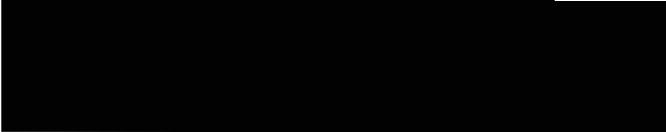




U.S. Citizenship
and Immigration
Services

L 1

PUBLIC COPY
**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



FILE: [REDACTED]
MSC-05-066-10043

Office: LOS ANGELES

Date: **JUL 03 2008**

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

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, Los Angeles. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director determined that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. Specifically, the director stated that though the applicant's Form I-687 showed that he left the United States only once during the requisite period, in 1987, at the time of his interview with a Citizenship and Immigration Services (CIS) officer on September 13, 2005, the applicant stated that he was also absent from the United States in 1985. The director went on to say that the applicant submitted two letters from one employer, ██████████, which contained conflicting testimony regarding his dates of employment with ██████████. Further, neither of these letters was consistent with what the applicant showed to be his employment dates with that employer on his Form I-687. The director further noted that the applicant's Form I-589 Application for Asylum and Cancellation of Removal and his Form EOIR-42B both state that the applicant first entered the United States on August 16, 1985 through Brownsville, Texas. The director found that the evidence in the record, when combined with the applicant's testimony did not allow him to prove by a preponderance of the evidence that he resided continuously in the United States for the duration of the requisite period. The director found 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. Because of this, she denied the application.

On appeal, the applicant asserts that he was the victim of inadequate counsel. He submits a statement in support of his 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) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to

timely file during the original legalization application period of May 5, 1987 to May 4, 1988. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant's claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his or her burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on December 5, 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 be [REDACTED] in Mendota, California from May 1985 until September 1985;

██████████ in Garden Grove, California from October 1985 until January 1987; ██████████ in Santa Ana, California from February 1987 until May 1987; and ██████████ in Garden Grove, California from June 1987 until May 1988. It is noted that the applicant did not provide any addresses of residence in the United States that were prior to May 1985 on his Form I-687. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that his only absence from the United States since his first entry was from November 10, 1987 to December 10, 1987 when he went to Mexico to visit his sick father. At part #33 where the applicant was asked to list all of his employment in the United States since he first entered, he showed that during the requisite period he was first employed by ██████████ in Firebaugh, California from May to September 1985. He showed that he was then employed: for the Double Tree Hotel in Orange California doing maintenance work from October 1985 until May 1986; and for ██████████ of Anaheim in Anaheim, California doing maintenance work from June 1986 until November 1988.

In the record is the applicant's Form EOIR-42B that was received by the Service on April 21, 1998. Part #17 of this form indicates that the applicant resided in the United States from August 16, 1985. Part #25 of this form asks the applicant to indicate all absences he had since he first entered. Here, he showed that he was absent during the month of May 1987 when he went to visit family. It is noted that both the applicant's date of first entry and his absence as stated on this form are not consistent with what the applicant showed on his Form I-687.

Also in the record is the applicant's Form I-589, which he signed on December 23, 1997. On this Form I-589 the applicant stated on page 4 that he had been in the United States since 1985. Here, he showed that he entered the United States on August 16, 1985 through Brownsville, Texas.

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).

Here, the applicant submitted voluminous documentation, approximately 164 pages, in support of his application. The following documents submitted by the applicant are examples of those that were relevant to the requisite period in chronological order from oldest to most recent:

There were no documents submitted that related to the years 1981 to 1984

1981 – 1985

- An affidavit signed by [REDACTED] that was notarized October 4, 2005. In this letter, [REDACTED] states that he employed the applicant from November 1981 until April 1985 for 100 days each year of that period. It is noted that the applicant was born on March 14, 1966. Therefore he would have been 15 years old in November 1981. Mr. [REDACTED] states that the applicant was employed thinning, weeding and harvesting tomatoes in San Joaquin Valley. He states that he does not have payroll records since these documents have been destroyed. He states that he is able to recognize the applicant because they had yearly contact with each other. Because this letter states that the applicant was only employed for 100 days each year, this letter does not establish that the applicant was employed continuously in the United States from 1981 until 1985. Further, this letter is not consistent with the applicant's Form I-687, where he showed that he began his employment with [REDACTED] in May 1985 and ended this employment in September of that same year. Because of this and because the applicant indicated on other forms previously noted in the record that he did not enter the United States until 1985, doubt is cast on the credibility of assertions made in this affidavit.

1985

- An affidavit signed by [REDACTED] that was notarized on November 11, 2004. In this employment verification letter, [REDACTED] states that he employed the applicant for a total of 105 days from May 1, 1985 until May 1, 1986. Mr. [REDACTED] states that the applicant was engaged in agricultural duties such as thinning, weeding and harvesting tomatoes in the San Joaquin Valley at that time. He states that he is unable to provide payroll records because these documents are unavailable but that he is able to recognize the applicant since he has contact with him on a yearly basis. This affidavit is not consistent with that which the affiant subsequently submitted affidavit which states that he employed the applicant from November 1981 until April 1985, casting doubt on the credibility of the affiant's assertions regarding the applicant's employment dates for his company. Further, the applicant stated on his Form I-687 that he was only employed by [REDACTED] from May 1985 until September of that year. Because this affidavit is neither consistent with the applicant's Form I-687 nor with a subsequently submitted affidavit from the applicant, doubt is cast on assertions made in this affidavits regarding the applicant's employment in the United States.

