



U.S. Citizenship
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FILE: [REDACTED]
MSC-04-280-12653

Office: NEW YORK

Date: **MAY 28 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 Records 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, 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. 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.

The applicant appealed the director's decision on September 11, 2006.

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 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 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 or her burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The Form I-687 application

The record shows that the applicant submitted a Form I-687 application and Supplement to Citizenship and Immigration Services (CIS) on July 6, 2004. The applicant filed insufficient evidence with his application of his residence during the requisite period. To meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. *See* 8 C.F.R. § 245a.2(d)(6).

At part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant showed his addresses in the United States to be at [REDACTED] Brooklyn, New York, from December 1980 to September 1982, and [REDACTED], Brooklyn, New York from January 1983 to December 1988.

Similarly, at part #33, he showed his employment in the United States to be for [REDACTED] Jersey City, New Jersey as a cleaner/helper from January 1981 to December 1983; for [REDACTED] of India Restaurant, 39 E. 29St., New York, New York, as a dish washer from January 1984 to December 1984; in self-employment as a cleaner at [REDACTED] Brooklyn, New York from January 1984 to December 1986; for Jewel Tree Inc., [REDACTED] Astoria, New York as a part-time sale person from April 1987 to April 1988. The applicant’s next listed employment position is in self employment at [REDACTED] Brooklyn, New York, from January 1989 to December 1990.

The applicant submitted copies of his passport pages and the following relevant documentation:

- An affidavit from [REDACTED] of New York, New York, made June 1, 2004, who stated that he met the applicant 24 years before “in a social function in Brooklyn, New York, sometime in December 1980.” According to the affiant, he thought the applicant was living in Brooklyn, New York. The affiant failed to state that he has direct, personal knowledge of the applicant's continuous residence in the United States. He does not indicate where the applicant lived during the requisite period, his frequency of contact with him during this period, or other details of the events and circumstances of the applicant's residence.
- An affidavit from [REDACTED] of Brooklyn, New York, made June 4, 2004, who stated that he met the applicant 24 years before “since about 1980” during a religious function in Masjid Al-Rahman mosque. According to the affiant when he met the applicant “he used to live in Brooklyn, New York.” He stated that he would regularly see the applicant in his restaurant. The affiant failed to state that he has direct, personal knowledge of the applicant's continuous residence in the United States. He does not indicate other details of the events and circumstances of the applicant's residences during the requisite period or other details of the events and circumstances of the applicant's residence.
- A letter on computer generated stationery from [REDACTED] of Popular Electronics, Mt. Morris, Illinois, dated December 29, 1980, addressed to the applicant at 2415 Glenwood Road, Brooklyn, New York concerning a magazine subscription. During the period October 1979 through January 1985, the magazine Popular Electronics was owned and published by the Ziff-Davis Publishing Company, of New York, New York, according to the website at <<http://swtpc.com>> accessed April 5, 2008. That site has images of the magazines pages including the masthead¹ of that magazine. The masthead of Popular Electronics stated that all subscription correspondence was to be directed to a post office box address in Boulder, Colorado. Reasonably, if Popular Electronics corresponded with the applicant in 1980 concerning a subscription it would have been through the Boulder, Colorado subscription office. This letter will be given no weight.
- A letter dated December 23, 1984, from [REDACTED], assistant manager of [REDACTED] of India Restaurant, 39 E. 29 Street, New York, New York, that the applicant worked part-time as a dish cleaner from January 6, 1984 to December 23, 1984 and was paid in cash for his services.
- A letter dated April 25, 1988, from [REDACTED] assistant manager of Jewel Tree Inc., 31-73 Steinway Street, New York, New York, that the applicant worked part-time as a sales person from April 3, 1987 to April 24, 1988. A certificate of appreciation to the applicant from this employer was attached to the letter.

¹ A masthead is a list in a publication that provides information about the publication's ownership, staff and office addresses as well as its circulation.

- A remittance dated February 15, 1985, indicating that there was a transfer of funds from the applicant through Habib Bank Limited, New York, New York.
- A form letter dated August 5, 1982, from Western Union Financial Services Inc. addressed to the applicant at Brooklyn, New York.
- A letter dated [REDACTED] M.D. of Flushing, New York, dated February 10, 1988, stating that the applicant has been his patient since March 6, 1986 with a medical report ordered by the physician for the applicant..
- A receipt dated August 2, 1982, from Central Drugs, Jersey City, New Jersey, naming the applicant as a customer residing in Brooklyn, New York.

