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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: NEW YORK

Date:

JUL 29 2008

consolidated herein]
MSC 05 197 10093

IN RE:

Applicant:

[Redacted]

APPLICATION: Application for Temporary Resident Status under 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 (director) in New York City. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish his continuous residence in the United States in an unlawful status from before January 1, 1982 through the date of attempted filing during the original one-year application period that ended on May 4, 1988.

An applicant for temporary resident status – under section 245A of the Immigration and Nationality Act (the Act) – 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. *See* 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. *See* 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. *See* 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. *See* 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.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant’s employment must: provide the applicant’s address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant’s duties; declare whether the information was taken from company records; and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

The applicant, a native of Mexico who claims to have resided in the United States since November 1981, filed his application for temporary resident status under section 245A of the Act (Form I-687), together with a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet, at the New York District Office on April 15, 2005.

On January 26, 2006, the director issued a Notice of Intent to Deny (NOID), indicating that the evidence of record – including a series of affidavits, utility bills, earnings statements, photocopied passport pages, and letter envelopes from Mexico – was insufficient to establish the applicant’s continuous unlawful residence in the United States from before January 1, 1982 through the date of attempted filing during the original one-year application period that ended on May 4, 1988. The applicant was granted 30 days to submit additional evidence.

On March 10, 2006, the director issued a Notice of Decision denying the application. The director found that the applicant had not submitted any additional evidence and therefore denied the application for the reasons stated in the NOID.

The applicant filed a timely appeal, asserting that he also responded in a timely manner to the NOID. The applicant submitted a photocopy of his response to the NOID, along with evidence that it was mailed to the New York District Office on February 22, 2006, and also submitted an appeal brief. The applicant asserts that the director violated the Administrative Procedures Act and his due process rights by not explaining the standards used in adjudicating the application.

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he continuously resided in the United States in an unlawful status from before January 1, 1982 through the date he attempted to file a Form I-687 during the original one-year application period that ended on May 4, 1988. The AAO determines that he has not.

The record does contain some primary evidence that the applicant resided in the United States from sometime in 1985 through the end of the original filing period on May 4, 1988, and beyond. This evidence consists, in particular, of the following documentation:

A series of letter envelopes sent from Mexico to the applicant at addresses in Brooklyn, New York [REDACTED] and Bronx, New York [REDACTED] where he claims to have lived from August 1985 to June 1986 and from June 1986 to December 1995, respectively. Most of the postmarks are illegible, but the three that can clearly be read are dated in 1986, 1987, and 1988.

- A series of registered mail receipts addressed to the applicant at a fruit market in Brooklyn with postmarks ranging from January to August 1987. The applicant has not explained the significance of that address, which is not identified elsewhere in the record.

Three ADP pay stubs in the applicant's name for pay periods in September and October 1987 (and two more for pay periods in August and September 1989), though the employer is not identified on any of them.

There is also some primary documentation in the name of [REDACTED] one of three aliases the applicant identified on an earlier Form I-687 submitted to the Legalization Office in Manhattan on November 1, 1989. Thus, the record includes an ADP pay stub for [REDACTED] dated in November 1987, though like the others cited above it does not identify the employer. Also included in the record is a Form W-2, Wage and Tax Statement, issued to [REDACTED] by the Albuquerque Eats restaurant in New York City for the year 1987. Like the registered receipts to the fruit market in Brooklyn, the address on the Form W-2 (2121 Grand Concourse in Bronx, New York) has not been identified by the applicant as a place of residence in 1987, or any other year. The two documents discussed above do not link [REDACTED] to the applicant, and there is no other evidence in the record identifying [REDACTED] as an alias used by the applicant. Accordingly, the documents in the name of [REDACTED] have little or no probative value.

