

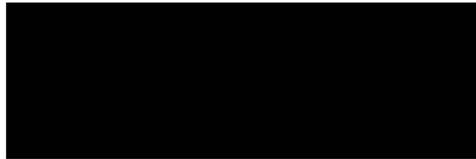
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FILE:



Office: NEW YORK

Date: **JUL 29 2008**

MSC 05 173 12146

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:

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.


for 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 appeal will be dismissed.

The district director denied the application because the applicant failed to demonstrate credibly that he entered the United States before January 1, 1982, and thereafter resided in the United States in a continuous unlawful status. On appeal, the applicant reiterated his claim of eligibility and indicated that any discrepancies were the result of misstatements.

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 Immigration and Nationality Act (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).

As to the requirement of continuous residence in the United States from January 1, 1982 through the date the application is filed, the regulation at 8 C.F.R. § 245a.2(h)(1) provides that an applicant shall be regarded as having resided continuously if no single absence during the salient period was longer than 45 days and the aggregate of all absences does not exceed 180 days.

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). To meet his or her

burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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 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 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.

On the Form I-687 application the applicant indicated that he first came to the United States during 1981 and had not left it since with one exception, from August 1996 to October 1996, when he visited his family in Senegal.

The pertinent evidence in the record is described below.

- The record contains an October 12, 2006 statement made by the applicant. In it, he stated that his initial Form I-687 application, not the instant application, was turned away by an official of I.N.S. because of a brief absence from the United States within the period of requisite residence. This office notes that such an absence would necessarily have been between January 1, 1982 and May 4, 1988, inclusive.

That statement conflicts with the applicant's statement, made on the Form I-687 that he did not leave the United States from 1981, when he first entered, until 1996, when he visited his family.¹

¹ In the notice of denial, the director attempted to rely, as a basis for denial, on the applicant's assertion that he had not left the United States during the period of requisite residence. The director reasoned that the applicant could not, therefore, have been turned away for such an absence, and was not, therefore, a CSS/Newman class member. The director did not, however, refer the matter to a special master, which is required by the CSS/Newman settlement agreement in cases denied for failure to qualify for class membership. Further, the director also denied the application based on the applicant's failure to demonstrate continuous residence during the period of requisite residence. Thus the director has treated the decision of denial as a decision on the merits. Because the district

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, the applicant must resolve any inconsistencies in the record with competent, independent, objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

- The record contains what purports to be an executed but undated lease of premises at [REDACTED] in Staten Island, New York. Because the applicant claimed, on the Form I-687 application, to have lived at that address beginning in 1999, that document is not directly relevant to the applicant's asserted continuous residence in the United States during the requisite period, which ended no later than May 4, 1988.

That document has been stamped and signed by a notary. The notary does not appear to be attesting to the signatures on that document, did not state that she administered an oath, and did not otherwise state what the intended significance of her stamp and signature was. This office further notes that an executed but undated lease, with no indication of the term of the lease, is so rare and unlikely as to raise questions about the authenticity of the document. The submission of this very questionable document, again, raises suspicions pertinent to all of the evidence submitted, and pertinent to all of the applicant's assertions.

Again, the apparent flaws in that document cast doubt not only on the document itself, but on all of the other evidence the applicant submitted in this case, and on the assertions of the applicant, pursuant to *Matter of Ho, supra*.

- The record contains an affidavit dated November 30, 2005² from [REDACTED] stated that he is the general manager of the Parkview Hotel in New York City, that he has known the applicant since 1981, and that he knows that the applicant was in the United States from January 1981 to March 1981 because the applicant stayed in the affiant's hotel.

The affiant failed to state the basis of his purported knowledge and the affidavit, even standing alone, would be accorded little evidentiary value. Because of the inconsistency between the statements the applicant himself has made in seeking approval of his application,

director issued a decision on the merits, and did not refer the matter to a special master, this office finds that the application was not denied for failure to demonstrate class membership, and will treat the decision as a denial on the merits. This office will only address the decision on the merits, without relying on the issue of whether the applicant is a member of the CSS/Newman class. That does not preclude this office, however, from noting discrepancies between the applicant's statements.

