

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

L1

PUBLIC COPY



FILE:



Office: NEW YORK

Date: JAN 15 2008

MSC 04 329 22944

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. 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, New York, and that 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, on August 16, 2004. 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. The director determined that the extent and credibility of the evidence submitted by the applicant, which consisted primarily of affidavits, was insufficient. 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 he denied the application.

On appeal, counsel for the applicant asserts the applicant submitted substantial, probative, reliable and uncontradicted evidence sufficient to meet the preponderance of the evidence standard. Counsel submits a brief and additional evidence in support of the appeal.

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 be 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).

Under the CSS/Newman Settlement Agreements, for purposes of establishing residence and physical presence, in accordance with the regulation at 8 C.F.R. § 245a.2(b)(1), "until the date of filing" shall mean 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 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 record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to Citizenship and Immigration Services (CIS) on August 16, 2004. 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 addresses in the United States during the requisite period to have been at: [REDACTED] in Corona, New York, from June 1981 until November 1984; and [REDACTED] in Jackson Heights, New York, from December 1984 until June 1990. At part #31 of the Form I-687 where applicants are asked to list all affiliations or associations with churches, clubs and other organizations in the United States, the applicant indicating nothing. Part # 33 of this application requests the applicant to list his employment in the United States since his entry. The applicant showed that, during the requisite period he worked for Citi Construction Corp. in Flushing, New York from May 1986 until March 1989; for Natco Construction Corp. in Brooklyn, New York from August 1984 until May 1986; and for A. Hunt General Carpentry and Alteration Corp. in New York, New York from May 1981 until July 1984. The applicant indicated at Part #32 that he had one absence from the United States during the requisite period, a visit to Canada in August 1987. The applicant listed only one other absence up to the present time, a visit to India in March 2003.

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).

The applicant submitted an affidavit in support of his application in which he stated that he entered the United States without inspection on March 25, 1981 and departed the country only one time during the requisite period, for less than 45 days. In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant provided the following:

- An affidavit dated August 7, 2001 from [REDACTED], who attests that he has known [REDACTED] of [REDACTED], Flushing, New York" since December 1981. As the applicant's name is not [REDACTED]" and there is no evidence that he has ever used this name or resided at the stated address, this affidavit has no probative value.
- A copy of the biographical page of a U.S. passport issued to [REDACTED]. It is unclear why this evidence was submitted, as the passport is not accompanied by an affidavit from [REDACTED], nor is there any explanation of his relationship to the applicant.
- Copies of the applicant's current Indian passport [REDACTED], and a previous Indian passport issued to him in New York on May 23, 1991. A notation on page 5 of the older passport indicates that the beneficiary previously traveled on passport number [REDACTED], issued in India on July 13, 1988. This information is inconsistent with information provided by the beneficiary on his Form I-687, where he indicated no absences from the United States between August 1987 and March 2003.

The applicant was interviewed under oath by a CIS officer in connection with the instant application on May 31, 2005. During his interview, the applicant stated that he lived with his brother, [REDACTED], in Jackson Heights, New York from 1981 until 1984, and that he later lived with a friend, [REDACTED] at another house in Jackson Heights until 1990. The applicant stated that he left the United States in December 1987 to visit a friend, whose name he did not recall, for two weeks, and returned by truck with someone he did not know. The applicant stated that he got married in India in 1992 and that his spouse is in the United States. It is noted that the applicant indicated on Form I-687 that his only absence from the United States during the requisite period was a trip to Canada in August 1987, not December 1987.

At the time of his interview, the applicant submitted a notarized declaration dated May 30, 2005 from [REDACTED] who states that he is the applicant's brother, and that he shared an apartment with the applicant, located at [REDACTED], Jackson Heights, New York, from June 1981 until 1984. [REDACTED] stated that he remains close with his brother and calls him from time to time. [REDACTED] provided a copy of the biographical page from his current U.S. passport as proof of his identity. It is noted that the applicant stated on his Form I-687 that he resided at [REDACTED] in Corona, New York from February 1981 until November 1984. As [REDACTED] statement is inconsistent with the applicant's own testimony regarding his address of residence during this period, its probative value is limited.

