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FILE: [REDACTED] Office: NEW YORK Date: **JUL 15 2008**
MSC-06-053-13421

IN RE: Applicant: [REDACTED]

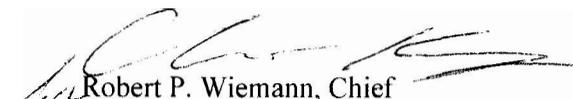
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



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, 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. 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, in her Notice of Intent to Deny (NOID), the director stated that she found that affiants from whom the applicant submitted affidavits did not have direct personal knowledge of the events and circumstances of his residency in the United States during the requisite period. The director further noted that though the applicant was of school age for the duration of the requisite period, he failed to submit school or medical records pertaining to that time. The director stated that the applicant did not produce proof of his departure and re-entry into the United States during his two month trip to Canada in 1987. Therefore, the director found the applicant failed to meet his burden of proof. The director granted the applicant 30 days within which to submit additional evidence in support of his application. In denying the application, the director noted that her office received additional evidence from the applicant in support of his application. However, she found this evidence did not overcome her reasons for denial as stated in her NOID. Therefore, she denied the application.

On appeal, the applicant asserts that the director erred in saying that he claimed to have gone to Canada for two months in 1987. He states that he traveled to Guatemala in 1987 and remained there for 30 days. He explains he did not attend school during the requisite period because his guardian was afraid the applicant would be deported if he did so.

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.

An applicant shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an “emergent reason.” Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that emergent means “coming unexpectedly into being.”

Even if the director has some doubt as to the truth, if the applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 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 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 November 22, 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 showed his addresses in the United States during the requisite period to be: [REDACTED], Rockville Center in New York, New York from January 1981 until January 1983; [REDACTED] in Brooklyn, New York from February 1983 until July 1987; and [REDACTED] in Brooklyn, New York from September 1987 until August 1990. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that he had one absence during the requisite period when he traveled to Guatemala to see family from July to September in 1987. 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 he was employed doing odd jobs in Brooklyn, New York. The applicant did not associate an employer or dates of employment that correspond with this employment.

The record contains a second Form I-687 that the applicant indicated was submitted in response to the NOID issued by the director of the National Benefits Center on December 16, 2005. The applicant indicated on this Form I-687 that his absence in 1987 occurred when he traveled to Canada rather than to Guatemala from July to September in 1987.

Also in the record are the notes from the CIS officer who interviewed the applicant. The officer's notes indicate that the applicant testified that he traveled to Canada for two months in 1987 with his uncle.

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. 8 C.F.R. § 245a.2(d)(5). To meet his burden of proof, an applicant must provide evidence of eligibility apart from his or her 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 initially failed to submit evidence that he resided in the United States for the requisite period.

The director of the National Benefits Center issued a NOID to the applicant on December 16, 2005. In this NOID, the director stated that the applicant failed to submit evidence of the following: that he entered the United States before January 1, 1982 and then resided in a continuous unlawful status except for brief absences from before 1982 until the date he (or his parent or spouse) was turned away by Immigration and Naturalization Service (INS) when they tried to apply for legalization; that he was continuously physically present in the United States except for brief, casual and innocent departures from November 6, 1986 until the date that he (or his parent or spouse) tried to apply for legalization; and that he was admissible as an immigrant. The director granted the applicant 30 days within which to submit additional evidence in support of his application.

In response to this NOID, the applicant submitted the following evidence that is relevant to the applicant's residence in the United States during the requisite period:

- An affidavit from [REDACTED] that was notarized January 6, 2006. The affiant submitted a photocopy of her New York State Driver License with her affidavit. The affiant states that she has known the applicant since 1981 and that she saw him on occasions such as Christmas, New Year's and Independence Day. She states that the applicant helped her clean and mowed her lawn. However, the affiant failed to indicate when and where she met the applicant and whether it was in the United States. Though she indicated that the applicant helped her clean and mowed her lawn, she did not indicate when she employed him. It is noted that applicant was born in 1974. Therefore, he would have been a minor for the duration of the requisite period. Though the affiant states that she saw the applicant on holidays, she failed to indicate the years she saw him on these holidays or to state the frequency with which she saw him during the requisite period. She did not state whether there were periods of time during the requisite period when she did not see the applicant. Because this affidavit is significantly lacking in detail, it can be accorded minimal weight as proof that the applicant resided in the United States for the duration of the requisite period.
- An affidavit from [REDACTED] that was notarized on January 9, 2006. The affiant submitted a photocopy of the identification page of his United States passport with his affidavit. The affiant states that he has known the applicant since the summer of 1981. He states that he socializes with the applicant at parties and functions and has done so since he met the applicant in 1981. The affiant states that the applicant has resided in Brooklyn for a number of years. However, he fails to state that he personally knows that the applicant resided in the United States during the requisite period. He does not indicate the frequency with which he saw the applicant during the requisite period. He fails to state whether there were periods of time during the requisite period when he did not see the applicant. Because this affidavit is significantly lacking in detail, it can be

accorded minimal weight as proof that the applicant resided in the United States for the duration of the requisite period.

