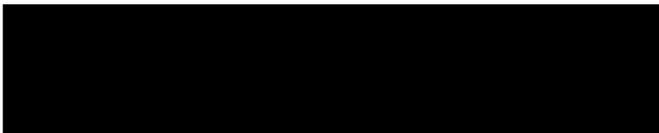
Office: NEW YORK

Date: **AUG 06 2007**

IN RE: Applicant: [REDACTED]

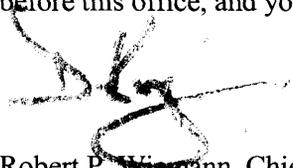
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.


Robert P. Wiemann, 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 District Director, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that he attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS) in the original legalization application period of May 5, 1987 to May 4, 1988. Therefore, the director determined that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and denied the application.

On appeal, counsel for the applicant asserts that the applicant has submitted credible affidavits and documents in support of his application.

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 Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(2).

An applicant applying for adjustment to temporary resident status must 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).

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

An alien applying for adjustment of status 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).

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.

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 (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.

An applicant for temporary resident status must establish that he has not been convicted of any felony or of three or more misdemeanors committed in the United States. Section 245A(a)(4) of the Act, 8 U.S.C. § 1255a(a)(4). "Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p). "Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

An FBI report based upon the applicant's fingerprints reveals that on February 7, 2005, the applicant was arrested and charged with *assault in the third degree* in violation of section 120.00 of the New York Penal Law. The FBI report does not contain information on the final disposition related to this charge. Section 120.00 of the New York Penal Law provides that *assault in the third degree* is a Class A misdemeanor, which carries a sentence of imprisonment not exceeding one year. The applicant has submitted two court records from the Criminal Court of the City of New York. These records indicate that on May 11, 2005, the applicant was convicted of *disorderly*

conduct in violation of section 240.20 of the New York Penal Law. Section 240.20 of the New York Penal Law indicates that *disorderly conduct* is a violation, which carries a sentence of imprisonment that shall not exceed fifteen days. An order of protection was issued against the applicant, preventing the applicant from contacting the protected person for a period of one year. It is unclear from the applicant's record whether these court records relate to the applicant's February 7, 2005 charge for assault in the third degree. Since the record does not indicate that the applicant has been convicted a felony or three misdemeanors, his offense(s) do not affect his eligibility for immigrant classification under section 245A(a)(4) of the Act.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he resided in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application with the Service in the original legalization application period of May 5, 1987 to May 4, 1988. Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant filed a Form I-687, Application for Status as a Temporary Resident, and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, with CIS on June 6, 2005. The applicant signed this application under penalty of perjury, certifying that the information he provided in the application is true and correct. Part 30 of this application requests the applicant to list all of his residences in the United States since his first entry. The applicant responded that he resided at [REDACTED] Astoria, NY from October 1981 until June 1991. Part 33 of the application requests the applicant to list his employment in the United States since his entry. The applicant responded that he was a deliveryman with "Door to Door News Paper Delivery" at an unknown location in New York from December 1981 until March 1995. The applicant failed to provide any other details on this employment, such as the name of his employer or the location of his delivery route. Although this application indicates that the applicant has resided in the United States since October 1981, he has failed to provide sufficient corroborating evidence to support this claim.

The applicant submitted in support of his application, his notarized statement. This statement provides, "I originally entered the USA on October 12, 1981. I remained in the USA continuously in an unlawful manner until today." To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). The applicant has the burden of proving by a preponderance of the evidence that he has resided in the United States for the requisite period. 8 C.F.R. § 245a.2(d)(5). The regulation at 8 C.F.R. § 245a.2(d)(3) provides and illustrative list of documentation that may be provided to establish proof of continuous residence in the United States during the requisite period. This list includes: past employment records; utility bills; school records; hospital or medical records; attestations by churches, unions or other organizations; money order receipts; passport entries; birth certificates of children; bank books; letters or correspondence involving the applicant; social security card; selective service card; automobile receipts and registration; deeds, mortgages or contracts; tax receipts; and insurance policies, receipts, or letters. The

applicant failed to provide any of these documents in support of his claimed continuous residence in the United States.

An applicant may also submit "any other relevant document." 8 C.F.R. § 245a.2(d)(3)(vi)(L). Pursuant to this regulation, the applicant has submitted copies of nine (9) "fill in the blank" notarized statements entitled "Affidavit of Witness" from [REDACTED]

[REDACTED], and two statements from [REDACTED]. 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 statements provided by the applicant fail to contain relevant, probative and credible testimony of the applicant's residence in the United States during the requisite period. These statements are vague and lack considerable detail on the authors' relationship with the applicant. Each of these statements fails to provide detailed information on how the applicant first met the author and the extent of the author's contact with the applicant throughout the requisite period.

The applicant was issued a Notice of Intent to Deny (NOID), and he was given the opportunity to provide a rebuttal to the NOID within thirty (30) days. The NOID provides that:

The affidavits that you submitted do not appear credible. The affidavit from [REDACTED] dated May 05, 2005 states that he has known you lived in Astoria, NY from December 1980 to June 1991. The second affidavit from [REDACTED] dated November 01, 2004 states that he has known you since 1980. In your interview you stated that you did not come to the United States until December 1981 and that you lived with [REDACTED] until you relocated in 1991. The affidavit from [REDACTED] states that she has known you since 1980. Again you stated in the interview that you did not come to the United States until December of 1981. These discrepancies cast doubt upon the veracity of your claims as to residency during the statutory period. Because of the above inconsistencies and contradictions, we are notifying you of our intention to deny your case.

In response to the director's NOID, counsel for the applicant submitted a written rebuttal statement. This statement provides:

With regard to the alleged contradictory information as it pertains to statements made during an interview dated on March 13, 2006, [REDACTED] is unable to communicate properly in English, as it is not his primary language. Therefore, his ability to express months and dates correctly, in English, is inadequate and [REDACTED] requires that a translator be present to fully express his responses. Further, in light of this, the veracity of the affidavits submitted on behalf of [REDACTED] should no longer be in doubt. With regard to the alleged contradictory information as it pertains to statements and forms submitted prior to the current filing, please note that once again [REDACTED] limited abilities to speak and write in English resulted in his seeking friends, family, and other individuals to assist in completing his forms. It is the case that these individuals did not appropriately fill said forms, and either failed to include information or included incorrect

information. Therefore, the inconsistencies that have arisen are through [sic] not intentional, and therefore should not be deemed to discredit the current application.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's assertion that the applicant "requires that a translator be present to fully express his responses" is unsupported by documentary evidence in the record. The record shows that counsel for the applicant was present during the applicant's interview and the applicant chose not to use an interpreter. There is no indication that either counsel or the applicant requested the interview to be rescheduled for the presence of an interpreter. Additionally, counsel's assertion that, "[w]ith regard to the alleged contradictory information as it pertains to statements and forms submitted prior to the current filing, please note that once again [REDACTED]'s limited abilities to speak and write in English resulted in his seeking friends, family, and other individuals to assist in completing his forms" is unsupported by documentary evidence in the record. The contradictory information cited by the director relates to the applicant's Form I-687 application and its supporting documentation. The record shows that counsel signed the applicant's Form I-687 application as the preparer of his application. Furthermore, counsel failed to provide amended statements or affidavits to correct the deficiencies noted in the director's NOID.

The absence of sufficiently detailed supporting documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of this claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the applicant's contradictory statements on his applications and his reliance upon documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application 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.