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U.S. Citizenship
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Services

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FILE: [Redacted]
MSC-05-230-10540

Office: SACRAMENTO

Date: **MAR 19 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:



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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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, Sacramento. 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. The director denied the application, finding 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.

On appeal, counsel for the applicant addresses the discrepancies in the evidence. Counsel asserts that the director has misapplied the continuous physical presence requirement under section 245A of the Act. Counsel further asserts that the director's analysis of the applicant's evidence is flawed.

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)(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).

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 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 supplement to Citizenship and Immigration Services (CIS) on May 18, 2005. The applicant signed this application under penalty of perjury, certifying that the information is true and correct. At part #30 of the application where applicants are asked to list all residences in the United States since first entry, the applicant showed his first address in the United States to be in Van Nuys, California from November 1981 until April 1990. The applicant showed at part #32 of the application that he has been absent from the United States on two occasions: December 1987 until February 1988 and December 2002 until January 2003. At part #33 of the application, the applicant showed his first employment in the United States to be in Van Nuys, California as a self employed “cash worker.” This application indicates that the applicant has resided in the United States during the requisite period; however he has failed to corroborate this testimony with credible and probative evidence.

In an attempt to establish continuous unlawful residence in this country, the applicant provided numerous documents. This proceeding will focus solely on those documents that relate to the applicant's residence in the United States during the requisite period.

The applicant filed with his application four nearly identical fill-in-the-blank affidavits from [REDACTED] and [REDACTED]. The affidavits from [REDACTED] and [REDACTED] are copies. The affiants testify that they have personal knowledge that the applicant has resided at [REDACTED] Van Nuys, California 91411 from November 1981 until April 1990. The affidavits are deficient because they do not provide any information on the extent of the affiant's contact with the applicant during the requisite period. This information is necessary to establish the affiant's direct personal knowledge of the applicant's continuous residence in the United States.

Moreover, these four fill-in-the-blank affidavits lack credibility because it is apparent that the affiant has not completed them. The section of the affidavits requesting the applicant's name and address has been photocopied. Similarly, the section of the affidavits requesting information on the affiant's first acquaintance with the applicant has been completed on each affidavit with identical handwriting using a felt tip black pen. Notably, the applicant's record contains a Form I-485, Application to Adjust Status, pursuant to section 1104 of the Legal Immigration Family Equity (LIFE) Act, filed on July 19, 2001. In support of this application the applicant submitted originals of the aforementioned fill-in-the-blank affidavits from [REDACTED] and [REDACTED] and a copy of the aforementioned fill-in-the-blank affidavit from [REDACTED]. None of these affidavits contain any information on the affiant's first acquaintance with the applicant. This finding leads to the conclusion that the "first acquaintance" sections on these affidavits were completed subsequent to the affiant's sworn signature. The affidavits have therefore been altered and are not credible evidence of the applicant's residence in the United States during the requisite period.

The applicant's file contains two other affidavits, submitted presumably at his interview, from [REDACTED] and [REDACTED]. The affidavit from [REDACTED] dated January 6, 2006, provides that he first met the applicant in April 1987 at the Yuba City Sikh Temple. The requisite period at issue in this proceeding is prior to January 1, 1982 until the date of filing in the original legalization application period of May 5, 1987 to May 4, 1988. In this regard, [REDACTED]'s affidavit is of only minimal probative value as corroborative evidence of the applicant's residence in the United States during the requisite period.

The affidavit from [REDACTED] dated January 4, 2006, provides that he first met the applicant in May 1986 at his cousin's birthday party. This additional affidavit from [REDACTED] is inconsistent with his earlier affidavit. [REDACTED]'s earlier affidavit provides that he has personal knowledge of the applicant's residence in the United States from November 1981 until April 1990. Therefore, [REDACTED] affidavits are not credible evidence of the applicant's residence in the United States during the requisite period.

