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**U.S. Citizenship
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Services**

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[Redacted]

FILE: [Redacted]
MSC-05-328-12071

Office: LOS ANGELES

Date: **SEP 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:
[Redacted]

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, Los Angeles. That decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined the applicant failed to establish that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that he either attempted to file or was discouraged from filing 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) or a Qualified Designated Entity (QDE) in the original legalization application period of May 5, 1987 to May 4, 1988. The director also stated that during his interview with a CIS officer, the applicant testified that he had been absent from the United States for a period of time that exceeded forty-five (45) days. 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.

In this case, the director adjudicated the Form I-687 application on the merits. As a result, the director is found not to have denied the application for class membership.

On appeal, the applicant provides a brief, asserting that he did meet his burden of proof of establishing by a preponderance of the evidence that he resided continuously in the United States from January 1, 1982 through May 4, 1988. In the brief he attempts to account for the contradictions in his previously furnished evidence. He further states that the director failed to protect the applicant's Fifth Amendment Rights, specifically his right to a full and fair hearing.

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).

Applicants who are eligible for adjustment to temporary resident status are those who establish that he or she entered the United States prior to January 1, 1982, and who have thereafter resided continuously in the United States in an unlawful status, and who have been physically present in the United States from November 6, 1986, until the date of filing the application. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3), and 8 C.F.R. § 245a.2(b)(1).

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, during the original legalization application period of May 5, 1987 to May 4, 1988, 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 applicant shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

An applicant 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).

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.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he continuously resided in the United States with no single absence exceeding forty-five (45) days from prior to January 1, 1982 through the date he would have 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 had he not been discouraged from doing so. Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on August 24, 2005. At part 30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant showed his first address in the United States to be [REDACTED], Los Angeles, California, from "N/A to N/A." He then showed his second and final address to be in Los Angeles, California from 2001 to the date he signed his I-687, August 18, 2005. At part 32 of this application, the applicant showed no absences from the United States. At part 33, he showed employment in the United States to be for "Laundry Service" in El Monte, California from 1989 to 1995. He also showed employment for R.N.B Associates from "N/A" to "N/A." The applicant listed a third and final employer as Carmen Furniture in El Monte, California from "N/A" to the present.

In addition to his Form I-687, the applicant provided a declaration in support of this application. The declaration was signed by the applicant on May 10, 2006.

The declaration provides that the applicant first entered the United States in January of 1981 without inspection through San Ysidro. It goes on to present the following:

- The applicant first lived with a friend at [REDACTED] in Watts, California for two months. It is noted that Watts is a neighborhood within Los Angeles, California. This is relevant because the two are used interchangeably as being associated with this address in documents submitted with this applicant's Form I-687.
- The applicant then lived in a trailer in Watts near the intersection of [REDACTED] and [REDACTED] with eight (8) people from 1981 until 1984. While living at this address he earned his living by making and selling wooden pallets.
- The applicant then resided in Compton, California in a trailer for two years and continued to sell pallets while living there. The applicant cannot recall the address of this trailer, but he states it was near [REDACTED]
- The applicant worked for a garment factory in El Monte, California on Portrero Avenue and Rush Street but only worked there for fifteen (15) days in 1986.
- The applicant worked at K-V Collections on Rush Street in El Monte, California ironing clothes from October 1986 to November 24, 1989. He was paid in cash until 1989 when he began to receive checks. While working at K-V- Collections the applicant lived at [REDACTED] in Los Angeles, California.
- The applicant hired a notary named [REDACTED] to complete his original Form I-687. This notary has since moved and has disconnected his telephone. The applicant indicates he believes the notary was not legitimate.

Though he requested it, the applicant did not receive a copy of the Form I-687 that the notary prepared for him.

It is noted that this document does not reflect any absences from the United States after January 1981.

Also in the record is a sworn statement written in the applicant's handwriting. This statement, when translated into English reads, "I went from the United States to Mexico in about January of 1984 and I stayed for about a year and I got married, [and] a month later I returned to the United States." This statement in affidavit form is signed both by the applicant and a CIS officer on May 15, 2006.