A receipt dated February 4, 1987, from Patel Discount, Elmhurst, New York, naming the applicant as a customer residing in Brooklyn, New York.

A letter from the Islamic Center of N.Y., 1 River Drive, New York, New York, by [REDACTED] i, administrative secretary, that the applicant has been a member of the religious organization from January 9, 1981 to present (i.e. December 28, 1984).

- A letter from the Muslim Center of New York, New York, by [REDACTED] i, secretary, that the applicant has been a member of the mosque from January 15, 1986 to present (i.e. December 10, 1987).

The regulation at 8 C.F.R. § 245a.2(d)(3)(v) states that:

Attestations by churches, unions, or other organizations to the applicant's residence by letter [are permitted] which:

- (A) Identifies applicant by name;
- (B) Is signed by an official (whose title is shown);
- (C) Shows inclusive dates of membership;
- (D) States the address where applicant resided during membership period;
- (E) Includes the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery;
- (F) Establishes how the author knows the applicant; and

(G) Establishes the origin of the information being attested to.

A review of the above two letters demonstrates they are not notarized and they do not include the seal of the organizations. They do not state how the writers know the applicant or state the origin of the information included in the letters. Neither [REDACTED] or [REDACTED] indicate that they have personal knowledge of the applicant's whereabouts during the requisite time period. For these reasons, therefore the letter statements will be given nominal weight in this proceeding.

- A letter on computer generated stationery from [REDACTED] of Acme Cleaners of Jersey City, New Jersey, dated December 30, 1983, that the applicant was employed there from January 1, 1981 until December 30, 1983 as a helper-cleaner. According to Ms. Stanley the applicant was paid in cash.

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states in pertinent part:

3) Proof of residence. Evidence to establish proof of continuous residence in the United States during the requisite period of time may consist of any combination of the following:

(i) Past employment records, which may consist of pay stubs, W-2 Forms, certification of the filing of Federal income tax returns on IRS Form 6166, state verification of the filing of state income tax returns, letters from employer(s) or, if the applicant has been in business for himself or herself, letters from banks and other firms with whom he or she has done business. In all of the above, the name of the alien and the name of the employer or other interested organization must appear on the form or letter, as well as relevant dates. Letters from employers should be on employer letterhead stationery, if the employer has such stationery, and must include:

(A) Alien's address at the time of employment;

(B) Exact period of employment;

(C) Periods of layoff;

(D) Duties with the company;

(E) Whether or not the information was taken from official company records; and

(F) Where records are located and whether the Service may have access to the records.

If the records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of (3)(i)(E) and (3)(i)(F) of this paragraph. This affidavit form-letter shall be signed, attested to by the employer

under penalty of perjury, and shall state the employer's willingness to come forward and give testimony if requested.

's letter does not provide the applicant's address at the time of employment, whether or not the information was taken from official company records or where records are located and the letter was not notarized. Therefore, this letter has little probative value.

Notice of Intent to Deny (NOID)

As stated in the Notice of Intent to Deny (NOID) dated August 26, 2005, the director determined that the applicant has not submitted sufficient relevant, probative, and credible evidence to explain or answer the questions raised, concerning the applicant's residency. Contrary to the applicant's statement in the Form I-687, the director found that the applicant was absent from the United States during the requisite period when the applicant was married in Pakistan. The applicant stated to CIS in an interview that his first trip out of the United States during the statutory period was from July 10, 1985 until August 15, 1985 with the purpose of entering into marriage.² This trip was not noted in the Form I-687 submitted by the applicant. The director also reported that the applicant stated that he next left for Pakistan from the United States on June 14, 1987.

At part #32 of the Form I-687 application, where applicants were asked to list all absences from the United States during the requisite period, the applicant listed only one absence during the relevant period, a visit to Pakistan from February 1988 to March 1988.³ Therefore the information provided to the director by the applicant has contradicted the applicant's sworn statement of his travel out of the United States during the requisite period.

