



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

41

FILE:

MSC 05 316 11283

Office: NEW YORK

Date:

JAN 29 2008

IN RE:

Applicant:

APPLICATION:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. 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. 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 on August 12, 2005. The director determined that the evidence submitted was insufficient to overcome the grounds for denial explained in the Notice of Intent to Deny (NOID). Specifically, the director found 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 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, counsel for the applicant asserts that the director's decision is not supported by the record. Counsel asserts that all issues raised in the NOID and in the director's decision were in fact sufficiently addressed by the applicant in his response and during his interview with a Citizenship and Immigration Services (CIS) officer. Counsel emphasizes that the applicant provided original receipts from 1981 and four affidavits from individuals who provide facts as to the applicant's residency during the requisite period. Counsel asserts that the fact that affidavits were the only evidence in support of the application cannot and should not be the only basis for the denial of the application.

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. 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.* 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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he resided in the United States for the duration of the requisite period. Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant submitted a Form I-687 application and Supplement to Citizenship and Immigration Services (CIS) on August 12, 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 indicated that he presently resides at [REDACTED] in New York, New York. He also indicated that he resided at [REDACTED] in New York, New York, but did not indicate the dates he resided at either address. At part #33, where asked to indicate all employment in the United States since entry, the applicant stated that he worked for East Side Car Wash and Broadway Lube, but again, did not provide the dates of his employment with either employer. It is noted that the record does not contain pages 3, 4, 6, 7 or 9 of the applicant's Form I-687, and it is unclear whether these pages were ever submitted.

The applicant did not submit supporting evidence in support of his application. Accordingly, on November 15, 2005, the director, National Benefits Center, issued a Notice of Intent to Deny (NOID) advising the application that he would be granted 30 days in which to submit evidence of his continuous residence and physical presence in the United States during the requisite periods.

In response to the NOID, the applicant submitted an affidavit in which he stated that he entered the United States without inspection on March 18, 1981 and lived at [REDACTED] in New York from the date of entry until December 19, 1990, during which time he supported himself as a street vendor. The applicant stated that he traveled out of the United States from January 19, 1987 until January 25, 1987. He also stated that he attempted to file a complete application for temporary residence with fee in May 1987, but was turned away because "I informed the immigration officer that I traveled to Canada on November 30, 1987." Based on this testimony, it is not clear whether the applicant was claiming that he traveled to Canada in January 1987, November 1987, or whether he was absent from the United States two times. Furthermore, his statement that his legalization application was turned away in May 1987 due to a trip he took in November 1987 is not credible.

The applicant went on to state that he never had a social security number, lease, phone bills or utility bills because he "moved from place to place and most of these items are either missing, lost or destroyed." It is noted that the applicant indicated on his Form I-687 that he has lived at a total of two addresses in the United States, thus his statement that he lost all of his documentation because he "moved from place to place" also lacks credibility.

The applicant also submitted the following evidence in support of his application:

Two form-letter "affidavits of knowledge of residence" completed by [REDACTED] and [REDACTED] both residents of New York, New York. Both affiants stated that they have known the applicant since 1981 because they lived with him in the same building located at [REDACTED] in New York, New York. While both affiants state that the applicant resided in the United States for the duration of the requisite period, it is noted that the applicant stated in his own affidavit that he resided at [REDACTED] from 1981 until 1990. 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. 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 application. *Id.* at 591. **The applicant provided no explanation for this discrepancy, and there** is no documenta evidence in the record that corroborates the statements made by [REDACTED] and [REDACTED]. Because the information provided by these affiants is inconsistent with the applicant's own testimony, their testimony is not credible.

An affidavit of witness from [REDACTED], a resident of Bronx, New York who stated that the applicant frequents the mosque located on [REDACTED] and [REDACTED]. [REDACTED] stated that he got to know the applicant very well between 1981 and 1988 and used to look forward to seeing him for prayer on Fridays. The affiant did not state how he dates his acquaintance with the applicant or how frequently he saw him during the requisite period. He also failed to provide any relevant and verifiable testimony, such as the applicant's address(es) of residence in this country, to corroborate the applicant's claim of residence in the United States for the requisite period. Due to its significant lack of detail, this affidavit can be given only minimal evidentiary weight.

- Two affidavits of witness ostensibly from [REDACTED]. Both affidavits are dated November 30, 2005, but one affidavit was notarized on December 2, 2005, and one was notarized on December 6, 2005. Although both affidavits appear to have been executed before the same Notary Public, it is obvious that the same person did not sign [REDACTED] on both of these documents, as the signatures bear no resemblance to each other. The two affidavits also included different contact numbers. Evidence provided by the applicant subsequent to this submission, specifically, a copy of [REDACTED] New York State identification card containing his signature, demonstrates that one of these two affidavits does bear [REDACTED] actual signature. However, the applicant's submission of the other affidavit that was clearly not personally signed by the affiant seriously undermines the credibility of the evidence submitted in support of this application.

