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U.S. Citizenship
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Services

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[REDACTED]

FILE: [REDACTED]
MSC-04-351-10044

Office: NEW YORK

Date: **JUL 17 2008**

IN RE: Applicant: [REDACTED]

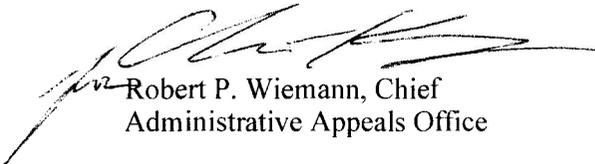
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. 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, the director stated in her Notice of Intent to Deny (NOID) that though the applicant submitted evidence in support of his claim of having maintained continuous unlawful residence for the duration of the requisite period, the evidence submitted was not sufficient to meet his burden of proof. She granted the applicant 30 days within which to submit additional evidence in support of his application. In her decision, the director stated that the applicant failed to submit additional evidence in support of his application and therefore, he did not overcome her reasons for denial as stated in her NOID. The director determined the applicant was not eligible to adjust to temporary resident status pursuant to the CSS/Newman Settlement Agreements and denied the application.

On appeal, the applicant asserts that he is appealing the decision because he did submit additional evidence for consideration in response to the director's NOID. He submits a declaration and resubmits the evidence that he asserts he submitted in response to the director's NOID.

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 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 September 15, 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 address in the United States during the requisite period to be in New York, New York from 1984 until 1992. It is noted that the applicant did not provide an address of residence for years before 1984. At part #31, where the applicant was asked to list all affiliations or associations, clubs, organizations, churches, unions, and businesses of which he was a member, the applicant did not indicate that he was a member of any such groups. At part #32 where the applicant was asked to list all of his

absences from the United States, he indicated that during the requisite period he had an absence from the United States from an unspecified date until 1984. 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 self-employed as a commerce trader in New York from 1981 and that he was still working in that capacity when he submitted his Form I-687.

Also in the record are notes taken from a Citizenship and Immigration Services (CIS) officer at the time of the applicant's interview pursuant to his Form I-687 application. These notes indicate that the applicant stated that he first entered the United States through the JFK airport with his uncle, [REDACTED] in April 1981. He stated that he was 13 years old at that time. He stated that he left the United States in June 1984 to go to Senegal because his mother was ill. The notes do not indicate when the applicant returned to the United States at that time. He stated that he attended school from 1981 to 1982 and that he was then employed as a street vendor for the duration of the requisite period.

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 apart from his Form I-687 which, as noted, did not indicate a residence in the United States prior to 1984 and did not clearly indicate the start and end dates of his absence from the United States during the requisite period.

The director of the National Benefits Center issued a NOID to the applicant on November 16, 2005. In his NOID, the director stated that he intended to deny the application because the applicant failed to provide evidence 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 that he or his parent or spouse was turned away by the INS when he tried to apply for legalization; that he was continuously physically present in the United States except for brief, casual and innocent departure from November 6, 1986 until the date that he or his parent or spouse was turned away by the INS when they tried to apply for legalization; and that he was admissible as an immigration. The director of the National Benefits Center afforded 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 requisite period:

- An affidavit from the applicant that was notarized on December 5, 2005. The applicant states that he is submitting documents as proof of his residence in the United States prior to January 1982.
- A photocopy of school records from the Sister Clara Muhammad School located on 116th Street in New York City. These records indicate that the applicant attended this school from September 1981 until June 1982. These records show that during that time, the applicant was absent a total of ten days of the 119 school days and that the applicant was promoted to the eight grade at the end of that school year.
- A photocopy of a contract between [REDACTED] in which he states he will pay tuition for the applicant to attend the Sister Clara Muhammad School during the school year September 1981 to June 1982.
- A photocopy of a Health History Form that is dated September 1981 and was signed by [REDACTED]. This form indicates that the affiant resided at [REDACTED] in New York when this form was completed. It shows that the applicant's uncle, [REDACTED] was his guardian.
- An affidavit from [REDACTED] that is dated November 30, 2005 and was notarized on December 2, 2005. The affiant submits a photocopy of his New York State Identification Card with his affidavit. The affiant states that he met the applicant and his uncle, [REDACTED], in the summer of 1981 at an African Cultural Festival. He states that he also saw them again at the Harlem Week Festival. He states that from 1981 to 1984 he became friends with the applicant and his uncle. He states that he visited the applicant's home and that they attended mosques for prayer on Fridays. He states that the applicant resided at [REDACTED] in New York at that time. The affiant states that he left the neighborhood in 1984 and returned in 1990. Though the affiant speaks of the applicant's moral character, he fails to indicate the frequency with which he saw the applicant during the requisite period. He does not state whether there were periods of time when he did not see the applicant. However, he does indicate that he moved residences from 1984 to 1990 and that he saw the applicant when he returned. He does not state whether he saw the applicant during that period of absence. Because it is significantly lacking in detail, this affidavit carries minimal weight as evidence that the applicant resided in the United States for the duration of the requisite period.
- An affidavit from [REDACTED] that is dated November 20, 2005 and was notarized November 21, 2005. The affiant submitted a photocopy of her New York State Driver License and a photocopy of the identification page of her United States Passport with her

