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**U.S. Citizenship
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FILE: [Redacted]
MSC-05-131-12747

Office: NEW YORK

Date: **APR 30 2008**

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. 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.

A handwritten signature in black ink, appearing to read "D. King" or similar, written over a light background.

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 Acting District Director, New York. 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 not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. Specifically, in her Notice of Intent to Deny (NOID) the director stated that at the time of the applicant's interview with a Citizenship and Immigration Services (CIS) or the Service officer on July 12, 2005, the applicant, who was born on January 28, 1966, stated and then signed a statement in which he asserted that he entered the United States for the first time when he was nineteen (19) or twenty (20) years old. The director found that this indicated that this indicated that the applicant would have first entered the United States subsequently to January 1, 1982. The director also found that the applicant's claimed absence from the United States from November 1986 to January 1987 exceeded forty-five (45) days. The director also noted that the affidavits submitted by the applicant in support of his application were not submitted with affiants' identity documents or proof that the affiants were in the United States during the requisite period. She went on to say that they further did not include telephone numbers at which the affiants could be reached to verify information in the affidavits. Therefore, the director found that the applicant failed to submit evidence that proved by a preponderance of evidence that he resided continuously in the United States for the duration of the requisite period. The director granted the applicant thirty (30) days within which to submit additional evidence in support of his application. As the applicant failed to submit additional evidence in response to the director's NOID, he did not overcome the director's reasons for denial. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to Temporary Resident Status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, the applicant asserts that the director did not give due weight to the evidence he submitted. He further states that he did not receive the Services' Notice of Intent to Deny (NOID).

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)(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) 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 his or her burden of establishing continuous unlawful residence in the United States during the requisite period and whether the applicant is ineligible for this benefit because of his criminal record. Here, though it appears the applicant is not ineligible for this benefit because of his criminal record alone, the applicant has failed to meet his burden.

The regulation at 8 C.F.R. § 245a.2(15)(c) states in pertinent part that those who have been convicted of a felony or three or more misdemeanors are ineligible to adjust status to that of a temporary resident.

"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).

It is noted that the record contains evidence that the applicant has been arrested and sentenced as follows:

1. On May 25, 2004 the applicant pled guilty to and was convicted of disorderly conduct, in violation of New York Penal Code § 240.20, a violation. It is noted that a violation under the New York Penal Code is equivalent to an infraction. The applicant was identified as [REDACTED] when he was both arrested convicted. (Date of arrest: April 29, 2004; Case No.: [REDACTED]). It is noted that charges at the time of arraignment were for violations of the New York State Penal Code § 165.71, Trademark Counterfeit in the Third Degree.
2. On October 25, 2004 the applicant pled guilty to and was convicted of disorderly conduct, in violation of New York Penal Code § 240.20, a violation. The applicant was identified as [REDACTED] when he was both arrested convicted. (Date of arrest: August 1, 2004; Case No.: [REDACTED]). It is noted that charges at the time of arraignment were for violations of the New York State Penal Code § 165.71, Trademark Counterfeit in the Third Degree and of the New York State Administrative Code § 20.453, operating as a general vendor without the required license.
3. On April 11, 2005 charges against the applicant for violation of New York State Administrative Code § 20.453, operating as a general vendor without the required license, a violation, were dismissed. The applicant was identified as [REDACTED] both at the time of his arrest and on the date these charges against him were dismissed (Date of arrest: July 15, 2004; Case No.: [REDACTED]).
4. Also on April 11, 2005, charges against the applicant for violation of New York State Administrative Code § 20.453, operating as a general vendor without the required license, a violation, were dismissed and the record of this offense was sealed. The

applicant was identified as [REDACTED] both at the time of his arrest and on the date these charges against him were dismissed. (Date of arrest: September 30, 2004; Case No.: [REDACTED])

Here, the two dismissals and his two convictions for violations or infractions alone do not render the applicant ineligible to adjust status to that of a temporary resident.

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 February 8, 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 address in the United States during the requisite period to be [REDACTED] in New York City from July 1981 until July 2000. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that during the requisite period, he was absent from the United States from November 1986 until January 1987 when he went to Canada to visit friends. It is noted that this indicates that the applicant may have had an absence from the United States that was in excess of forty-five (45) days. However, as there are not specific dates associated with this absence, it cannot be determined that this is the case with absolute certainty. At part #33, where the applicant was asked to list all of his employment in the United States since he first entered, he showed that he has been employed as a vendor at the Fulton Mall in Brooklyn, New York since August 1981 and until he signed his Form I-687 in 2005. It is noted here that the applicant was born on January 28, 1966. Therefore, in August 1981 when the applicant began working he would have been 15 years old.