The applicant's record contains an affidavit from [REDACTED]. This affidavit was submitted with the applicant's Form I-687, filed for a determination of the applicant's class membership in *Catholic Social Services v. Meese*. The affidavit from [REDACTED] provides that he has personal knowledge of the applicant's residence in the United States. The affidavit further states that [REDACTED] has personal knowledge that the applicant was absent from the United States on a trip to India from December 1987 until February 1988. [REDACTED]'s affidavit lacks any information on when he first met the applicant and the extent of their contact during the requisite period. The requisite period at issue in this proceeding is prior to January 1, 1982 until the date of filing in the original legalization application period of May 5, 1987 to May 4, 1988. In this regard, [REDACTED]'s affidavit is of only minimal probative value as corroborative evidence of the applicant's residence in the United States during the requisite period.

The applicant's record also contains a copy of his passport, which was filed with his Form I-485 application. The Indian Consulate in San Francisco issued the applicant's passport on May 25, 1995. The consulate stamped an "observation" note on this passport, which provides, "[t]he holder previously traveled on Passport No. [REDACTED] date 18 Mar. 1986 Issued by [REDACTED] which has been reported as lost." The applicant's travel in March 1986 is inconsistent with his testimony on his Form I-687 application. The applicant reported on his application that he has been absent from the United States on only two occasions: December 1987 until February 1988 and December 2002 until January 2003. This inconsistency draws into question the credibility of the applicant's claim of continuous residence in the United States during the requisite period.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The remaining evidence offered in support of this application is a letter from the Sikh Temple Los Angeles, [REDACTED], dated May 27, 2002. The author of this letter [REDACTED] lists his title as the VP (Admn) & Director Ex. Management Committee and Board of Directors. [REDACTED]'s letter provides, in part, "[the applicant] came to this country sometime during November 1981 and sought shelter at our a/m [sic] Gudwara/Temple . . . [REDACTED] was performing odd services especially in the Community kitchen of the Temple and in compensation we provided him free boarding and lodging . . . for any question about this issue, please contact the undersigned." The regulation at 8 C.F.R. § 245a.2(d)(3) provides guidelines for attestations by religious organizations. Upon initial review, the letter from [REDACTED] appears to satisfy these guidelines. However, based on the above noted negative credibility findings, the reliability and sufficiency of this evidence shall be reevaluated. On March 29, 2006, the director issued a Notice of Intent to Deny (NOID) to the applicant, which provides that a CIS immigration officer contacted the phone number on [REDACTED]'s letter and found that it has been disconnected. In rebuttal to the NOID, the applicant failed to provide a reliable phone number for [REDACTED], making it impossible to contact [REDACTED] to verify his testimony. Therefore, this letter can only be given minimal weight as credible and probative evidence of the applicant's residence in the United States during the requisite period.

On February 24, 2006, the director issued a NOID to the applicant. The director asserted that the applicant testified under oath that he was absent from the United States during the period from December 1987 to February 1988. The director noted that the regulation at 8 C.F.R. § 245.2a(h) provides that an applicant for temporary residency shall be regarded as having resided continuously in the United States if, at the time of filing the application, no single absence has exceeded 45 days. The director determined that pursuant to 8 C.F.R. § 245.2a(h), the applicant's absence was in excess of 45 days, and therefore interrupted his continuous residence in the United States during the statutory period. The applicant was afforded 30 days to submit a rebuttal in response to the NOID.

In response to the NOID, the applicant submitted his affidavit, which states that he was absent from the United States from December 28, 1987 until February 6, 1988. The applicant also submitted an affidavit from [REDACTED], which states that the applicant was absent from December 28, 1987 until February 6, 1988. These affidavits note that the applicant was absent for a period of 40 days.

