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U.S. Citizenship
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Services

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FILE:

MSC-06-047-11087

Office: NEWARK

Date:

APR 02 2008

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 Records 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.

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, Newark. 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 had failed to prove her eligibility for temporary resident status.

On appeal, counsel for the applicant stated that the applicant submitted additional evidence to establish her continuous physical presence in the United States, together with a statement addressing the questions raised by the director.

An applicant for temporary resident status must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term “until the date of filing” in 8 C.F.R. § 245a.2(b) 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).

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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet her burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The record shows that the applicant submitted a Form I-687 application and Supplement to Citizenship and Immigration Services (CIS) on November 16, 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 listed the following addresses during the requisite period: [REDACTED] New York, New York from 1981 to 1982; [REDACTED] Brooklyn, New York from 1982 to 1985; and [REDACTED] Bronx, New York from 1985 to 1989. At part #32 where applicants were asked to list all absences from the United States since entry, the applicant listed one absence during the requisite period, which was a trip to Mexico to visit a friend during July 1987. At part #33 where applicants were asked to list all employment in the United States since entry, the applicant indicated only that she was a self-employed massage worker from 1981 to present.

In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant provided multiple attestations. The applicant submitted a form affidavit from [REDACTED] which states that, to the affiant’s personal knowledge, the applicant lived at the [REDACTED] address from February 1981 to June 1982; in Brooklyn from July 1982 to March 1985; and in the Bronx from April 1985 to February 1989. The affiant stated that he met the applicant in the summer of 1981 when she went to watch the soccer games at Flushing Meadow Park. This affidavit is internally inconsistent. Specifically, the affiant claimed to have personal knowledge of the applicant’s residence in the United States since February 1981, yet he also claimed not to have met the applicant until the summer of 1981. This inconsistency calls into question whether the affiant can actually confirm that the applicant resided in the United States during the requisite period.

The applicant provided a form affidavit from [REDACTED], which states that the affiant got to know the applicant in 1983 when she lived at [REDACTED] in Brooklyn. This affidavit does not confirm that the applicant resided in the United States, other than at an unspecified time in 1983. On this affidavit, the applicant's first name appears to have been altered with liquid paper at the top of the page so that the affidavit reads "In the Matter of the Application of [REDACTED]" Elsewhere in the affidavit, the applicant's first name is listed two times in the masculine form so that it reads [REDACTED] and [REDACTED]. The alteration at the top of the page, together with the misspellings of the applicant's name multiple times in the affidavit, casts some doubt on the authenticity of the affidavit and on whether the affiant can actually confirm that the applicant resided in the United States during the requisite period.

The applicant also provided a form affidavit from [REDACTED]. The affiant stated that she has known the applicant since 1981, and that the applicant and the affiant lived in the same building at that time at the [REDACTED] address. This affidavit also does not confirm that the applicant resided in the United States, other than at an unspecified time in 1981. In addition, this affidavit also lists the applicant's name first as [REDACTED] and later as [REDACTED]. This affidavit also appears to have been altered with liquid paper. The discrepancy in the spelling of the applicant's name on the affidavit and the apparent alterations cast some doubt on the authenticity of the affidavit and on whether the affiant can actually confirm that the applicant resided in the United States during the requisite period.

The applicant also submitted three affidavits that fail to state that the applicant resided in the United States during the requisite period. These include the affidavits from [REDACTED] and [REDACTED].

In denying the application the director noted that the applicant had failed to prove her eligibility for temporary resident status. It is noted that the director erroneously stated that the affidavit from [REDACTED] offered no statement as to the applicant's physical presence in the United States during the statutory period, although [REDACTED] did make statements regarding the applicant's residence in the United States during the requisite period. The director's error is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The director raised the issue of class membership in the decision. Since the director adjudicated the application on the merits, she is found not to have denied the applicant's claim of class membership.

On appeal, counsel for the applicant stated that the applicant submitted additional evidence to establish her continuous physical presence in the United States, together with a statement addressing the questions raised by the director. The applicant stated that she first entered the United States in

1981 and explained the difficulty of obtaining evidence of residence as a person who is in the United States unlawfully. The applicant also submitted evidence that is not relevant to the determination of whether she resided in the United States during the requisite period.

In summary, the applicant has not provided any contemporaneous evidence of residence in the United States relating to the requisite period; and has submitted attestations that are internally inconsistent, appear to have been altered, refer to the applicant by the wrong name, confirm the applicant's residence for only a limited time during the requisite period, or fail to confirm that the applicant resided in the United States during the requisite period. The affidavit from [REDACTED] is internally inconsistent. The affidavit from [REDACTED] appears to have been altered, misspells the applicant's name, and confirms the applicant's residence in the United States only at some time during 1983. The affidavit from [REDACTED] misspells the applicant's name and confirms the applicant's residence in the United States only at some time during the requisite period. The affidavits from [REDACTED] and [REDACTED] fail to confirm that the applicant resided in the United States during the requisite period.

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 contradictions within the applicant's supporting documents, and given her reliance upon documents with minimal probative value, it is concluded that she has failed to establish continuous residence in an unlawful status in the United States for the requisite period 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.