Tax documents signed in 1986 that are for the year 1985, including the applicant W-2 showing that he was employed for the Double Tree Hotel. This W-2 is consistent with where the applicant showed he worked from October 1985.

- Pay stubs issued to the applicant from the Double Tree Hotel in 1985.

1986

- A California Identification Card issued to the applicant. This card was issued to the applicant on May 28, 1986 and shows an address that is consistent with the address that the applicant showed he resided at when the card was issued to the applicant.
- Income tax documents from 1986 including a Form 1040A and a W-2 form issued to the applicant.
- Pay stubs from the Double Tree Hotel issued to the applicant in 1986.
- A letter issued to all employees of Emerald of Anaheim, where the applicant stated he worked in 1986 on his Form I-687. This letter is regarding parking procedures for employees.
- A form showing that a [REDACTED] who was born on March 14, 1966 was employed by Emerald of Anaheim from May 14, 1986 as a steward on call. The address associated with [REDACTED] is the address the applicant indicated he resided at in May 1986 in Garden Grove, California.
- A money order receipt showing the applicant sent 4700 pesos to [REDACTED] in Mexico on November 26, 1986.
- A form showing that the applicant was promoted from steward on call to a full time steward on December 23, 1986.
- Other receipts for purchases and payments made by the applicant in 1986.

1987

- A California Driver's License issued to the applicant on February 27, 1987. This Driver's License shows that the applicant resided at an address that is consistent with what the applicant showed he resided at in 1987 on his Form I-687.
- A receipt for a money order sent to the applicant's father, S [REDACTED] by the applicant on January 15, 1987.
- Tax documents from 1987 including the applicant's Form 1040A and his W-2 form.
- A form indicating that [REDACTED] received a pay raise on March 23, 1987 for his work as a steward.
- Receipts for payment of fees for a course in English as a Second Language.

1988

- Tax documents including the applicant's Form 1040A and his W-2 Form.
- Receipts for money orders sent by the applicant in January, March, May and October 1988.
- Receipts for payment of fees for course in English as a Second Language.

While it is noted that the applicant submitted documents that prove he resided in the United States after May 4, 1988, this is after the requisite period ended. The issue in this proceeding is whether the applicant submitted sufficient evidence to allow him to prove, by a preponderance of the evidence that he resided in the United States during the requisite period. This period began on the date the applicant entered the United States prior to January 1, 1982 and ended on the date the applicant attempted to file for legalization during the original filing period, which was between May 5, 1987 and May 4, 1988. Because these documents pertain to the period of time subsequent to the requisite period, they are not relevant for this proceeding.

The director denied the application for temporary residence on September 18, 2006. In denying the application, the director stated that though the applicant's Form I-687 shows that he was only absent from the United States one time since he first entered, from November 10, 1987 to December 10, 1987, he testified that he was also absent from the United States in 1985 at the time of his interview with a CIS officer pursuant to his Form I-687 application. She noted that the applicant stated on his Form I-687 that he was employed for [REDACTED] from May 1985 until September 1986 but that he submitted a letter from [REDACTED] stating that the applicant worked for him from May 1985 until May 1986 and a second letter stating that he worked for him from November 1981 until April 1985. This, combined with the applicant's Forms I-589 and EOIR 42B, both of which state that the applicant first entered the United States on August 16, 1985 cast doubt on the applicant's claim of having resided continuously in the United States from a date prior to January 1, 1982 and then for the duration of the requisite period. The director stated that these inconsistencies cause the applicant to fail to prove by a preponderance of the evidence that he resided continuously in the United States for the duration of the requisite period.

On appeal, the applicant submits the following new documents that are relevant to the requisite period in support of his application:

- A statement in which he asserts that he was the victim of inadequate counsel. He states that he erred when he showed that his first entry into the United States was on August 16, 1985 on his Forms I-589 and Form EOIR-42B. He states that he did not know immigration law at the time he completed these forms. He states that he believes he has proven that he resided continuously in the United States during the requisite period and goes on to say that he is submitting all necessary documents to approve his application.

Here, the AAO finds that the applicant's argument that he was the victim of inadequate counsel is not persuasive. The applicant submitted documentation stating and testified under oath that he did not enter the United States until 1985. He has submitted sufficient documentation to meet his burden of proving that he resided in the United States since August 1985. However, the absence of sufficient, credible documentation showing his residence from before 1985, when considered with the applicant's Form I-687 that does not show that he was employed or that he resided in the United States before 1985 casts doubt on whether the applicant resided continuously in the United States from a date before January 1, 1981 until August of 1985.

In summary, the applicant has not provided sufficient evidence of residence in the United States to meet his burden of establishing that he entered the United States before January 1, 1982 and then resided continuously in the United States until the end of the requisite period. He has submitted two affidavits from [REDACTED] that are not consistent regarding his dates of employment. Neither of these affidavits is consistent with the applicant's claimed dates of employment for [REDACTED] on his Form I-687. The applicant's own testimony and other documents in the record are not consistent regarding when the applicant first entered the United States and when he was absent from the United States during the requisite period. The applicant's inconsistent statements regarding his first entry into the United States and his absence from the United States were made under oath. Advice from counsel should not have limited his ability to provide accurate testimony while under oath.

Further, the any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, as well as the inconsistencies and contradictions 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 inconsistencies in the record and the lack of credible supporting documentation, it is concluded that he has failed to establish by a preponderance of the evidence that he has continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. The applicant is, therefore, ineligible for Temporary Resident Status under section 245A of the Act on this basis.

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