On March 29, 2006, the director issued a second NOID to the applicant. The director found that the applicant successfully addressed the basis for denial put forth in the initial NOID. However, the director determined that there were other reasons to deny the application. First, the director asserted that pursuant to section 245A(a)(3)(B) of the Act, the applicant has failed to maintain continuous physical presence in the United States from November 6, 1986 until the date of filing the application. The director found that the applicant's absence of 40 days is deemed to not be a brief absence within the meaning of this section of the Act. Second, the director found that the affidavits from [REDACTED] and [REDACTED] lack detail to establish the affiant's identity and credibility. Third, the director found that the applicant submitted inconsistent affidavits from [REDACTED] and one of these affidavits had been altered. Fourth, the director noted that a CIS immigration officer attempted to call [REDACTED] author of the letter from the Sikh Temple Los Angeles, however the phone number provided on the letter had been disconnected. The director determined that on this basis, [REDACTED]'s letter is not credible. Fifth, the director noted that a CIS immigration officer contacted [REDACTED]. The director found that based on [REDACTED]'s testimony, the applicant probably resided unlawfully in the United States from 1986 through the end of the statutory period. Finally, the director found that the applicant's record contains a copy of his passport, which has a stamp showing that he traveled on another passport on March 18, 1986. The director determined that this information is inconsistent with the applicant's testimony that he was in the United States during this time period. The director concluded that based on the foregoing issues, the applicant failed to meet his burden of proof in the proceeding. The applicant was afforded 30 days to provide a rebuttal in response to the NOID.

In rebuttal to the NOID, counsel for the applicant asserted that the applicant's 40 day departure from the United States was brief, casual and innocent within the meaning of section 245A(a)(3)(B) of the Act. Counsel further asserted that the director's dismissal of the affidavits was in error and they should be given proper weight. Counsel stated that the director ignored the class agreement and agency memo guidelines to be followed in adjudicating legalization applications. Counsel noted that failure to provide evidence other than affidavits shall not be the sole basis for finding that an

alien failed to meet the continuous residence requirements. Finally, counsel asserted that the applicant's passport entry regarding his travel on March 18, 1986 is an error that cannot be rectified because the Indian Consulate records prior to 1994 are in storage. Counsel submitted the following additional evidence: an affidavit from [REDACTED] an affidavit from the applicant; and a letter from the Consulate General of India.

The affidavit from [REDACTED] provides, "I personally know [REDACTED] from 1981 when he comes to Sikh Temple at Stockton on New Year Day . . . I personally know Mr. [REDACTED] live at [REDACTED]" This affidavit is inconsistent with the letter from [REDACTED] which provides that the applicant attended religious services at the Sikh Temple Los Angeles, California during his residence in Van Nuys, California. The applicant reported on his Form I-687 that he resided in Van Nuys, California from November 1981 until April 1990. Therefore this affidavit is not credible evidence of the applicant's residence in the United States during the requisite period.

The affidavit from the applicant provides, "I have been residing in the United States continuously since November 1981 till present. I was absent from the United States from December 1987 to February 1988 for a period of 40-days when I had to go to India to take care of a family . . . I have not left the United States either before or after that day and the entry in my passport regarding a prior visit to India in March 18, 1986 is incorrect." The applicant's assertions are not probative evidence of his eligibility for temporary resident status. Pursuant to 8 C.F.R. § 245a.2(d)(6), to meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. Besides, the applicant's affidavit is inconsistent with his Form I-687 application, which states that he has been absent from the United States on two occasions, December 1987 until February 1988 and December 2002 until January 2003.

Moreover, pursuant to *Matter of Ho*, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. 19 I&N Dec. 582, 591-92 (BIA 1988). The applicant submitted a letter from the Consulate General of India, which states that the information contained in the previous passport held by the applicant cannot be verified because their records from 1994 have been sent to the record rooms. Hence, the applicant has failed to submit any objective evidence to resolve the inconsistency between his passport and testimony.