² Although the month of the notary's attestation is unclear, this office believes it is November.

however, [REDACTED] affidavit will be accorded no evidentiary value, even for the limited proposition that the applicant entered the United States prior to January 1, 1982.³

The record contains an undated form declaration from [REDACTED] of Jersey City, New Jersey.⁴ [REDACTED] states that he has firsthand knowledge of the applicant's continuous residence in the United States since 1981 because "we lived under the same roof with his father at [REDACTED]." Although neither the applicant nor the declarant currently live at that address, the declarant did not state how long they both continued to live there. He did not indicate the nature and frequency of his encounters with the applicant, either during the period when they lived at the same address, or after that period. He did not indicate for what periods of time he may have not seen the applicant during the period of requisite residence.

That declaration purports to have been stamped and signed by [REDACTED], a New York notary public. That form attestation states, "[The affiant] being duly sworn, deposes and says that (s)he is/is not a citizen of the United States" No one modified that stock language to specify whether the affiant is a man or a woman, or whether they are a U.S. citizen. The form attestation further states, "SUBSCRIBED AND SWORN to before me on this ____ day of ____ in the year ____." The date was not entered in the blanks in that attestation. Why a notary would fail to complete an attestation is unknown to this office. Whether the notary meant to attest to the signature and to indicate that an oath was administered is unclear. As such, the notary's stamp and signature does not convert that declaration into an affidavit and does not otherwise augment its credibility and evidentiary value.

Because of the irregularities in the declaration and the notary's attestation, and because of the lack of detail pertinent to the applicant's residential history, that affidavit, standing alone, would be accorded only very little evidentiary value. Because of the inconsistency in the statements the applicant has made in seeking approval of the application, however, the affidavit will be accorded no credibility, either for the proposition that the applicant resided continuously in the United States or for the proposition that the applicant was in the United States during 1981.

The record contains a form affidavit, dated February 24, 2005, also from [REDACTED] of Jersey City, New Jersey. In it, [REDACTED] iterated that he knew the applicant's residential history because, "We lived together since [the applicant] came to the US until 1996," and stated that the longest period during which he had not seen the applicant was two weeks. That

³ As that affidavit only addresses the applicant's residence during 1981, it is not, even ostensibly, evidence in support of the proposition that the applicant continuously resided in the United States during the period of requisite residence that began on January 1, 1982, and would not under any circumstances, of course, be accorded any weight as support for that proposition.

⁴ Although [REDACTED] did not include "Jersey City" in the address, the zip code he provided corresponds to Jersey City.

document purports to have been attested to by New York notary public [REDACTED]. The pre-printed attestation reads, "Subscribed and sworn to before me by the above-named witness at _____ this _____ day of _____, 2005. The month and day are filled in, but the location at which the attested to that affidavit. That affidavit, standing alone, would be accorded moderate evidentiary weight. Because of the irregularity in the attestation and the other suspicious attestations by [REDACTED] that document will be accorded no evidentiary value.

- The record contains a form affidavit dated January 11, 2005 from [REDACTED] of New York City in zip code [REDACTED] stated that he is personally able to confirm the applicant's claim of continuous residence in the United States throughout the qualifying period because they have been friends since the applicant entered the United States during 1981. He further stated that the longest period during which he has not seen the applicant since they met was two months, but did not indicate whether or how he knew the applicant was in the United States during that two month interval. This office notes that an absence from the United States of two months is sufficient to render an applicant ineligible pursuant to 8 C.F.R. § 245a.2(h)(1).

[REDACTED] did not provide a phone number on his affidavit. In the address provided for [REDACTED] the street number and zip code are moderately legible. The street name is not legible. This office was unable to determine the street name provided by reference to a map of the affiant's zip code. As such, [REDACTED] cannot be readily located and contacted and the information on the affidavit is not amenable to verification. For that reason, and based on the discrepancies in the applicant's assertions, [REDACTED] January 11, 2005 affidavit will be accorded no evidentiary value either for the proposition that the applicant was present in the United States prior to January 1, 1982 or for the proposition that he remained in the United States during the qualifying period.

- The record contains an undated form declaration from [REDACTED] of East Orange, New Jersey. [REDACTED] stated that he met the applicant during 1981, that he is a good friend of the applicant, and that he is personally able to confirm the applicant's residential history. The declarant stated that the longest period that has passed without the declarant and the applicant meeting is one week.

That declaration also purports to have been stamped and signed by New York notary public [REDACTED]. The form attestation states, "Subscribed and sworn to before me on this _____ day of _____, 2005." The date was not entered in the blanks in that attestation. Why a notary would fail to complete an attestation remains unknown to this office. Whether the notary meant to attest to the signature and to indicate that an oath was administered is unclear. As such, the notary's stamp and signature does not convert that declaration into an affidavit and does not otherwise augment its credibility and evidentiary value. Because of the irregularity in the notary's attestation, and because of the discrepancy in the applicant's assertions, that affidavit is accorded no evidentiary value either for the proposition that the

applicant was in the United States during 1981 or for the proposition that the applicant resided continuously in the United States during the entire period of requisite residence.