affidavit. The affiant states that she met the applicant in 1981. However, she does not indicate where she met the applicant or whether it was in the United States. She asserts that when she met the applicant he was attending the School of Clara Muhammad in New York. She states that he attended Friday prayers at the Malcom Shabazz Mosque. She further states that the applicant resided with his uncle, [REDACTED], from 1981 until 1992 at [REDACTED] in New York. It is noted that the applicant indicated he resided at this address from 1984 until 1992 on his Form I-687. She asserts that the applicant worked as a street vendor during his residence. She also states that the applicant went to Senegal for one month in early 1984. Though the affiant states that she has known the applicant since 1981, she does not indicate where or how she first met him. She does not specify the frequency with which she saw the applicant during that time. She fails to indicate if there were periods of time when she did not see the applicant. Because it is significantly lacking in detail, this affidavit carries minimal weight as evidence 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 March 26, 2006. In this NOID, the director stated that though the applicant testified during his interview with a CIS officer that he entered the United States with a fraudulent passport in April 1981, he did not submit evidence of this entry. The director further stated that the affidavits the applicant submitted did not contain proof that the affiants had direct personal knowledge of the events and circumstances of his residency during the requisite period. She further stated that credible affidavits contain a document identifying the affiant, proof that the affiant was in the United States during the statutory period, proof that there was a relationship between the applicant and the affiant and a current telephone number at which an affiant can be contacted to verify information in his or her affidavit. The director found that the affidavits submitted by this applicant were lacking with regards to these criteria. The director granted the applicant 30 days within which to submit additional information in support of his application.

In response to the director's NOID, the record shows that the applicant submitted the following:

- A letter from the Masjid Malcolm Shabazz that is dated April 5, 2006 and was notarized on April 6, 2006. In this letter, [REDACTED], who indicates he is the executive director of the mosque, states that the applicant was a member of his community from 1993 until April 2006. He further states that the applicant was a member during the previous administration of [REDACTED] since 1983. Though this letter indicates that the applicant has been a member of this mosque since 1983, it does not specify how the dates of the applicant's membership were determined except to say that it was determined as a result of personal recollections. The letter fails to state the frequency with which the applicant attends Friday prayers or whether there were periods of time during the requisite period when he did not attend prayers. Further, the applicant failed to list that he was a member of the Masjid on part #31 of his Form I-687 application.

- A second letter from the Masjid Malcolm Shabazz that is dated February 28, 2006 and is signed by [REDACTED], Secretary of the mosque. This letter states that the applicant was a member of the Masjid Malcolm Shabazz for more than 15 years and that he is a donor to the Clara Mohammed School. This letter does not state how its author determined the applicant's start date as a member of the mosque. Because this letter asserts that the applicant has been a member of the mosque for 15 years, or since 1991, this letter is not relevant to the requisite period.
- A photocopy of a Social Security Earnings Statement from [REDACTED] that shows that he began working in the United States in 1968. This statement shows that during the requisite period, Mr. [REDACTED] was employed in 1981, 1982, and 1988. It is noted that there are no earnings shows for 1983 through 1987
- A photocopy of the previously submitted affidavit from [REDACTED]
- A photocopy of [REDACTED]'s New York State Identification Card.

The director denied the application for temporary residence on August 28, 2006. In denying the application, the director stated that though her office afforded the applicant a period of 30 days within which to submit additional evidence in support of his application, he failed to do so. Therefore, the director stated that the applicant failed to overcome her reasons for denial as stated in her NOID and she denied the application.

On appeal, the applicant states that he did submit additional evidence in response to the director's NOID. He describes that additional evidence, resubmits it and also submits a photocopy of the delivery confirmation notice, which shows that this evidence was received on April 24, 2006.

The AAO notes that the record shows applicant did submit additional evidence for consideration in support of his application. This additional evidence was received timely on April 24, 2006. Therefore, the director's statement that the applicant failed to submit additional evidence in support of his application in response to her NOID is in error. However, the director's error is harmless because 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). The AAO maintains plenary power to review each appeal 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 AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO withdraws the director's statement that the applicant failed to submit additional evidence in support of his application in response to her NOID.

Though the applicant has submitted school records as proof that he first entered the United States prior to January 1, 1982, he has only submitted such records for one year of the requisite period. He has submitted affidavits from individuals who attest to his presence in the United States during the requisite period. However, affiant [REDACTED] did not state where she first met the applicant or indicate the frequency with which she saw the applicant during the requisite period or whether there were periods of time during the requisite period when she did not see the applicant. Affiant [REDACTED] has indicated that he did not reside in the applicant's neighborhood from 1984 until the end of the requisite period. This affiant further failed to indicate the frequency with which he saw the applicant during the requisite period or state whether there were periods of time during the requisite period when he did not see the applicant. Though the applicant has submitted a letter from the Masjid Malcolm Shabazz mosque that attests to his having been a member of that mosque since 1983, this letter does not state how the mosque was able to confirm the applicant's start date as a member of the mosque. The letter from the mosque does not indicate the frequency with which he attended prayers or state whether there were periods of time when the applicant was not seen by members of the mosque. The applicant has indicated that he had an absence from the United States in June 1984 but he did not indicate whether this absence was for less than 45 days on his Form I-687. The record does not show that he indicated the length of this absence at the time of his interview. He has submitted an affidavit from [REDACTED] that asserts that the applicant went back to Senegal in "early 1984" for one month. However, this affiant does not state how she knows when the applicant went to Senegal nor does she provide specific dates associated with this absence. She does not indicate how she is able to confirm that this absence was for one month. On the applicant's Form I-687, he did not show an address of residence in the United States prior to 1984. The applicant failed to submit evidence from a parent or guardian that explains the events and circumstances of the applicant's residency in the United States as a minor during the requisite period.

Though the applicant has submitted documentation that is relevant to his residence in the United States during the requisite period, he has not met his burden of proving that he maintained continuous residence in the United States for the duration of the requisite period by a preponderance of the evidence for the reasons noted above.

In this case, the absence of sufficient credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, as well as the lack of detail in the record concerning the applicant's absence from the United States in 1984 seriously detracts 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 lack of credible supporting documentation that is sufficiently detailed regarding the applicant's continuous residency in the United States for the duration of the requisite period, 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