The Applicant's Response to the NOID

In response to the NOID, the applicant submitted the following relevant documents:

- A birth certificate of the applicant's daughter A that stated her date of birth to be March 14, 1988 and another daughter, that stated her date of birth to be January 29, 1989.
- A marriage certificate that evidences that the applicant married in Pakistan on July 16, 1985.
- A lease agreement naming the applicant as tenant for the lease premises at Brooklyn, New York, as dated January 1, 1983 through December 31, 1985.

² The director noted that according to Form G-325A (Biographic Information) found in the record of proceeding, the applicant stated he was married on May 8, 1985, which conflicted with his statement.

³ The applicant confirmed this trip and its duration by his affidavit dated June 27, 2004 that accompanied the Form I-687 application.

- Copies of the applicant's passport pages.

Notice of Decision⁴

The director denied the application for temporary residence on August 7, 2006. In the denial, the director referenced the above referenced birth certificate of [REDACTED] showing her birth date to be March 14, 1988. According to the director, the I-485 filed with CIS on September 7, 2002, stated that a son, [REDACTED], was born to the applicant on March 15, 1988, one day after [REDACTED]'s birth date, which the director stated was not credible. The director found that the applicant was "merely amending [his] responses to conform to the parameters of eligibility for the legalization program as the evidence on file strongly suggests that you were not physically present in the United States during the statutory period and instead were in Pakistan raising a family." Thus, the director determined that the applicant had failed to meet his burden of proof by a preponderance of the evidence of his residence in the United States relating to the requisite period.

The Applicant's Appeal

On appeal, the applicant asserts that he entered the United States without inspection in the month of December of 1980. The applicant contends that the director ignored two affidavits submitted into evidence and the applicant describes reputed errors of fact in an I-485 application filed with CIS that are above mentioned as clerical errors that were committed by another that passed without correction by him when he signed the document.

According to the applicant, the birthdates of his children in Pakistan proved by their birth certificates submitted are consistent with his contention that his absences from the United States during the statutory period were each less than 45 days.

On appeal the applicant cites several federal court cases in support of his contentions. These are *Martinez-Sanchez v. INS*, 794 F. 2d 1396, 1400 (9th Cir. 1986), *Aguilera-Cota v. U.S. INS*, 914 F. 2d 1375, 1381 (9th Cir. 1990) and *Vilorio-Lopez v. INS*, 852 F. 2d 1137 (9th Cir. 1988), *Bolanos-Hernandez v. INS*, 749 F. 2d 1316 (9th Cir. 1984), *Addington v. Texas*, 441 U.S. 418, 425 (1979), and *United States v. Mastrangelo*, 561 F. Supp. 1114, 1120 (E.D.N.Y. 1983).

We note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law.

⁴ Since the CIS forms required that the information be sworn to by the applicant under penalty of perjury as true and correct, the director is entitled to rely upon what information is contained in the forms in review of the applicant's eligibility for the temporary resident status requested by the applicant.

The applicant cites *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) for the contention that the applicant's testimony cannot be rejected solely because it may be viewed as self-serving. Nowhere in this deportation proceedings case is that contention put forth but rather the Board held that the alien in that case must meet his evidentiary burdens of proof and persuasion as to the facts, and he must meet the statutory standards of eligibility set out by the pertinent provisions in the Act.

The applicant cites *Matter of C-*, 19 I&N Dec. 808 (BIA 1988) for the contention that CIS should not apply standards that are more severe than the standards contemplated by the Congress that the applicant states requires a "sympathetic consideration in this case." *Matter of C-* can be distinguished from the present case as it concerned the issue, relating to an Application for Status as a Temporary Resident, of whether an applicant's absence from the United States was excusable for emergent reasons. Also, in *Matter of C-* the applicant's credibility was not questioned whereas in the present case the director questioned the applicant's statements in applications submitted to CIS.

The applicant cites *Matter of Carrubba*, 11 I&N Dec. 914, 917 (BIA 1966) for the contention that the applicant has established his claim by clear and convincing evidence rather than by a preponderance of the evidence which the applicant states is the standard that applies in the review of evidence in this case. This is an erroneous assertion. The "preponderance of the evidence" standard applies in the review of evidence in this case. See *Matter of E-M*, *Id.*

On appeal, the applicant submitted his marriage certificate that stated the date of his marriage to Surya Bugum to be July 16, 1985, and also a subsequent Divorce Deed of that marriage dated June 7, 1996 that also referenced that marriage date.