Moreover, it is noted that the applicant's administrative record includes a Form I-687, Application for Temporary Residence, filed by the applicant in 1991. On the older version of the Form I-687 (dated 04/01/1987), applicants were requested at part #32 to list all brothers and sisters. The applicant indicated that he has two sisters residing in India and listed no other siblings, and specifically, no brother. In

addition, the beneficiary's previous application included a "Proof of Residency Affidavit" executed by [REDACTED] on January 17, 1991. At that time, [REDACTED] stated that his relationship to the applicant is that of a friend. He also did not indicate that he ever shared an apartment with the applicant. Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

On August 17, 2005, the district director issued a notice of intent to deny (NOID). The director noted that the affidavit from [REDACTED] has no bearing on the case as [REDACTED]'s statement did not appear to relate to the applicant. The director also acknowledged the affidavit submitted by [REDACTED] but noted the inconsistency in the addresses provided by the applicant and [REDACTED] for the 1981 through 1984 period. The director also observed that CIS records show that [REDACTED] entered the United States in 1984 and found that the affidavit did not appear to be truthful.

The director further advised the applicant that his testimony that his only absence from the United States was a trip to Canada in December 1987 was not credible. The director noted that the applicant's record shows that he had a passport issued in India in July 1988, and that he was reported as a deserting crewman in January 1990, having signed on a vessel in October 1989. The director concluded that the applicant provided no credible evidence of his residence in the United States during the requisite period and was not truthful regarding his absences from the United States.

The applicant, through former counsel, submitted a response to the NOID on September 15, 2005. The applicant stated that he never submitted an affidavit from [REDACTED], but rather submitted affidavits from [REDACTED] and [REDACTED]. In support of his response, the applicant submitted the following:

- An affidavit, executed on February 19, 2004, from [REDACTED] (apparently also known as [REDACTED] [REDACTED] who attests that he has known the applicant as a friend since 1984 because they have attended the same temple since that time. The affiant provided a copy of his U.S. passport as proof of his identity. [REDACTED] provides specific addresses of residence for the applicant dating back to June 1981, which are consistent with the information provided on the applicant's Form I-687. However, he does not explain how he came to obtain direct, personal knowledge of the applicant's residences prior to meeting him in 1984. [REDACTED] also states "I also know the residence history of [REDACTED] as we regularly visit each others house." As noted above, the applicant did not indicate on his Form I-687 that he has belonged to a church in the United States, thus casting doubt on [REDACTED]'s claim that he attends the same temple as the applicant. [REDACTED]'s statement that he knows the residence history of a "[REDACTED]" has no bearing on this application and the fact that he appears to be attesting to the residence history of two different individuals in one affidavit raises questions regarding the credibility of his testimony. Mr. [REDACTED] does not indicate how frequently he had contact with the applicant or whether there were any periods of time during the requisite period in which he did not see the applicant. Given

the affiant's claim of a 20-year friendship with the applicant, the lack of detail regarding the events and circumstances of the applicant's residence is significant and further diminishes the probative value of the affidavit. Overall, given the inconsistencies with the applicant's own testimony, the significant lack of detail, and the fact that the applicant first met the affiant in 1984, this affidavit can be given no weight in establishing the applicant's continuous residence in the United States prior to 1984, and extremely limited weight in establishing his residence for the remainder of the requisite period.

- A new affidavit executed by [REDACTED] on September 9, 2005. He attests that the applicant is his brother, that he himself first entered the United States in 1980, and that he resided with the applicant at [REDACTED] in Jackson Heights, New York from June 1981 until November 1984. This new affidavit was accompanied by a photocopy of the above-referenced affidavit executed by [REDACTED] in January 1991, in which he stated that the applicant is his friend, rather than his brother, and in which he indicated a different address of residence for the same period and did not indicate that he ever resided with the applicant. [REDACTED] provided a copy of his U.S. passport as proof of his identity. As only one identity document was provided, it is assumed that both affidavits were executed by the same [REDACTED]. As already discussed above, [REDACTED]'s testimony is not credible based on the internal inconsistencies in his own testimony, the conflicts with the beneficiary's statements regarding his addresses of residence, and based on the applicant's own previous testimony that he has no brother.
- A notarized letter from [REDACTED] Head Granthi of The Sikh Center of Flushing, New York, dated February 16, 2004. [REDACTED] states that the applicant is a member of the Sikh church congregation, but provides no information regarding his dates of membership or the length of his acquaintance with the applicant. Because the information provided does not reference the beneficiary's continuous residence in the United States between 1981 and 1988, and is inconsistent with the applicant's own testimony that he has not been affiliated with a church in the United States, this statement has no probative value.
- A notarized letter from [REDACTED], president of Citi Construction Corporation, who indicates that the applicant was employed by the company as a full-time construction worker from May 1986 to December 1986, from June 1988 to November 1988, and in March and April 1989. 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, the

