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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: MIAMI

Date: DEC 02 2008

MSC-06-039-13935

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. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed or rejected, 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.

John F. Grissom, Acting 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 Director, Miami. 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 (together comprising the I-687 Application). The director denied the application, finding that the applicant had failed to meet his burden of proof by a preponderance of the evidence that he entered the United States before January 1, 1982 and has resided continuously in the United States in an unlawful status throughout the requisite period. The director specifically noted that the two affidavits submitted in support of the applicant's claim of continuous residence in the United States in an unlawful status during the requisite period were not credible. The director also concluded that the applicant lived in Hong Kong between 1981 and 1987 based on the applicant's Form G-325, Biographic Information, filed in 1993.

On appeal, counsel for the applicant claims that the director's conclusion that the applicant resided in Hong Kong between 1981 and 1987 is arbitrary and capricious and further states that the director erred in denying the application for lack of proof.

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)(1) 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 shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period 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, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

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."

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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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, "[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 applicant 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 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 here is whether the applicant entered the United States before January 1, 1982 and has continuously resided in the United States in an unlawful status throughout the entire requisite period.

To show continuous residence in the United States since 1981, the applicant submitted a number of various documents such as photocopies of his tax returns from 1987 to 2005, bank statements showing deposits and balance in the savings and checking account from 1986 to 1989, and a social security statement indicating his annual income in the United States from 1987 to 2003. The applicant also submitted three affidavits from friends who claim that they have known him since 1981 and three photos claimed by the applicant to be taken in the United States in 1981.

As stated above, the burden is on the applicant to prove by a preponderance of the evidence that he entered the United States before January 1, 1982 and has continuously resided in the United States in an unlawful status since such a date until he filed or attempted to file an application for temporary resident status pursuant to Section 245A of the Act. The burden is met when, based on relevant, probative, and credible evidence, the applicant's claim is probably true. In this case, the tax returns, the bank statements, and the social security statement that the applicant submitted are relevant, probative, and credible as evidence of his continuous residence in the United States from 1987, but are insufficient to establish eligibility for the benefit sought.

In an attempt to show continuous residence in the United States since 1981, the applicant submitted three affidavits from friends. In their affidavits, [REDACTED] and [REDACTED] claim to have met the applicant in the United States in 1981, and they describe their first meeting with the applicant. Mr. [REDACTED] further claims to have regularly called the applicant as a friend since he met the applicant and attests to the applicant's continuous presence in the United States since 1981. While these affidavits have some evidentiary weight as to the applicant's presence in the United States in 1981, they have no weight as to his continuous residence in the United States during the requisite period, specifically between 1981 and 1987. The affiants claim a long-term relationship with the applicant but do not provide detailed information as to the applicant's residence in the United States during the requisite period and do not state how regularly they met with or talked to the applicant or provide other details about the relationship to establish the credibility of the assertions. Mr. [REDACTED]'s brief assertion to regularly calling the applicant without other detailed information is not persuasive as evidence of the applicant's claim that he resided continuously in the United States during the requisite period.

The record also includes three photos claimed by the applicant to be taken in the United States in 1981. While such photos may show that the applicant was actually in the United States in 1981, the photos, by themselves, do not add additional information about the applicant's continuous residence in the United States during the time between 1981 and 1987. Moreover, none of the pictures show any date and place when and where they were taken.

On appeal, counsel states that the director has arbitrarily and capriciously concluded that the applicant resided in Hong Kong between 1981 and 1987. To prove it, he submits a photocopy of the applicant's Form G-325 filed in 1993, in which the applicant listed his residence in the United States for the last five years from 1988 to 1993 as well as his address in Hong Kong from August 1969 to March 1981. Counsel then claims in his brief that the director cannot conclude based on this evidence that the applicant resided in Hong Kong between 1981 and 1987. The record reveals,

however, that the applicant's Form G-325 submitted on appeal has different information from the original Form G-325 that the applicant submitted in 1993. In that 1993 original Form G-325, the applicant listed an additional address in Hong Kong between 1981 and 1987 as his residence outside of the United States. This is a material inconsistency in the record for which the applicant has not produced any objective and independent evidence to resolve or reconcile. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application. *Id.* at 591.

On appeal, counsel further states that it is unreasonable for the government to request documentation to establish continuous residence in the United States since before January 1, 1982, considering that more than 25 years have passed since the applicant first arrived in the United States and that the applicant is now over 70 years old. In his brief, counsel states that after more than 25 years, many of the applicant's friends have passed away or moved, and a number of documents are lost. Nonetheless, as stated above, the burden is upon the applicant to establish by a preponderance of the evidence that he is eligible for temporary resident status pursuant to Section 245A of the Act. Moreover, the Board of Immigration Appeals (BIA) has held in the *Matter of E- M--* that it is reasonable to expect an applicant who has been residing in this country since before January 1, 1982 to provide some documentation including affidavits and other relevant contemporaneous documents to establish eligibility. *Supra* at 82-83. In this case, while the applicant's presence in the United States prior to January 1, 1982 has been established by the submitted affidavits and the photos, his continuous residence in the United States from that time until 1987, however, has not been established by any credible evidence.

The absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period and lack of detail noted 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 lack of credible supporting documentation, it is concluded that the applicant 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.

Beyond the decision of the director, the applicant appears to be ineligible for the benefit sought because of his multiple absences from the United States during the requisite period.

As stated above, no single absence for more than 45 days and no multiple absences for a total of more than 180 days from the United States are allowed during the requisite period, unless return cannot be accomplished due to emergent reasons.

At part #32 of the Form I-687, the applicant indicated that he visited China multiple times between 1981 and 1988. Along with the Form I-687, the applicant submitted a typed statement that shows in detail the length of each of his absence from the United States between 1981 and 1988. The AAO observes based on this statement that the applicant visited China 11 times during that time and that each visit ranges from approximately one to three months. The AAO further finds that the 1984 visit from May 1984 to August 1984 is more than 45 days and thus, breaks the applicant's continuous residence in the United States. Moreover, adding all of the days of his absences from the United States between 1981 and 1988, the applicant has surpassed the 180 days total absence allowed during the requisite period. There is no evidence in the record indicating the purpose of the applicant's visits to China and no explanation of an emergent reason or reasons relating to the applicant's inability to return to the United States within the prescribed time allowed. For this additional reason, the application may not be approved.

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