



U.S. Citizenship
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Services

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[Redacted]

FILE: [Redacted]
MSC-06-097-13780

Office: CHICAGO

Date: JAN 24 2008

IN RE: Applicant: [Redacted]

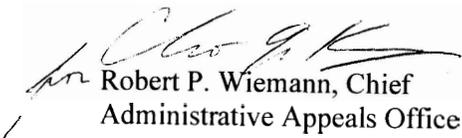
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[Redacted]

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 Citizenship and Immigration 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, Chicago (the director). The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further action and consideration.

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: 1) that he had continuously resided in the United States in an unlawful status from a date prior to January 1, 1982 and continuing until the date when he attempted to apply for legalization but was turned away; 2) that he was continuously physically present in the United States, except for brief, casual and innocent departures, from November 6, 1986 until the date he attempted to apply for legalization; and 3) that he was admissible to the United States as an immigrant. Specifically, the director suggested that the applicant's entry as a nonimmigrant during the statutory period supported the finding that he was present in the United States lawfully during the statutory period. 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 through counsel that he has established continuous residence and physical presence in the United States during the requisite periods. He also asserts that if the evidence he submitted was in some way deficient Citizenship and Immigration Services (CIS) had an obligation to inform him of that and to afford him an opportunity to provide additional evidence. Finally, the applicant indicates through counsel that the reasoning of the director as set out in the notice of decision is contradictory and as such the application was improperly denied.

The regulation at 8 C.F.R. § 245a.2(b) provides, in relevant part:

(b) *Eligibility.* The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

. . .

(9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.

(10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

Section 212(a)(6)(C) of the Act provides in relevant part:

Misrepresentation.

(i) In General. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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)(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. *See* CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

An applicant for temporary resident status must establish that he is admissible as an immigrant, except as otherwise provided under Section 245A(d)(2) of the Act. Section 245A(a)(4) of the Act, 8 U.S.C. § 1255a(a)(4).

CIS shall adjudicate the Forms I-687 filed under the CSS/Newman Settlement Agreements in accordance with § 245A of the Act, its regulations, administrative and judicial precedents which the Immigration and Naturalization Service (now CIS) followed when adjudicating the Forms I-687 timely filed during the original legalization application period of May 5, 1987 to May 4, 1988. *See* CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 9.

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.

Where the director concludes that it is appropriate to deny the application, he or she shall issue a notice of decision which identifies for the applicant the reasoning underlying the denial such that the applicant might be able to provide a meaningful appeal. *See* 8 C.F.R. § 245a.2(o).

The AAO maintains plenary power to review this matter 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 federal courts have long recognized the AAO’s *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

The issue in this proceeding is whether the director appropriately identified for the applicant the reasoning underlying his decision to deny the application based on the applicant’s failure to provide sufficient evidence: to demonstrate that the applicant continuously resided in the United States during the requisite period; to demonstrate that he was continuously physically present in the United States during the requisite period; and to demonstrate that he is admissible to the United States as an immigrant. This office finds that the director failed to appropriately identify deficiencies in the evidence such that the applicant might have the opportunity to provide a meaningful appeal. *See* 8 C.F.R. § 245a.2(o).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

That is, regarding counsel's claim that the director was contradictory in his reasoning, this office notes the following excerpt from the director's notice of decision dated May 31, 2006:

[The applicant] must establish that [he was] continuously physically present in the United States during the period beginning on November 6, 1986, until the date of filing the application, and did not meet the criteria established to permit [CIS] to substantiate [his] claim to being physically present in the United States during the prescribed periods.

The AAO finds that this sentence might be interpreted as stating simultaneously the following contradictory points: that the applicant must demonstrate that he meets the physical presence requirement and that he does not meet this requirement. Further, the director suggested that the applicant's rent receipts from the Hotel Chicagoan dated November 1981 and following are not probative in that the applicant did not submit the original receipts, but instead submitted only copies of these receipts. Yet, the applicant's original Hotel Chicagoan rent receipts were submitted into the record.²

Further, the director suggested in the denial notice that the fact that the applicant entered the United States as an F-1 nonimmigrant during 1986 (and apparently did not violate that status until 1988), in and of itself, establishes that the applicant was lawfully present in the United States during part of the statutory period, and that the application should be denied on this basis. Yet, the record indicates that the applicant claimed to have first entered the United States during 1981 and to have reentered in 1986 to return to an unrelinquished, unlawful residence. Pursuant to the regulation at 8 C.F.R. § 245a.2(b)(9), an applicant who reentered the United States as a nonimmigrant during the statutory period in order to return to an unrelinquished, unlawful residence might nonetheless be deemed eligible so long as he or she was otherwise eligible for legalization. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 51 (1993) (which explains further that this eligibility is qualified at 8 C.F.R. § 245a.2(b)(10) which would oblige such an applicant to obtain a waiver of a statutory provision that deems inadmissible those aliens who enter the United States by fraud or willful misrepresentation.)³

Also, the director suggested that the affidavit of the applicant's previous landlord, [REDACTED], which relates to the applicant's residence in Chicago from July 1981 through April 1985 is not probative strictly because it is not accompanied by rent receipts or other contemporaneous evidence of the applicant's residence during the statutory period. However, according to the CSS Settlement Agreement, paragraph 11 at page 6, and the Newman Settlement Agreement, paragraph 11 at page 10, CIS shall not

² The AAO underscores that in this paragraph it is not implying that in all instances where the applicant fails to produce original contemporaneous documents, and instead produces only copies of such documents, that such evidence must be ignored as non-probative. This office is only stating here that evidence in the record contradicts the director's stated reason for finding that the copies of the Hotel Chicagoan rent receipts are not probative.

