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**U.S. Citizenship
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FILE: [Redacted]
MSC-05-333-10797

Office: NEW YORK Date: **SEP 14 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: SELF REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 that decision 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. In her Notice of Intent to Deny (NOID), the director stated she found that the applicant submitted affidavits that she found were neither credible nor amendable to verification. She specifically noted that she found there was no proof that the affiants had direct personal knowledge of the events and circumstances of the applicant's residency. She went on to note that credible affidavits are those which include a document identifying the affiant, proof that the affiant was in the United States during the statutory period, proof that there was a relationship between the affiant and the applicant such as photos and a current phone number at which the affiant may be contacted for verification. The applicant was then granted thirty (30) days within which to submit additional evidence in support of his application. In denying the applicant's Form I-687 application, the director stated that the additional evidence submitted in response to her NOID did not overcome the reasons for her denial as stated in her NOID. 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, the applicant asserts that the affidavits he submitted were credible and amenable to verification. He goes on to say that there is no record that the director attempted to contact the affiants in attempt to verify information in the affidavits and notes that it has been held that failure to provide evidence other than affidavits shall not be the sole basis for finding that an alien has failed to meet his or her continuous residence requirement.

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) and 8 C.F.R. § 245a.2(b)(1).

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. 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).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that emergent means "coming unexpectedly into being."

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 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. An applicant who has maintained continuous residence during the requisite period has 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 applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, he or she 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). Here, it does not appear that the evidence supports the applicant's claim of having maintained continuous residence.

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 29, 2005. Part #30 of the Form I-687 application asks applicants to list all residences in the United States since first entry. Here, the applicant showed he had four addresses in the United States during the requisite period which were:

██████████ Brooklyn, New York from June 1980 until May 1983; ██████████ Bronx, New York from June 1983 to April 1986; ██████████ Far Rockway, New York from May 1986 until August 1987 and then ██████████ in Corona, New York from September 1987 until March 1989.

Part #32 asks applicants to list all of their absences dating back to January 1, 1982. Here, the applicant showed one absence during the requisite period that occurred between June 1987 and November 1987, a period of approximately four (4) to six (6) months or one hundred twenty-four (124) to one hundred eighty-two (182) days. Here, he indicates he went to Pakistan for a family trip. It is noted that this constitutes an absence of more than forty-five (45) days. At part #33, where the applicant was asked to list his employment since January 1, 1982, he shows he worked for 1-5 Pizza Corp in Brooklyn from October 1980 until September 1984, that he was self employed doing odd jobs from December 1984 until January 1987 and that he then worked for Pizza N' Things from April 1987 until January of 1991. It is noted that the applicant does not indicate employment from September to December of 1984 or from January to April of 1987.

The record shows that during his interview with the CIS officer on March 23 2006, the applicant indicated that he first entered the United States in October of 1980. It is noted that the applicant provided an address at which he claims to have resided since June of 1980 on his Form I-687, casting doubt on when the applicant entered the United States. When was asked about his absences from the United States since his first entry he indicated that during the requisite period he had left the United States only once. He stated that in 1987 he went to Pakistan for a family trip for three (3) to four (4) months. It is both noted that this constitutes an absence of more than forty-five (45) days and that his statement is not consistent with what he indicated on his Form I-687, where he indicated that he left for a period of four (4) to six (6) months.

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). 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).

In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant provided: five (5) affidavits and two (2) employment letters. It is also noted that the applicant has submitted photocopies of his passport and an additional employment letter, both of which pertain to dates that are subsequent to the requisite period. The issue in this proceeding is the applicant's residence in the United States during the requisite time period. Because these documents verify the applicant's presence in the United States subsequent to the requisite time period, they are not relevant evidence for this proceeding and therefore they are not detailed here.

Details regarding evidence submitted by the applicant in support of his claim to have maintained continuous residence in the United States during the requisite period include:

Five (5) affidavits as follows:

- An affidavit from [REDACTED] that is signed and notarized on April 15, 2006. Here, the affiant indicates that he met the applicant in New York, but he fails to indicate the date on which he met the applicant. He then goes on to say that the applicant entered the United States in 1981 without inspection and that the applicant attempted to file for legalization during the original filing period but was turned away. Here, he fails to indicate how he knows this. Further, it is noted that during his interview with a CIS officer on March 23, 2006, the applicant stated that he entered the United States in 1980 rather than in 1981. Although not required, the affiant provided no evidence of his presence in the United States during the requisite period. Because the affiant has not established that he was present in the United States during the requisite period, because he has not established when he met the applicant or stated that he had regular, ongoing contact with him in the United States during the requisite period, and because he stated that the applicant entered the United States in 1981 which conflicts with what the applicant showed on his Form I-687, this affidavit is found to both not be consistent with other evidence in the record and to be lacking sufficient detail to establish that the applicant maintained continuous residence in the United States for the duration of the requisite period.
- An affidavit from [REDACTED] that was signed and notarized on April 6, 2006. Here, the affiant states that he has known the applicant since October 1984. He goes on to say that he saw the applicant in a grocery store on [REDACTED] in Brooklyn and that he used to see him coming to and going from a mosque in that area. The affiant fails to give an address for this mosque or to indicate the dates on which he claims to have seen the applicant coming from and going to the mosque. It is further noted that this affiant does not claim to have known the applicant for the duration of the requisite period. Although not required, the affiant provided no

evidence of his presence in the United States during the requisite period. Because this affidavit does not span the duration of the requisite period and because it is significantly lacking in detail, minimal weight can be given to this affidavit in establishing that the applicant maintained continuous residence in the United States during the requisite period.