- The record contains a form affidavit dated February 28, 2005 from [REDACTED] of New York City. [REDACTED] stated that he met the applicant when they were selling vacuum cleaners from 1986 to 1996. [REDACTED] further stated that, based on his own personal knowledge, he was able to confirm that the applicant lived at [REDACTED] to 1996. How [REDACTED] is able to confirm, from his own personal knowledge, the applicant's residential history from 1981 through 1985, when he only met him in 1986, is unclear to this office. Further, that affidavit, which purports to have been attested to by New York notary public [REDACTED], bears the following preprinted attestation. "Subscribed and sworn to before me by the above-named witness at _____ this _____ day of _____, 2005." The month and day were entered in the appropriate blanks. The location at which it is alleged to have been notarized was not entered in the appropriate blank. Because of the irregularity in the notary's attestation, and the apparent contradiction between [REDACTED] meeting the applicant in 1986 and swearing, from his own personal knowledge, to the location at which the applicant lived from 1981 to 1985, [REDACTED] affidavit would be accorded no evidentiary weight, even standing alone.

The record contains no other evidence pertinent to the applicant's residence in the United States during the salient period.

With the Form I-687 application the applicant provided no evidence in support of his claim of continuous residence in the United States during the requisite period. At his December 7, 2005 interview the applicant submitted the November 20, 2005 affidavit of Steve Tarver, which is described above.

In a Notice of Intent to Deny (NOID), dated February 8, 2006, the director stated that the applicant failed to submit evidence sufficient to demonstrate his entry into the United States prior to January 1, 1982, and continuous residence during the requisite period. The director granted the applicant thirty days to submit additional evidence.

In response the applicant submitted the January 11, 2005 affidavit of [REDACTED]; the undated declaration of [REDACTED], the February 28, 2005 affidavit of [REDACTED], the February 24, 2005 affidavit of [REDACTED] the undated declaration of [REDACTED] on, and the undated lease, all of which are described above.

In the Notice of Decision, dated September 15, 2006, the director denied the application based on the reasons stated in the NOID, finding that the evidence submitted still did not demonstrate the applicant's eligibility.⁵

⁵ As was noted above, the director also appeared to attempt to deny the application for failure to demonstrate class membership, although this office finds the director's attempt to rely on that basis was ineffective.

On appeal, the applicant reiterated his claim of continuous residence in the United States during the requisite period, and implied that the evidence of record supports his claim. The applicant also stated that he had been absent for a short time during the requisite period, but did not state when he was absent, for how long, or any other details, and did not provide any evidence, either in support of his claim of continuous residence, in support of his claim of having left the United States during the period of requisite residence, or in support of any other proposition.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate entry into the United States prior to January 1, 1982, and continuous residence during the requisite period.

The applicant's October 12, 2006 statement that he was not permitted to file his original Form I-687 because he had left the United States briefly during the period of requisite residence directly conflicts with the information that he provided on the instant Form I-687 application, that he did not leave the country from his initial entry during 1981 through 1996.

The authenticity of the lease submitted is suspect because the document contains neither a date of ratification, nor a date when the term of the lease was to begin, nor a date when the lease was to terminate.

Some items of evidence, the undated form statement from [REDACTED] the February 24, 2005 form affidavit from [REDACTED] the January 11, 2005 form affidavit from [REDACTED] the November 30, 2005 affidavit from [REDACTED] and the undated form declaration from [REDACTED] would have been accorded slight to moderate evidentiary weight standing alone, but their credibility is undermined by the applicant's conflicting claims and his submission of the undated lease.

Even absent the opprobrium of the questionable lease and the applicant's conflicting statements, the February 28, 2005 form affidavit from [REDACTED] would have been accorded no evidentiary weight, because, as is detailed above, the notary's attestation is irregular and the affiant purports to confirm, from his own personal knowledge, the applicant's residence prior to 1986, when the affiant and the applicant met.

The evidence must be evaluated not by the quantity of evidence alone but by its quality. The absence of sufficiently credible documentation to corroborate the applicant's claim of continuous residence for the entire requisite period 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 paucity of credible supporting documentation he has failed to meet his burden of proof and failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application, 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. The appeal will be dismissed.



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