The applicant has the burden of proving by a preponderance of the evidence that he has resided continuously in the United States for the requisite period. 8 C.F.R. § 245a.2(d)(5). To meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of documentation that an applicant may submit to establish proof of continuous residence in the United States during the requisite period. An applicant may also submit any other relevant document pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

To establish that the applicant maintained continuous residence in the United States, he submitted the following documents that are relevant to the requisite period: two (2) legal documents, one (1) affidavit and two (2) declarations.

The two legal documents from Mexico include:

- A birth certificate for the applicant's daughter, [REDACTED]. This birth certificate indicates that the applicant was present at the time of his daughter's birth which occurred in Colima, Mexico in 1984. It is noted that while the original birth certificate lists the applicant's daughter's date of birth as November 28, 1984, the English translation of the document erroneously lists her date of birth as November 28, 1994. This document lists the applicant as the child's father and states that both the child's mother and the applicant, listed as the child's father, were present for the child's birth. Information in this document indicates that the applicant was in Mexico on November 28, 1984. This absence conflicts with information provided by the applicant in his Form I-687, which indicates that the applicant has never been absent from the United States since his date of first entry.
- The applicant's marriage certificate. This certificate lists the applicant's date of marriage as December 11, 1985 and place of marriage as Santiago, Manzanillo, Colima, Mexico. The original Spanish version of this document lists the applicant's address at the time of his marriage as "[REDACTED]" This document indicates that the applicant was in Mexico on December 11, 1985. This absence conflicts with

information provided by the applicant in his Form I-687, which indicates that the applicant has never been absent from the United States since his date of first entry.

One affidavit and two declarations as follows:

- An affidavit notarized on May 12, 2006 and signed by [REDACTED]. This affidavit provides the name and address of the affiant and states that he is a United States Citizen. The affiant states that the applicant has been in the United States since prior to 1981 and that the applicant visited the affiant at his home in August 1981. Though this document states that [REDACTED] saw the applicant in the United States in August of 1981, it does not establish that the applicant has been residing in the United States continuously since 1981. The affiant does not list an address at which he can verify he has personal knowledge that the applicant lived during the statutory period. In this affidavit, the affiant failed to explain how he met the applicant. Although not required, the affiant also failed to provide documentation of his identity or his residence in the United States during the statutory period. This affidavit is found to be insufficiently detailed to confirm the applicant's residence during the requisite period
- A declaration executed and signed by [REDACTED] on May 13, 2006. The declaration states that [REDACTED] is a naturalized citizen of the United States who lives in Los Angeles, California but met the applicant in 1970 in their shared hometown of Chandiablo, Manzanillo, Colima, Mexico. [REDACTED] further states that the applicant came to the United States in January 1981 and remained in the United States continuously since that time. The declaration states the applicant lived with [REDACTED] and her husband at [REDACTED] in Los Angeles, California just after his arrival and remained there for two months. The declaration goes on to say that the applicant then moved to a trailer in Watts and that though the applicant was no longer living with [REDACTED], her saw and her husband saw the applicant "practically every weekend." [REDACTED] states that in 1986 the applicant came back to live with her on [REDACTED] and remained there for several years. [REDACTED] goes on to state that the applicant worked for K-V Collections in 1986. The declaration goes on to say that in December 1989 the applicant began working at Sunrise Pillow Company in El Monte, California. In this declaration [REDACTED] does not establish the dates during which she saw the applicant practically every weekend. Therefore, though this declaration establishes that [REDACTED] can verify that she has personal knowledge that the applicant resided continuously in the United States from approximately January 1981 until March of that year, and again from 1986 though the end of the requisite period, the declaration does not establish that the [REDACTED] has personal knowledge that the applicant continuously resided in the United States from March of 1981 until 1986. Therefore, this document is found insufficient to confirm that the applicant maintained continuous residence throughout the requisite period.