- An affidavit that was signed and notarized by [REDACTED] on November 25, 2005. Here, the affiant indicates that he first met the applicant in July 1981 at a specific address in Brooklyn, New York. He fails to indicate how he and the applicant both came to be at that address. He goes on to say that he has personal knowledge that the applicant has resided continuously in the United States for most of his acquaintance with the applicant. However, he fails to indicate the frequency with which he has seen the applicant or dates of the applicant's absences since 1981. Although not required, the affiant provided no evidence of his presence in the United States during the requisite period. Because this is significantly lacking in detail, minimal weight can be given to this affidavit in establishing that the applicant maintained continuous residence in the United States during the requisite period.
- An affidavit from [REDACTED] that was signed and notarized on November 22, 2005. Here, the affiant states that he has lived in the United States since 1980 and that he has known the applicant and been friends with him since September of 1980. It is noted that the affiant does not indicate that he met the applicant in the United States. However, it is further noted that though the applicant provided an address at which he claimed to have lived since June of 1980, he also indicated he did not enter the United States until October of 1980 during his interview with the CIS Officer on March 23, 2006. The affiant fails to indicate the frequency with which he has seen the applicant or dates of the applicant's absences since he met him in 1980. The affiant went on to say that the applicant attempted to file for legalization during the original filing period but was turned away. The affiant fails to indicate how he knows this. Because this is significantly lacking in detail, minimal weight can be given to this affidavit in establishing that the applicant maintained continuous residence in the United States during the requisite period.
- An affidavit from [REDACTED] who claims to be the applicant's wife. This affidavit was signed and notarized on April 12, 2006. Here, the affiant indicates that the applicant went to Pakistan in June of 1987 where he stayed until November of 1987. Though this is consistent with what the applicant showed on his Form I-687 regarding his absences, it indicates that the applicant was absent from the United States for more than forty-five (45) days during the requisite period. This letter does not indicate that there was an emergent circumstance that came unexpectedly into being that prevented the applicant from returning within forty-five (45) days. Because this affidavit states that the applicant was absent from the United States for more than forty-five (45) days it established that the applicant did not maintain continuous residence in the United States during the requisite period.

Employment letters relevant to the requisite period:

- An employment letter from Pizza N' Things on company letterhead. That was signed and notarized on February 2, 1991. This affidavit states that the applicant worked for this company from April 1987 to January 1991. This letter indicates the applicant's address at the time this letter was signed. This address is consistent with the address shown by the applicant on his Form I-687 at that time.
- An employment letter from [REDACTED] that was signed but not notarized on September 19, 1984. This letter indicates that the applicant worked at this establishment as a helper from October 1980 until September 1984. It goes on to provide the applicant's address. This address is consistent with the address shown by the applicant on his Form I-687 at that time.

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states, in pertinent part: that letters from employers should be on the employer letterhead stationary, if the employer has such stationary and must include the following: an applicant's address at the time of employment; the exact period of employment; periods of layoff; duties with the company; whether or not the information was taken from the official company records; and where records are located and whether the Service may have access to the records. The regulation further provides that if such records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and noting why such records are unavailable may be accepted in lieu of statements regarding whether the information was taken from the official company records and an explanation of where the records are located and whether USCIS may have access to those records. This affidavit form-letter shall be signed, attested to by the employer under penalty of perjury, and shall state the employer's willingness to come forward and give testimony if requested. Here, both employment letters are not found to meet all of these requirements. Therefore, minimal weight can be given to these letters as evidence that the applicant maintained continuous residence in the United States for the duration of the requisite period.

Thus, on the application, which the applicant signed under penalty of perjury, he showed that he resided and worked in the United States since June 1980. He stated that he entered the United States in October 1980 during his interview. The evidence submitted with the application that is relevant to the 1981-88 period in question does not establish by a preponderance of the evidence that the applicant resided continuously in the United States for the duration of that requisite period.

In denying the application the director noted the above. Though not noted by the director, it is noted here that the applicant's Form I-687, his testimony given at the time of his interview on March 23, 2006, and the affidavit from his wife all consistently state that the applicant was absent from the United States for a period of time that spanned three (3) to six (6) months during the requisite period in 1987. The applicant did not indicate on his Form I-687 or during his interview that any emergent circumstances that came unexpectedly into being caused him to stay out of the United States for more than forty-five (45) days at that time. Similarly, the affidavit from the applicant's wife does not indicate this.

On appeal the applicant states that the director did not attempt to verify information contained in the affidavits with the affiants but yet claimed they were not amenable to verification. He indicates that it has been held that failure to provide evidence other than affidavits should not be the sole basis for finding that an applicant failed to meet the continuous residence requirement.

It is noted that it has been held that while it is reasonable to expect an applicant who has been residing in this country since prior to January 1, 1982, to provide some documentation other than affidavits, the absence of contemporaneous documentation is not necessarily fatal to an applicant's claim to eligibility. Although the Service regulations provide an illustrative list of contemporaneous documents that an applicant can submit, the list also permits the submission of affidavits and "[a]ny other relevant document. If a legal conclusion of a director were to be made that an applicant could meet his burden of proof by his "own testimony and that of unsupported affidavit," this would be inconsistent with the both 8 C.F.R. § 245a.2(d)(3)(iv)(L) and *Matter of E- M-*, *supra*.

However, here it is found that both the applicant's testimony during his interview, the Form I-687 he submitted and an affidavit from the applicant's wife all consistently establish that the applicant was absent from the United States for a period of time during the requisite period that exceeded forty-five (45) days. Because the applicant has not indicated that his absence was longer than forty-five (45) days because of an emergent reason that came unexpectedly into being, it is found that he did not meet his burden of establishing, by a preponderance of the evidence, that he maintained continuous residence during the requisite period.

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 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). Due to the absence, the applicant did not continuously reside in the United States for the requisite period. 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.