letter from [REDACTED] does not include the applicant's address at the time of employment and does not address whether or not the information was taken from official company records, where records are located and whether the Service may have access to the records. As the letter does not comply with the regulatory requirements for employer letters, its probative value is limited.

- A letter from [REDACTED] printed on what appears to be a blank invoice of A. Hunt General Carpentry and Alteration Corporation. [REDACTED] states that the applicant worked as a carpenter and helper for this company from May 1981 until April 1982, but provides no further information regarding his employment. Therefore, this letter fails to meet many of the regulatory requirements for employer letters stated above. Further, it is noted that the applicant indicated on his Form I-687 that he worked for this company until 1984, thus, the employer's statement is inconsistent with the applicant's own testimony. For these reasons, this letter can be given only minimum probative value.
- Copies of stamped envelopes which the applicant described as an envelope that he and his brother mailed to India in 1983 and an envelope that he received in his name in the United States in 1981. There were in fact three copies of envelopes attached. One was mailed from New York to India in June 1983, but the name of the mailer is not clearly identified. One envelope with Indian postage is addressed to the applicant at his claimed initial address of residence in the United States, but the date of the postmark appears to be handwritten in pen as "8 81" The third envelope is addressed to the applicant at the same address but the postmark date is illegible. These documents, even if the postmarks were clearly discernable and credible, would carry little weight in establishing the applicant's continuous residence in the United States for the duration of the requisite period.

The director denied the application on February 8, 2006. In denying the application, the director concluded that the new evidence and evidence already included in the record was insufficient to establish the applicant's eligibility for temporary residence under Section 245A of the Act. The director specifically noted that the affidavits submitted appeared neither credible nor amenable to verification, and that such affidavits were uncorroborated by other evidence in the record.

On appeal, counsel for the applicant asserts that the applicant submitted substantial, probative, reliable and uncontradicted evidence sufficient to establish by a preponderance of the evidence his eligibility for adjustment to temporary resident status. Counsel states that the director made "substantive errors of law and fact" but does not elaborate. In a brief dated March 21, 2006, emphasizes that the affidavits from [REDACTED] and [REDACTED] provided credible and verifiable information regarding the applicant's addresses of residence since 1984 and 1981, respectively, and are in fact sufficient to establish his entry to the United States in 1981 and his continuously residence during the requisite statutory period.

In addition, the applicant submits the following additional evidence on appeal:

- An affidavit executed on March 27, 2006 by [REDACTED] who states that he has resided in the United States since 1975. [REDACTED] states that he first met the applicant at the Sikh Center of New York in June 1981. He states that the applicant told him that he entered the United States in February 1981 and that he resided in Corona, New York. [REDACTED] states that he is aware that the

applicant worked for A. Hunt General Carpentry and Alteration Corporation in New York "during that period" because he visited his place of work a few times. In addition, the affiant states that the applicant told him that he attempted to file for legalization during 1987, but was turned away because he stated to the immigration officer that he traveled to Canada in May 1987. Finally, Mr. [REDACTED] states that he personally knows that the applicant never married. [REDACTED] provides a copy of his New York States driver's license as proof of his identity, as well as evidence that he earned wages and paid taxes in the United States in 1975.