[REDACTED] states that he met the applicant in the summer of 1981 when he saw him at the African Cultural Festival and at the Harlem Week Festival. He states that from 1981 to 1984, he was good friends with the applicant, attended different mosques with him, and frequented his home. He further indicates that the applicant resided at [REDACTED] in New York during this time. [REDACTED] stated that he moved away from the neighborhood in 1984 but found the applicant still living at the same apartment when he returned in 1990. Here, while the affiant claims to have direct, personal knowledge of the applicant's residence in the United States from 1981 to 1984, the address he provides is also inconsistent with what the applicant indicated in his own affidavit. Because this declaration is inconsistent with the applicant's own testimony, and does not cover the period from 1985 to 1988, it can be given minimal weight in establishing that the applicant continuously resided in the United States. Further, because it contains information which is not consistent with the information contained in the applicant's own sworn statement, doubt is cast on the testimony contained in it.

The applicant was interviewed by a CIS officer on March 21, 2006. The record contains a sworn statement from the applicant in which he stated that he first came to the United States on March 18, 1981, that he went to Canada twice in 1987, and that, other than those two trips, he did not leave the United States until 1997, when he went to Mali. The applicant stated that he is married with two children ages 12 and 14. The record shows that the applicant testified under oath that his wife has never been to the United States. He stated that he did not remember when he was married.

At the time of his interview, the applicant submitted the following additional evidence:

An affidavit from [REDACTED], who stated that he met the applicant in the summer of 1981, at which time he was a vendor on [REDACTED] in Harlem. He indicated that he was one of the applicant's regular customers and eventually they became friends. [REDACTED] indicated that he remembers that the applicant got a vendor's booth at [REDACTED] in Harlem, and he helped him to bring merchandise from his apartment located at [REDACTED], New York to his booth in 1987. He stated that he did not stay in contact with the applicant after that time but later saw him at a restaurant in 2001. While [REDACTED] stated that he met the applicant in 1981 and visited the applicant's apartment on one occasion in 1987, he does not indicate how he dates his acquaintance with the applicant or how frequently he had contact with the applicant during the requisite period. It cannot be determined based

on his statements that he had direct, personal knowledge of the applicant's residence in the United States for the duration of the requisite period. [REDACTED] is the only affiant who corroborated the applicant's own affidavit testimony that he resided at [REDACTED] during the requisite period, but the inconsistencies with regard to the applicant's address of residence have not been resolved. Four other affiants stated that the applicant resided at a different address during the same period. The applicant has not provided any testimony with respect to exactly where he worked as a street vendor, so [REDACTED] statements in this regard cannot be compared to the applicant's own statements. Overall, due to the lack of detail and the conflicting information provided by affiants regarding the applicant's address of residence during the requisite period, [REDACTED] affidavit is lacking in probative value.

- An affidavit from Anthony Anderson, who stated that he met the applicant in October 3, 1987, when he and the applicant were both working at [REDACTED] in Harlem, New York. As noted above, the applicant states that he attempted to file his original application for temporary residence under the legalization program in May 1987. Therefore, [REDACTED] acquaintance with the applicant falls outside the requisite period and his testimony is not relevant. While [REDACTED] places the applicant in New York in 1987, he does not claim to have any personal knowledge of the applicant's residence in the United States during the requisite period.

The district director issued a NOID on March 21, 2006. The director observed that the affidavits submitted appeared neither credible nor amenable to verification. The director advised the applicant that credible affidavits are those which include some document identifying the affiant, some proof the affiant was in the United States during the statutory period, some proof of a relationship between the affiant and the applicant, and a current phone number. The director advised that the submitted affidavits did not meet these criteria.

The director also stated that the applicant could not credibly explain how he fathered two children born in Africa, ages 12 and 14, if he did not depart the United States between 1987 and 1997 and his wife was never in the United States. The director advised the applicant that this discrepancy called into question the veracity of all of his statements.

In response to the NOID, the applicant submitted the following evidence:

- Two original "Charity Receipts" issued to the applicant by [REDACTED] [REDACTED] [REDACTED] in New York, dated June 13, 1981 and August 4, 1981. The receipts identify the applicant's address as [REDACTED], New York, New York, and show that he made \$25.00 donations to the mosque on these dates.