- A declaration executed and signed by [REDACTED] on May 13, 2006. This declaration states that [REDACTED] is a legal permanent resident of the United States who currently lives in Los Angeles, California. [REDACTED] states he is a distant relative of the applicant who grew up with him in Chandiablo, Manzanillo, Colima, Mexico. Mr. [REDACTED] goes on to state that the applicant entered the United States in January 1981 and that he then lived with [REDACTED] at [REDACTED] in Watts, California just after he entered the United States. [REDACTED] states that the applicant only stayed in his home for a few months and then moved into a trailer that was also in Watts, California. However, [REDACTED] continued to see the applicant every eight days or so. [REDACTED] goes on to say that the applicant returned to live with his family in the home on [REDACTED] in 1986 and resided there until 1989. At the time the applicant returned to live with [REDACTED] he was working at K-V Collections but he then began working at Sunrise Pillow Company in December 1989. [REDACTED] states the applicant was not paid by check by Sunrise Pillow Company until May 1990. [REDACTED] states the applicant worked at Sunrise Pillow Company for at least five years. [REDACTED] goes on to state that the applicant has maintained continuous residence in the United States since he arrived in 1981. The declaration from [REDACTED] consistently reflects the information in [REDACTED]'s declaration. As such, his declaration is found insufficient to confirm that the applicant maintained continuous residence throughout the requisite period.

It is noted that the applicant submitted tax documents, employment letters, bank records, employment pay stubs, one (1) additional declaration and utility bills that do not pertain to the requisite period. As they are not relevant to this proceeding, they are not detailed here.

That the applicant was present in Mexico in 1984 is reflected on his daughter's birth certificate. The applicant's residence in 1985 is reflected as being in Mexico on his marriage certificate. The applicant's sworn statement states that he was absent from the United States during the statutory period for a period of time that exceeded forty-five (45) days. This evidence conflicts with information provided by the applicant on his Form I-687, the statements he made in his declaration in support of his Form I-687, and with statements made in the affidavit submitted by [REDACTED] and declarations submitted by [REDACTED]. The presence of this conflicting evidence casts doubt on the credibility documents submitted by the applicant in support of his claim that he maintained continuous residence in the United States during the entirety of the statutory period.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of a petition. It is incumbent upon the petitioner 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In summary, the applicant has not submitted sufficient evidence to establish by a preponderance of the evidence that he maintained continuous residence in the United States from his date of entry in January 1981 through May 4, 1988 and that no single absence during that period exceeded forty-five (45) days. Though the applicant has submitted attestations from three people in an attempt to establish that he maintained continuous residence during the statutory period, none of the individuals submitting declarations or affidavits or the applicant himself can establish the applicant's addresses from March of 1981 until 1986. Therefore, those attestations do not establish by a preponderance of the evidence that the applicant maintained continuous residence in the United States during those years. Further, the applicant's declaration, his Form I-687, the affidavit from [REDACTED], and the declarations from [REDACTED] and [REDACTED] do not mention that the applicant returned to Mexico at any point in time after his entry in 1981. Though the declarations from [REDACTED] and [REDACTED] state that both individuals saw the applicant nearly every weekend they do not establish dates through which they claim they had this regular contact with the applicant.

Though documents submitted by the applicant preceding his interview with the CIS officer indicate the applicant was never absent from the United States during the statutory period, at the time of his interview the applicant signed a sworn statement that detailed an absence that exceeded forty-five (45) days. The sworn statement attested to the fact that the applicant left the United States in January of 1984 and that he remained outside of the United States until approximately one month after his marriage. Documentary evidence in the file further indicates the applicant was in Mexico rather than the United States at the time of his daughter's birth on November 28, 1984 and at the time of his marriage on December 11, 1985.

In denying the application the director noted the above, and that when the applicant was testifying during his interview he stated that he was absent from the United States for more a period of time that had exceeded forty-five (45) days.

On appeal the applicant attempts to explain these contradictions, stating that he is the victim of notary fraud, and that his applicant's Fifth Amendment rights were violated, specifically that he did not receive a fair hearing during his interview with the CIS officer. The applicant further states that contrary to the director's decision, he did establish by a preponderance of the evidence that he maintained continuous residence in the United States.

The applicant's counsel reiterates statements made by the applicant and further states:

- That the applicant previously hired a notary named [REDACTED] to prepare his Form I-687. Though the applicant told this notary that he had traveled to Mexico on two occasions between 1984 and 1985, this notary did not include this information on the applicant's Form I-687. The brief goes on to explain that the applicant never received a copy of his Form I-687 after it was completed and therefore, the applicant was not aware of discrepancies in this application. He further states that the applicant was a victim of notary fraud.