Here, there are several inconsistencies between [REDACTED] statement and the applicant's own testimony which diminish the probative value of the affidavit. First, the applicant indicated during his interview with a CIS officer that he was married in 1992. The applicant filed a Form I-485, Application to Adjust Status, in 2002 on which he stated that he is married with two children born in the United States. The fact that [REDACTED] believes that the applicant has never been married raises questions regarding his claimed 25-year friendship with the applicant. Further, the applicant stated on his Form I-687 that he traveled to Canada in August 1987, and stated during his interview that he traveled to Canada in December 1987. Mr. [REDACTED] has now introduced a third date, May 1987, for what is presumably the same trip to Canada, which further reduces the credibility of the applicant's testimony regarding his absences from the United States. As noted above, the applicant did not indicate on his Form I-687 any association with the Sikh Center of New York or any other church or religious organization, so [REDACTED] statement that he first met the applicant at this temple is suspect. Finally, the affiant offers little detail of the events and circumstances of the applicant's residence in the United States beyond generally confirming where he worked and resided in 1981. [REDACTED] does not indicate how frequently he had contact with the applicant for the duration of the requisite period. Given the inconsistencies between [REDACTED] statements and other evidence in the record, and in light of the significant lack of detail in his testimony, his affidavit is not credible or probative.

- A new affidavit from [REDACTED] who states that he has been in the United States since 1981. He states that the applicant is a good friend of his who he met in 1984 at the Sikh temple in Flushing, New York. He states that the applicant told him that he has never married and that he has no relatives living in the United States. [REDACTED] states that he has personal knowledge of the applicant's residences since 1984 and lists all addresses. He further states that he personally knows that an immigration officer rejected the applicant's application for legalization because the applicant traveled to Canada in May 1987. Finally, [REDACTED] states that he has been in "continuous contact" with the applicant since meeting him in 1984. [REDACTED] provides evidence that he was granted temporary residence in 1987 as proof of his residence in the United States since 1981.

Upon review, the new affidavit from [REDACTED] is less credible than the previous affidavit, as it is inconsistent with the applicant's own testimony that he is married with two children who reside with him in the United States. Further, like [REDACTED] affidavit, it contains new information regarding the date of the beneficiary's absence from the United States in 1987, which conflicts with the beneficiary's previous written and oral testimony. In addition, the deficiencies that existed in the previous affidavit from this affiant, which are discussed above, have not been resolved. This affidavit does not establish the

beneficiary's residence in the United States prior to 1984, and carries very little probative value in establishing his continuous residence here thereafter.

- A new affidavit from [REDACTED] who states that he came to the United States in 1980. He states that the applicant is his brother, and that the applicant is unmarried with no family of his own. Mr. [REDACTED] again states that the applicant came to the United States in 1981 and resided with him at 35-[REDACTED] in Jackson Heights, New York during that time. He states that the applicant worked as a carpenter from May 1981 until July 1984 and later performed construction labor. [REDACTED] further states that the applicant traveled to Canada in May 1987 and for this reason, his legalization application was not accepted by the immigration officer during the initial application period. Mr. [REDACTED] provides a copy of a passport issued to him in New York in December 1983 as evidence of his presence in the United States prior to 1984.¹

Upon review, many of the deficiencies addressed above also apply to this affidavit, particularly with respect to the applicant's marital status and dates of absence from the United States during the requisite period. It simply defies credibility that the applicant's claimed friends and brother are unaware of the existence of the applicant's wife and children. In addition, as noted previously, the address for the apartment [REDACTED] purportedly shared with the applicant does not appear on the applicant's Form I-687 application. Again, doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. at 591-92.

As is stated above, 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). The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence pursuant to 8 C.F.R. § 245a.2(d)(3). 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.

Here, the evidence submitted is not, as counsel asserts, "substantial, probative, reliable, and uncontradicted." The affidavits from the applicant's claimed employers all lack required information that is specifically

¹ It is noted that according to the information contained on the biographical page of [REDACTED]'s Indian passport ([REDACTED]), he is the son of [REDACTED]. The applicant lists the same father and permanent address in India in his passport, thus suggesting that [REDACTED] is in fact the applicant's brother. However, the fact remains that [REDACTED] has previously submitted an affidavit identifying himself as a friend of the applicant, and the applicant himself has indicated on a previous Form I-687 that he does not have a brother. This conflicting information has not been resolved.

outlined in the regulations, while information contained in affidavits submitted by purported friends of the applicant are all inconsistent with the applicant's own statements and testimony to various degrees.

Further, this applicant has provided no contemporaneous evidence of residence in the United States relating to the 1981-88 period that can be clearly associated with him. The absence of sufficiently detailed and consistent evidence 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 inconsistencies in the record and the applicant's reliance upon affidavits with minimal probative value, it is concluded that 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, 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.