In denying the application, the director determined that the applicant failed to meet his burden of proof in the proceeding. First, the director asserted that counsel failed to persuasively argue that the applicant had maintained physical presence throughout the statutory period. Second, the director noted that the affidavits from [REDACTED], and [REDACTED] were evaluated and found to be insufficient. Third, the director noted that the letter from [REDACTED] is a declaration and thus requires telephone verification to determine the identity and credibility of the declarant. Fourth, the director asserted that the statement from the Indian consulate does not substantiate the applicant's claim. Finally, the director noted that a CIS officer contacted Parmjit

██████████ and he stated that the applicant has resided in Stockton since 1981. The director found that this information is inconsistent with the applicant's Form I-687, which provides that he resided in Van Nuys, California from 1981 until 1990. The director also found that ██████████ had no knowledge of the applicant's marital status and whether he had children. The director further found that ██████████ did not know whether the applicant has left the United States since his 1981 entry and when or how he first came to the United States. The director concluded that the applicant is ineligible for temporary resident status and denied the application.

On appeal, counsel for the applicant addresses the basis of the director's denial. First, counsel asserts that the applicant has met the physical presence requirement. Counsel notes that the director's conclusion that physical presence must be stricter than residence has no basis upon statutory authority or case law. Second, counsel asserts that none of the terms of the class agreement seem to have been followed in the director's decision to exclude the declaration of ██████████. Third, on the issue of the stamp in the applicant's passport, counsel asserts that the director ignored the applicant's affidavit, which states he has only been absent from the United States from December 28, 1987 until February 6, 1988. Finally, counsel asserts that the director's analysis of ██████████'s affidavit is flawed. Counsel noted that ██████████ is only testifying as to his recollection of how and when he met the applicant and under what circumstances. Counsel claims that the affiant's lack of knowledge about the applicant's residence is not relevant or material. Counsel resubmits his brief and evidence filed in rebuttal to the director's second NOID.

The director's assertion that the applicant failed to maintain physical presence throughout the requisite period is in error. The director's second NOID stated, in part, "[y]our absence of 40 days is deemed not to be to [sic] a brief absence within the meaning of INA 245A(a)(3)(B). Accordingly, you have failed to maintain continuous physical presence throughout the statutory period." Additionally, in denying the application, the director stated, in part, "[p]hysical presence must be a stricter requirement than residence. Therefore, while the statute does not contain a specific numerical limitation regarding the number of days absence [sic] that fall within the meaning of 'brief,' a 'brief' absence surely is not more than 45 days."

There is a significant body of case law that addresses the issue of "brief, casual and innocent absences." An analysis of brief, casual and innocent absences can be made based on the length of time the applicant is absent, the purpose of the visit and whether the applicant has to procure any travel documents in order to make his trip. See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). The question of whether an absence was brief, casual and innocent is one of fact to be resolved in a hearing, on a case-by-case basis. *Catholic Social Services v. Meese*, 685 F. Supp. 1149, 1159 (E.D. Cal. 1988)(noting that any construction of the statute requires a generous and liberal interpretation). Hence, the applicant's absence is a question to be resolved based on the individual facts of his situation. However, the record does not contain enough factual information to analyze whether the applicant's absence was brief, casual and innocent. Therefore, this part of the director's decision shall be withdrawn. Nevertheless, the director's action must be considered to be harmless error as 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 director was correct in his overall decision denying the application for temporary residency. The applicant has failed to provide probative and credible evidence of his residency in the United States during the requisite period. The applicant has been given the opportunity to satisfy his burden of proof with a broad range of documentary evidence. *See* 8 C.F.R. § 245a.2(d)(3). The applicant submitted affidavits, which as noted, are either inconsistent, altered, or lack considerable detail. Additionally, the applicant failed to provide reliable contact information for [REDACTED], the author of the letter from the Sikh Temple Los Angeles. Finally, the applicant's record contains a copy of his passport, which shows he traveled on a date during the requisite period that he failed to disclose on his Form I-687 application. When viewing this evidence either individually or within the totality, they do not establish that the applicant's claim is probably true. The applicant's failure to provide sufficient documentary evidence to establish his continuous residence in the United States during the requisite period renders a finding that the applicant has failed to satisfy his burden of proof, as delineated in 8 C.F.R. § 245a.2(d)(5). Pursuant to *Matter of E-M-*, the applicant has not submitted sufficient evidence to establish that his claim is "probably true" under the preponderance of the evidence standard.

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.