³ If, subsequent to this remand, the director determines that the applicant reentered the United States during 1986 to return to an unrelinquished, unlawful residence that would make the applicant inadmissible, the applicant would therefore be ineligible to adjust status as a temporary resident unless he first obtains a waiver of this ground of inadmissibility. This office would note though that the director did not identify this issue as a rationale underlying his May 31, 2006 decision to deny.

use the failure to provide evidence other than affidavits as the sole basis for finding that an applicant did not meet the continuous residence requirement. In turn, CIS may not use this as the sole basis for finding this evidence non-probative.

The director also indicated that the employment letter in the record dated November 25, 1984 regarding the applicant's employment at Clothes Castle during 1981 through 1984 is not probative strictly because when CIS attempted to contact this employer during 2006, the telephone number provided on the employer's statement was not in service. This office would concur that the director may find a document non-probative if it is no longer amenable to verification. However, this letter includes an address and the record does not indicate that CIS attempted to verify the contents of the letter using that address.⁴

On the other hand, the director did suggest that the statement of A [REDACTED] in the record dated October 2001 is not probative because [REDACTED] was no longer in Rochelle, Illinois, but was instead living in Pakistan in 2006, when CIS attempted to verify the contents of his statement. The AAO would agree that where the director has found that a document is no longer amenable to verification, the director may deem such document non-probative. The director also indicated that the applicant's own affidavit regarding his self-employment during the statutory period is not probative. The regulation at 8 C.F.R. § 245a.2(d)(6) states in relevant part that to meet his or her burden of proof the applicant must provide evidence beyond his or her own testimony. The applicant's affidavit is no more than the applicant's own testimony in written form. As such this office concurs in the director's determination that this document is not probative. However, the determination that these two documents are not probative on its own is not a sufficient basis for denying the application, given the various other evidence in the record, the deficiencies of which CIS has yet to identify for the applicant such that he might be able to provide a meaningful appeal. *See* 8 C.F.R. § 245a.2(o).

As to counsel's claim that where the evidence submitted pursuant to an application for temporary residence filed under the CSS/Newman Settlement Agreements is in some way deficient, CIS has an obligation to inform the applicant of that deficiency and to afford him an opportunity to provide additional evidence, this office notes that counsel cites no authority for this assertion. Further, CIS must adjudicate these applications in accordance with § 245A of the Act, its regulations, administrative and judicial precedents which the Immigration and Naturalization Service (now CIS) followed when adjudicating the Forms I-687 timely filed during the original legalization application period. *See* CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 9. These statutes, regulations and precedents do not include an obligation to issue a request for additional evidence when the initial evidence submitted is deficient, as suggested by counsel. *See Id.* *See also* 8 C.F.R. § 245a.2(o).

The director's decision to deny is withdrawn. The matter will be remanded for the director to issue a new decision in which he appropriately identifies the reasons underlying his decision for the applicant, including an appropriate identification of legal deficiencies in the evidence of record.

⁴ This office would note incidentally that CIS shall draw no negative inference regarding a document's credibility when a document which was drafted more than twenty years previously is no longer amenable to verification using the telephone number or address on the document.

Regarding the deficiencies and inconsistencies in the evidence, the AAO notes the following. In the record is the applicant's affidavit dated January 5, 1990 in which the applicant attested that he first entered the United States on **November 12, 1981**. Yet, in a brief submitted on June 16, 2005, the applicant stated through counsel that he first entered the United States on **June 16, 1981**.

The record also shows that the applicant submitted a Form I-687 and Supplement to CIS on January 5, 2006. He signed this document under penalty of perjury on December 29, 2005. At part #30 of the Form I-687 where the applicant was asked to list all of his residences in the United States since his first entry, he showed his first address in the United States to be at [REDACTED] Chicago, Illinois 60640, from 1981 to 1986.⁵ At part #33, where the applicant was asked to list all his previous employment in the United States dating back to January 1, 1982, he listed only the following employment during the statutory period:

1982-1984 [REDACTED]
1984-1989 [REDACTED]

The record also includes the statement of [REDACTED] dated October 24, 2001 (and dated November 5, 2001 by the notary) which indicates that from **July 1981** through April 1986 the applicant lived with Mr. [REDACTED] at [REDACTED] Chicago, Illinois 60640. Yet, another statement written by Mr. [REDACTED] in the record which is dated February 4, 1990 (and dated February 9, 1990 by the notary) specifies that the applicant did not begin living in the United States until **November 1981**. In that document, Mr. [REDACTED] also stated that the applicant lived with him at [REDACTED], Chicago, Illinois for four years. In addition, the record includes the statement of [REDACTED] dated February 6, 1990 which also indicates that the applicant did not begin living in the United States until **November 1981**. [REDACTED] states further that the applicant lived at [REDACTED] Chicago, Illinois 60640, then at 4 [REDACTED] Chicago, Illinois 60640 between November 1981 and February 1990 when [REDACTED] signed this document.