A form-letter affidavit of witness from [REDACTED] who states that he met the applicant in 1981 "when he would come to the mosque to attend religious services." He stated that he has personal knowledge that the applicant resided at [REDACTED] from 1981 to 1988 and at [REDACTED] from 1981 to 1988. [REDACTED] did not indicate how he dates his initial acquaintance with the applicant, how he came to have personal knowledge of the applicant's residential addresses, how frequently he had contact with the applicant during the requisite period, which mosque

he attended with the applicant, or where he himself resided during this time. His testimony that the applicant resided at two different addresses simultaneously, without some further explanation, is not credible and does not resolve the inconsistencies noted above with respect to the applicant's claimed address during the requisite period. The affidavit is not accompanied by any proof of the affiant's identity or proof of his relationship with the applicant. Based on these deficiencies, this affidavit is lacking in probative value.

The applicant also submitted a copy of [REDACTED] New York State identification card and a Judgment of Divorce for [REDACTED] dated June 15, 1989, which indicates that she was married in New York in May 1988. Neither the applicant nor counsel addressed the discrepancy noted by the director with respect to the applicant's children born in Africa in the early 1990s during a time in which he claims to have been in the United States.

The director denied the application on July 19, 2006. In denying the application, the director acknowledged the evidence submitted in response to the NOID but found that it was insufficient to overcome the grounds for denial. The director noted that the additional affidavit from [REDACTED] was not accompanied by any proof that the applicant knows the affiant. The director further noted that the applicant had not explained how he fathered children in Africa while he was in the United States and therefore found that his testimony and evidence are not credible.

On appeal, counsel for the applicant asserts that the applicant adequately addressed all issues raised in the NOID, either during his interview with a CIS officer in his response to the NOID. Counsel states that the applicant informed him that he told the examiner during his interview that he is not the biological father of the two children born to his wife in Mali. Counsel emphasizes that each of the affidavits submitted by the applicant "contains facts as to the residency of the applicant in this country between June 1981 and late May 4, 1988," and states "the affidavits were made by people with direct personal knowledge of the event that the affidavits relate." Counsel states that the fact that the affidavits were the only evidence submitted in support of the application cannot and should not be the only basis for the denial.

Counsel's assertions are not persuasive. While it is true that an applicant's failure to provide documentary evidence apart from affidavits cannot be the sole reason for the denial of an application, an application which is lacking in contemporaneous documentation cannot be deemed approvable if considerable periods of claimed continuous residence rely entirely on affidavits which are lacking in credibility. As discussed above, the applicant stated in his own affidavit signed on December 1, 2005 that he resided at [REDACTED] in New York from 1981 until 1990. [REDACTED] and [REDACTED] all stated in their affidavits that the applicant resided at [REDACTED] during the requisite period. [REDACTED] stated that the applicant resided at [REDACTED] in 1987, but did not state that he knew him at this address prior to that time. [REDACTED] inexplicably stated that the applicant simultaneously resided at both of these addresses from 1981 to 1988. [REDACTED] and [REDACTED] provided no testimony regarding the applicant's address of residence during the requisite period. Furthermore, the affidavits of [REDACTED] and [REDACTED] contain a date that does not match the notarization date, calling into question their authenticity.

Finally, the applicant has submitted two affidavits from [REDACTED] one of which was clearly signed by someone other than the affiant.

Doubt cast on any aspect of the evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an 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. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Given that the applicant's affidavit evidence is generally lacking in credibility, the lack of contemporaneous documentary evidence is indeed significant in this case. The two original receipts from 1981 are insufficient to establish that the applicant continuously resided in the United States for the duration of the requisite period.

With respect to the director's findings with respect to the applicant's two children born in Mali, the AAO acknowledges counsel's explanation that "our client informed us that at the interview he informed the examiner that he is not the biological father of these two children." Counsel suggests that the applicant's testimony in this regard was the primary reason for the denial of the application. The AAO conducts a de novo review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). All evidence submitted in support of the application, and the credibility and sufficiency of each piece of evidence, has been discussed herein. Based on the deficiencies, inconsistencies and suspect credibility of the evidence submitted to establish the applicant's continuous residence in the United States for the duration of the requisite period, the applicant has not met his burden of proof and the application is not approvable for this reason. The AAO does not find it necessary to consider the credibility of statements the applicant made during his interview regarding his absences from the United States subsequent to the statutory period. However, it is noted that the director accurately set forth a legitimate basis for denial of the application apart from questioning the veracity of the testimony given by the applicant during his interview with a CIS officer.

The absence of sufficiently detailed, consistent, credible supporting documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of this claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the contradictions between the applicant's statements and the statements of his affiants and given his reliance upon documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States for the requisite period under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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