Discussion

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).

Reviewing the evidence pertaining to the births of the applicant's children in Pakistan,⁵ the applicant has provided the following information:

Birth Certificates – Dates of Birth

Form I-485-Dates of Birth

[REDACTED]	04/16/1986	04/16/1986
[REDACTED]	03/14/1988	03/14/1987
[REDACTED]	01/29/1989	03/15/1988

⁵ There is no evidence in the record that the applicant's spouse, [REDACTED] was ever in the United States.

08/08/1994

08/08/1994

As can be seen from the above documents, the applicant has provided two different accounts of the birthdates of his two children [REDACTED] and [REDACTED]. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. In this instance the applicant has resolved the inconsistent information he has provided to CIS concerning the birth dates of his children by providing their birth certificates but he has not explained how the errors first occurred.

The dates of birth of the applicant's children relate to the dates when the applicant was absent from the United States during the requisite period. The applicant stated to CIS his first trip out of the United States during the statutory period was from July 10, 1985 until August 15, 1985 with the purpose of entering into marriage. According to the marriage certificate submitted by the applicant, he married [REDACTED] on July 16, 1985. Ten months after the marriage date, [REDACTED] had a child, [REDACTED], on April 16, 1986.

According to the NOID, the director reported that the applicant stated in an interview that he next left the United States on June 14, 1987. According to the birth certificate submitted, the couple had a child [REDACTED] on March 14, 1988.

As already stated, according to part #32 of the Form I-687 application, the applicant listed only one absence during the relevant period, a visit to Pakistan from February 1988 to March 1988. In the record of proceeding, there is evidence of a one-way ticket issued to the applicant, (number [REDACTED]) by Pan Am Airlines from New York City to Pakistan dated February 10, 1988 confirming this visit. According to the birth certificate submitted for [REDACTED], the applicant's daughter was born on January 29, 1989.

By the applicant's own statements to CIS corroborated by the birth certificates statements mentioned above, the applicant was absent from the United States during the requisite period in 1985, 1987 and in 1988. Two of the absences were not disclosed on the Form I-687 and the director evidenced in the NOID issued to the applicant doubts as to the applicant's veracity concerning all his absences and their duration.

The applicant's response to the NOID was insufficient and not credible according to the discussion above. Despite disclosing in statements that the applicant undertook the two additional trips outside the United States during the requisite period, the applicant has not provided sufficient evidence as to their durations.

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 visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

Section 245A(a) of the Act sets forth the statutory requirements for eligibility for temporary resident status. Among those is the requirement that the applicant must prove continuous unlawful residence in the United States before January 1, 1982, and through the date the application is filed. Section 245A(a)(2) of the Act. The regulation at 8 C.F.R. § 245a.1(c)(1)(i) implementing this provision states, *inter alia*, that the continuous residence requirement is met when:

[n]o single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed.

The credibility of the applicant pertaining to his absences from the United States during the requisite period has been questioned by the director. We note that the applicant has at various times during these proceedings declared to CIS by his applications and biographic information statement submitted, as well as in interviews, different dates for the occurrence of his marriage and different **dates for the births of two daughters, [REDACTED] and [REDACTED]**. These dates are relevant to the issue of the applicant's absences from the United States during the requisite period since the absences were not disclosed to CIS when the applicant filed his application. In fact the applicant by his sworn affidavit dated June 27, 2004, affirmatively stated that there was only one absence from February 1988 to March 1988. The applicant later admitted to the director that there were three absences during the requisite period but the applicant has not provided any corroborating evidence to their duration which he stated did not exceed 45 days. If CIS fails to believe that a fact stated in the application is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Failure to submit requested evidence in response to the director's NOID that precludes a material line of inquiry shall be grounds for denying the application. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

In this case, there was submitted insufficient credible and probative evidence to corroborate the applicant's claim of continuous residence for the entire requisite period. The inconsistencies and contradictions noted in the record seriously detract from the credibility of the applicant's 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