The Hotel Chicagoan rent receipts in the record indicate that the applicant paid rent for Room # [REDACTED] at the Hotel Chicagoan, 536 N. Rush Street, Chicago, Illinois 60611 for the month of November 5, 1981 through December 5, 1981, the month of December 6, 1981 through January 5, 1982, the month of February 6, 1982 through March 5, 1982, the month of April 6, 1982 through May 5, 1982, and the month of June 6, 1982 through July 5, 1982. Thus, the receipts which the applicant submitted as contemporaneous evidence of his unlawful residence during the statutory period suggest that the applicant was living on N. Rush Street in Chicago during November 1981 through July 1982. Yet, certain statements and affidavits in the record summarized in this analysis indicate that the applicant was living in an apartment on [REDACTED] in Chicago during this period.

Also, in the record is the applicant's Form I-687 submitted on February 16, 1990. The applicant signed this form under penalty of perjury on February 5, 1990. At part #33 of this form where he was asked to list his

⁵ In fact, the Form I-687 states that the applicant was at this address from 1981 until "1286." This office will assume for purposes of this analysis that the applicant intended to write 1986, rather than 1286.

residences in the United States, he stated that his first residence in this country was at [REDACTED] Chicago, Illinois where he resided from November 1981 through July 1986.

At part #36 of the Form I-687 submitted on February 16, 1990, where the applicant was asked to list all his employment since arriving in the United States, he stated that he had done only **maintenance work** from December 1981 through October 1989, and that subsequent to that he was unemployed. This contradicts the employment information which the applicant entered on the Form I-687 submitted on January 5, 2006 as well as the applicant's affidavit dated July 22, 1990 in the record on which he attested to having run a **weekend business in the "Fleemarket"** at [REDACTED] [Chicago] between February 1982 and June 1986. Moreover, the applicant also submitted into the record a document which purports to be an employment verification letter from Clothes Castle, 4225 S. Archer Avenue, Chicago, Illinois 60632 that indicates that the applicant was employed as a **sales person** at this store from **December 15, 1981** through **November 25, 1984**, the date that letter was signed.

On another Form I-687 in the record, which the applicant submitted on March 1, 1990 and which he signed under penalty of perjury, but failed to date, he stated at part #36 that he did not begin working in the United States until **September 1985**. On this form, regarding the specific jobs that he had had in the United States, he listed that he had only been **self-employed** from September 1985 until the date that he submitted the form. In keeping with this statement, the record also includes the applicant's affidavit dated March 1, 1990 in which the applicant attested to having worked **selling newspapers** on Diversey and Western Avenue [Chicago, Illinois] from September 1985 until the date that he signed that document. In addition, on the Form I-687 submitted on March 1, 1990 at part #33 where the applicant was to list all his residences since entering the United States, he indicated that he lived at [REDACTED] Chicago, Illinois from July 1981 until **April 1988**, and that he lived at [REDACTED] Chicago, Illinois from May 1988 through the date that he submitted the form.

Regarding the applicant's claim that he was residing unlawfully in the United States and then departed during the statutory period, the record also includes the following inconsistencies. On the Form I-687 submitted on January 5, 2006, the applicant stated that he first departed the United States during July 1986 and returned during August 1986. On the Form I-687 submitted on March 1, 1990, the applicant stated that he first departed the United States during July 1985 and returned during August 1985. On the Form I-687 submitted on February 16, 1990, the applicant stated that he first departed the United States on July 20, 1986 and returned on August 30, 1986.

Regarding these inconsistencies, this office would underscore that doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

This office notes that thus far the applicant has failed to provide credible, contemporaneous evidence that might be considered independent, objective evidence of his having resided in the United States from a date prior to January 1, 1982 and throughout the statutory period to overcome the inconsistencies in the record. Given the applicant's contradictory statements on his various applications and the contradictory

information included in his supporting documents, the applicant has not established 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*. However, because the May 31, 2006 notice of decision did not identify appropriate bases for denying this application in order to afford the applicant the opportunity to provide a meaningful appeal, the matter is remanded for the director to issue a new decision that addresses deficiencies in the evidence such as those referred to here as well as any other deficiencies or bases for denial that the director may identify.

ORDER: The May 31, 2006 decision of the director is withdrawn. The application is remanded to the director for further action in accordance with the foregoing discussion. The director shall issue a new decision that is to be certified to the Administrative Appeals Office for review.