- During the applicant's interview on May 15, 2006, the applicant stated that he was confused by a question regarding whether he attempted to file his application during the initial filing period. However, rather than allowing the applicant to ask his attorney clarifying question, the officer told the applicant to, "Ask your question after the interview is over and you have left the office."
- The CIS officer did not allow the applicant to explain the details regarding his absences from the United States in 1984 and 1985.
- Counsel states that the applicant was denied due process as he asserts the applicant did not receive a full and fair hearing on his application at the time he was interviewed by the CIS officer.
- Rather than being vague about previous addresses, the applicant previously provided a detailed declaration that cited intersections at which residences were located as well as affidavits and declarations from individuals attesting to the fact that the applicant had remained continuously in the United States during the statutory period.
- All affiants who submitted affidavits are willing to come forward to testify on the applicant's behalf.
- During his interview, the applicant was not permitted to explain that rather than making one trip, he took two trips outside of the country. The CIS officer assumed but did not ask clarifying questions to establish whether the applicant had lived in Mexico from November 24, 1984 until the end of 1985.
- The applicant made two trips to Mexico from 1984 to 1985. The first trip the applicant made since entering the United States in January 1981 was made to witness the birth of his child. This trip occurred from November 20, 1984 until January 2, 1985. This constitutes an absence of 43 days. The second trip was to celebrate the applicant's daughter's first birthday and it began on November 24, 1985 and ended on December 31, 1985. This constitutes an absence of 37 days. The applicant was therefore absent from the United States for a total of 80 days during the requisite period.
- Counsel asserts that the Notice of Denial should be reconsidered because the applicant's due process, as guaranteed under his Fifth Amendment, was violated. Counsel states that this right was violated when the applicant was not given the right to present all of the evidence at the time of his interview.

No additional contemporaneous evidence was submitted with the appeal.

The applicant states that, contrary to the director's decision, he did establish by a preponderance of the evidence that he maintained continuous residence in the United States during the statutory period. As is noted above, the brief submitted with the applicant's appeal explains that during the statutory period the applicant had only two absences from the United States during the statutory period, the first of which was for the birth of his child in November of 1984, which lasted 43 days and the second of which occurred at the end of November of 1985 and lasted 37 days. However, it is noted that during his interview, the applicant stated that his wife entered the United States in February 1987, having never previously entered the United States. Because his wife gave birth to a child that the applicant believes to be his biological child in November of 1984 and because the applicant also states that his wife had never previously entered the United States before the birth of that child, it can be logically concluded that the applicant would have had to have been present in Mexico for that child's conception in early 1984. Therefore, doubt is cast upon the assertion that, as the brief states, the applicant's first absence from the United States since January of 1981 was in November of 1984 when he went to witness the birth of his child.

The applicant's testimony during his interview with the CIS officer in which he stated that he was in Mexico in 1984 and remained for a year and his sworn statement made at the time of his interview stating he was in Mexico beginning in January 1984 and remained there until a month after his marriage, which occurred on December 11, 1985 conflict with statements made by the applicant in support of his appeal. The applicant fathered the child of a woman who resided in Mexico and had not ever entered the United States at the time the child was conceived in early 1984. This is not consistent with the brief submitted with the applicant's appeal. This brief states that that applicant entered the United States before January 1, 1982 and did not ever leave the United States until late November of 1984. Statements provided by the applicant regarding his absences, including the brief he submitted with his appeal, are not internally consistent. They are also not consistent with information contained in documents in the record. Therefore, doubt is cast upon whether the applicant fully and completely represented his absences during the requisite period in the brief he submitted with his appeal.

The applicant states that his Fifth Amendment right to due process was violated when counsel was not permitted to ask the applicant a question during his interview with the CIS officer. The AAO does not have jurisdiction over constitutional matters. However, although the applicant argues that his right to procedural due process was violated, he has not shown that any violation of the regulations resulted in "substantial prejudice" to him. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The applicant has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the applicant's case. The applicant's primary complaint is that the director denied the petition after finding that the applicant did not continuously reside in the United States during the requisite period. As previously discussed, the applicant has not met

its burden of proof and the denial was the proper result under the regulation. Accordingly, the applicant's claim is without merit.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she has *continuously* resided in an unlawful status in the United States from prior to January 1, 1982 through the date of filing, is admissible to the United States under the provisions of section 245A of the Act, 8 U.S.C. § 1255a, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). Here, the applicant has not met that burden. It is concluded that because 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 ineligible for temporary resident status under section 245A of the Act.

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