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. 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. 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 prove that he resided continuously in the United States for the duration of the requisite period, the applicant submitted the following evidence:

- An affidavit from [REDACTED] that was notarized on January 28, 2005. In this affidavit, the affiant states that he is aware that the applicant left the United States after November 6, 1986. He goes on to say that this caused him to be unable to file for legalization under the amnesty program. Here, the affiant does not state that he personally

knows that the applicant ever resided in the United States before, during or after the requisite period. Therefore, this affidavit carries no weight in proving that the applicant resided continuously in the United States for the duration of that period.

- An affidavit from [REDACTED] that was notarized on January 28, 2005. In this affidavit, the affiant states that he knew the applicant before December 31, 1981 in New York. Here, the affiant does not indicate whether the applicant or he himself resided in New York before January 1, 1982. He fails to provide identity documents or proof that he himself resided in the United States for any part of the requisite period. He further fails to indicate that it is personally known to him that the applicant resided in the United States or to provide an address at which he knows the applicant resided during the requisite period. Further, the affiant does not provide a telephone number at which he can be reached to verify information in this affidavit. Because it is significantly lacking in detail and because it is not amenable to verification, this affidavit carries only very minimal weight in establishing that the applicant was present in the United States during the requisite period.

The director issued a Notice of Intent to Deny (NOID) the applicant on February 15, 2006. In her NOID, the director noted that the applicant both testified and then signed a statement before a Citizenship and Immigration Services (CIS) officer on July 12, 2005 in which he stated that the first time he entered the United States he was 19 to 20 years old. The director found this indicated that the applicant, who was born in 1966, would have then first entered in 1985 or 1986 rather than before January 1, 1982. The director found that the applicant's absence from the United States from November 1986 until January 1987 was over forty-five (45) days long. It is noted here that because dates are not associated with this absence, it is not clear that it exceeded forty-five (45) days.

The director noted that credible affidavits include documents identifying the affiant, proof that the affiant was in the United States during the statutory period and proof that there was a relationship between the affiant and the applicant. However, the affidavits submitted by the applicant were lacking with regards to these criteria. The director afforded the applicant thirty (30) days within which to submit additional evidence in support of his application.

It is noted that the director sent her NOID to the applicant's address of record by certified mail. However, the record shows that on March 15, 2006 the United States Postal Service returned the director's NOID as unclaimed.

The director denied the application for temporary residence on July 27, 2006, sending it to the same address of record that the NOID was sent to. In denying the application, the director stated that the applicant failed to submit additional evidence for consideration in support of his application. Therefore, the applicant did not overcome the director's reasons for denial as stated in her NOID.

On appeal, the applicant asserts that the director did not give due weight to the evidence he provided in support of his application. He further states that the Service never sent him a NOID. He states that he was not granted due process because of this oversight.

Here, the AAO finds that the director correctly found that the evidence submitted by the applicant does not carry sufficient weight to allow the applicant to prove that he entered the United States on a date prior to January 1, 1982 and then resided continuously for the duration of that period.

Though the applicant states that his due process was violated because he did not receive the Service's NOID, which the record shows was issued to him and sent to his address of record, the director is not required to issue a Notice of Intent to Deny (NOID) in this case. Pursuant to paragraph 7, page 4 of the CSS Settlement Agreement and paragraph 7, page 7 of the Newman Settlement Agreement the director shall issue a NOID before denying an application for class membership. Here, 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. Therefore, the director was not required to issue a NOID prior to issuing the final decision in this case.

In summary, the applicant has not provided any evidence of residence in the United States relating to the period from before January 1, 1982 until the end of the requisite period for the reasons noted above. The applicant's statement in the record further casts doubt on whether the applicant entered the United States prior to January 1, 1982.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, as well as his statement in the record, seriously detract from the credibility of his 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 inconsistencies in the record and the lack of credible supporting documentation, it is concluded that he has failed to establish by a preponderance of the evidence that he has 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 on this basis.

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