The director of the New York District Office issued a second NOID to the applicant on November 9, 2006. In this second NOID, the director stated that the affiants from whom the applicant submitted affidavits did not have direct personal knowledge of the events and circumstances of his residency. The director also noted that the applicant did not submit contemporaneous evidence in support of his application. She specifically noted that the applicant failed to submit school records pertaining to that time though the applicant was of school age during the requisite period. She further stated that the applicant did not produce proof of his departure and re-entry into the United States during his two month trip to Canada that began in September 1987. Therefore, the director found the applicant failed to meet his burden of proof. The director granted the applicant 30 days within which to submit additional evidence in support of his application.

In response to this second NOID, the applicant submitted the following additional evidence that is relevant to his residence in the United States during the requisite period:

- A declaration from the applicant that is dated December 4, 2006. In his declaration, the applicant states that he did not travel to Canada in 1987 as was stated in the second NOID. He asserts that he traveled to Guatemala in 1987 and remained there for 30 days. He states that because he was undocumented during the requisite period, it is difficult for him to produce evidence in support of his application.

The director denied the application for temporary residence on December 19, 2006. In denying the application, the director stated that though her office received additional evidence from the applicant in support of his application, this additional evidence was not sufficient to overcome her reasons for denial as stated in her NOID. She states that the applicant testified under oath at the time of an interview with a CIS officer on April 19, 2006 that he first entered the United States in January 1981 when he was seven years old. She noted that though the applicant was of school age for the duration of the requisite period he failed to submit school records or medical records pertaining to that time. She further noted that though the applicant indicated at the time of his interview with a CIS officer that he traveled to Canada in September 1987 with his uncle and remained there for two months, he failed to produce proof of his departure from the United States and his re-entry after that departure. The AAO also notes that the applicant did not indicate that his return from that absence was delayed due to an emergent situation that came suddenly into being. Therefore, it appears that the applicant may have had a single absence during the requisite period that exceeded 45 days.

On appeal, the applicant submits a declaration that is dated January 11, 2007. In this declaration, he asserts that the director erred in saying that he claimed to have gone to Canada for two months in 1987. He states that he traveled to Guatemala in 1987 and remained there for 30 days. He further states that he did not submit school records because his uncle was afraid to send him to

school because he was undocumented at that time and his uncle believed that the applicant might be deported if he attended school at that time.

The AAO has reviewed the documents the applicant has submitted in support of his application and other relevant documents in the record. Though the applicant submitted two affidavits, the affiants do not state the frequency with which they saw the applicant during the requisite period. They do not state whether there were periods of time during the requisite period when they did not see the applicant. This is significant because the applicant testified that he had an absence of two months in 1987 during his interview with a CIS officer pursuant to his Form I-687 application. This testimony indicates that he may have had a single absence during the requisite period that exceeded 45 days. Though the applicant was a minor, he has neither submitted an affidavit from his uncle who he states cared for him during the requisite period, from his parents, or from another adult who was responsible for his well being that explains the events and circumstances of his residency in the United States. Further, the applicant has submitted two Forms I-687 that indicate that he was absent from July to September in 1987 when he went either to Guatemala or Canada. That the applicant has not been consistent regarding where he went during this absence casts doubt on the accuracy of his representation of his absences to CIS. Regardless of whether he went to Canada or Guatemala during this absence, he submitted two Forms I-687 both showing that he was absent from July to September 1987 and then testified to a CIS officer that he was absent for two months in 1987. He has not established that his return to the United States was delayed because of an emergent circumstance that came suddenly into being. Therefore, doubt is cast on whether the applicant maintained continuous residence in the United States for the duration of the requisite period.

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 the applicant has failed to establish by a preponderance of the evidence that he has continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M-*, *supra*. The applicant is, therefore, ineligible for Temporary Resident Status under section 245A of the Act on this basis.

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