While the previously discussed letter envelopes, registered mail receipts, and ADP stubs indicate that the applicant resided in the United States at least part of the time from 1985 onward, there is no primary documentation showing the applicant's residence in the United States in earlier years. As evidence of his continuous residence in the country from before January 1, 1982 through the end of the original filing period on May 4, 1988, the applicant has submitted a series of letters and affidavits from individuals who claim to have employed or otherwise known the applicant in the United States during the 1980s. They include the following:

- An affidavit by [REDACTED] manager of El Mariachi Mexican Restaurant at [REDACTED] Centre, New York, dated May 11, 1990, stating that he supervised the applicant during his employment as a "kitchen help man" from December 1981 to September 1984. According to [REDACTED], the restaurant's records show that the applicant lived at [REDACTED] during his time of employment.
- A letter from [REDACTED] general manager of Albuquerque Eats restaurant in New York City, dated October 16, 1989, stating that the applicant had been employed as a "line cook" from the restaurant's opening day at its [REDACTED] Avenue location on October 25, 1984.
- An affidavit by [REDACTED] a resident of New York City, dated May 16, 1990, stating that he had known the applicant since December 1981, that they were good friends and had sometimes worked together in restaurants over the years, and that the applicant had been absent from the United States just once since then – when he visited his mother in Mexico from December 15, 1987 to January 6, 1988.

A letter from [REDACTED] of the Wesel Road Holding Corp. in Nanuet, New York, dated May 1, 1988, stating that the applicant had rented [REDACTED] [REDACTED] since 1986.

- An affidavit by [REDACTED] a resident of Bronx, New York, dated February 20, 2006, stating that he met the applicant in his father's grocery store in the Bronx on December 24, 1981, and that he remembers the applicant traveled to Mexico to visit his ailing mother in December 1987 and returned to New York on January 6, 1988 with news that his mother was better.

An affidavit by the applicant's brother [REDACTED] a resident of Bronx, New York, dated February 21, 2006, stating that they came to the United States together on November 20, 1981, tried to work together or close to each other in the following years, that he accompanied his brother back to Mexico on December 15, 1987 because their mother was ill, and that they returned to New York together on January 6, 1988.

The letter from [REDACTED] has a brief fill-in-the-blank format with no information about the applicant except for his address as of 1986. It provides no evidence of the applicant's residence in the United States before 1986. With regard to two affidavits from [REDACTED] neither provides much information aside from the affiants' statements that they first met the applicant in December 1981 and that he traveled to Mexico for a short trip six years later. Even the applicant's brother, in his affidavit, offers little information aside from the statement that the applicant entered the United States in November 1981 and returned to Mexico for a short visit in late 1987. None of these three affiants provides any meaningful details about the applicant's life in the United States during the years 1981-1988, where he lived, and where he worked. Nor are the affidavits accompanied by any documentary evidence from the affiants – such as photographs, letters, and the like – of their personal relationship with the applicant in the United States during the 1980s. In view of these substantive shortcomings, the AAO finds that the affidavits have little probative value. They are not persuasive evidence of the applicant's continuous unlawful residence in the United States from before January 1, 1982 through the date of attempted filing during the original one-year application period that ended on May 4, 1988.

As for the two employment affidavit/letters, the one from El Mariachi Mexican Restaurant appears to meet most of the regulatory criteria at 8 C.F.R. § 245a.2(d)(3)(i), although it was not written on business letterhead. It is curious, however, that the applicant has no earnings statements from that restaurant, where he claims to have worked from December 1981 to September 1984, whereas he has submitted several pay statements from the years 1987 and 1989 – when he claims to have been working at Albuquerque Eats Restaurant.

The AAO also notes that the applicant's claim to have worked at the El Mariachi in the years 1981-1984, and to have resided at [REDACTED] from November 1981 to August 1985, is contradicted by the applicant himself in an affidavit he signed on July 16, 1999, in conjunction with a previous application he had filed in 1996 for permanent resident status as the spouse of a U.S. citizen. In his 1999 affidavit the applicant stated that he had been "physically present" in the United States since 1985 and that he had "been employed since

1986.” These years accord with the pertinent primary evidence in the record (the letter envelopes, registered mail receipts, and ADP pay stubs), none of which date before 1985.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). In this case, the applicant has not satisfactorily explained the inconsistent information in the record about the dates of his physical presence, residence, and employment in the United States. Furthermore, doubt cast on any aspect of the applicant’s evidence also reflects on the reliability of the applicant’s remaining evidence. *See id.*

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant has failed to establish that his continuous unlawful residence in the United States began before 1985. Thus, the record does not establish that the applicant entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from that date through the date he attempted to file a Form I-687 during the original one-year application period that ended on May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A(a)(2) the Act.

The appeal will be dismissed, and the application denied.

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