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FILE:

MSC 05 232 14268

Office: LOS ANGELES

Date: NOV 04 2008

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.

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 Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that he attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS) in the original legalization application period between May 5, 1987 to May 4, 1988. Therefore, the director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and section 245A of the Immigration and Nationality Act (Act) and denied the application.<sup>1</sup>

On appeal, the applicant contends that the director erred in denying his application without first issuing a notice of intent to deny to him as required under paragraph 7 of the CSS/Newman Settlement Agreements. The applicant states that a brief in support of his appeal will be forthcoming within thirty days of the receipt of the appeal. However, the record shows that as of the date of this decision the applicant has failed to submit a statement, brief, or evidence to supplement his appeal. Therefore, the record must be considered complete.

An alien applying for adjustment to temporary resident status must establish that he or she entered the United States before January 1, 1982, and that he or she has resided continuously in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2)(A) of the Act and 8 C.F.R. § 245a.2(b).

An alien applying for adjustment to temporary resident status must 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 and 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), “until the date of filing” shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

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<sup>1</sup> According to evidence in the record, the applicant was expeditiously removed on November 7, 1999 and again on September 18, 2002.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, 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 including affidavits is permitted pursuant to 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 "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 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 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on May 20, 2005. 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 listed [REDACTED] in San Fernando, California from 1981 to 1989.

In support of his claim of continuous residence in this country for the requisite period, the applicant submitted forty-five photocopied rent receipts ranging in date February 2, 1981 to March 2, 1988 for a room purportedly rented by the applicant from [REDACTED] at [REDACTED] in San Fernando, California. Each of the photocopied rent receipts is signed by [REDACTED].

The applicant provided a declaration signed by [REDACTED] who stated that he had lived at [REDACTED] in San Fernando, California from prior to January 1982 through the date the declaration was executed on April 22, 2005. Mr. [REDACTED] indicated that he first met the applicant on April 2, 1982 when the applicant began working as his gardener. Mr. [REDACTED] noted that the applicant had talked to him quite a bit regarding his residence in the United States prior to January of 1982. However, [REDACTED] failed to attest to the applicant's address of residence during that period he employed the applicant as his gardener as required by 8 C.F.R. § 245a.2(d)(3)(i). Further, as discussed above, the applicant claimed that he lived at [REDACTED] in San Fernando, California from 1981 to 1989 at part #30 of the Form I-687 application and submitted photocopies of forty-five signed rent receipts ranging in date February 2, 1981 to March 2, 1988 for a room purportedly rented by him from [REDACTED] at this address. The fact that [REDACTED] failed to testify that the applicant had lived in his home renting a room from 1981 to 1989 brings into question the applicant's claim that he resided at this address during the requisite period. In addition, the fact that the record contains four photocopied receipts signed by [REDACTED] reflecting the applicant's payment of rent for a room at [REDACTED] in San Fernando, California on February 2, 1981, April 1, 1981, June 2, 1981, and September 3, 1981, respectively, directly contradicts [REDACTED]'s testimony that he first met the applicant on April 2, 1982 when the applicant began working as his gardener. Neither the applicant nor [REDACTED] provided any explanation for these conflicts.

The applicant included a declaration that is signed by [REDACTED]. Ms. [REDACTED] declared that she had knowledge the applicant resided in this country since September 1982 when he became her gardener. Nevertheless, [REDACTED] failed to provide the applicant's address of residence during that period she employed him as her gardener as required by 8 C.F.R. § 245a.2(d)(3)(i). Furthermore, [REDACTED] failed to attest to the applicant's residence in this country from prior to January 1, 1982 up through September 1982.

The applicant submitted a declaration signed by [REDACTED] who indicated that he had knowledge the applicant resided in this country from March 1981 to 1992 as the applicant worked as his gardener cutting grass weekly at two properties during this period. Regardless, [REDACTED] failed to provide the applicant's address of residence during that period he employed the applicant as his gardener as required by 8 C.F.R. § 245a.2(d)(3)(i).

The applicant provided a declaration that is signed by [REDACTED]. Mr. [REDACTED] stated that he first met the applicant over forty years ago as both he and the applicant were from the same city in Mexico. Mr. [REDACTED] asserted that he had knowledge the applicant entered and began residing in the United States prior to January 1982 because he was already living in this country when the applicant arrived in the United States and both he and the applicant visited one another at each of their respective homes. However, [REDACTED] failed to provide any specific and verifiable testimony to corroborate the applicant's claim of residence in this country for the requisite period.

The applicant included a declaration signed by [REDACTED] who noted that he had knowledge the applicant resided in the United States prior to January 1982 because he first met the applicant on November 15, 1981 when the applicant approached him on the street and asked for a job.

The applicant submitted a declaration that is signed by [REDACTED]. Mr. [REDACTED] declared that he first met the applicant in 1981 at a Jack in the Box restaurant in San Ysidro, California just after the applicant crossed the border from Mexico and illegally entered the United States. [REDACTED] claimed that he and the applicant began talking after the applicant approached him in the Jack in the Box and they had remained friends since.

Although all three declarants discussed in the previous three paragraphs, [REDACTED] and [REDACTED] attested to the applicant's residence in this country since prior to January 1, 1982, none of these declarants provided any direct, detailed, and relevant testimony to substantiate the applicant's claim of residence in the United States for the period in question.

A review of the record revealed that the applicant possessed another separate Administrative file or A-file, [REDACTED] which has been consolidated into the current record of proceeding. The record contains a Form I-867B, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, dated November 7, 1999 that is signed by the applicant and initialed by him on each page. The sworn statement reflects that when the applicant was asked by the interviewing officer if he had previously lived in the United States his response was "Once I stayed for one year." The fact that the applicant admitted that prior to November 7, 1999 he had only lived in this country for one year without specifying the dates of such residence seriously undermined his claim to have continuously resided in the United States for the requisite period.

The record contains another separate Form I-867B sworn statement dated September 18, 2002 that is signed by the applicant and initialed by him on each page. This sworn statement reflects that when the applicant was asked by the interviewing officer if he had previously lived in the United States his response was "Yes for about three years." The fact that the applicant acknowledged that he had only lived in this country for about three years prior to September 18, 2002 negated his claim to have continuously resided in the United States for the period in question.

The director determined that the applicant failed to establish his residence in the United States in an unlawful status from prior to January 1, 1982 and, therefore, denied the Form I-687 application on February 27, 2007. In the notice of denial, the director stated that the applicant admitted he had only previously lived in this country for one year in the Form I-867B sworn statement dated November 7, 1999. While the director failed to note that the applicant subsequently provided similar testimony approximately three years later in the Form I-867B dated September 18, 2002, this omission must be considered as 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(b).

On appeal, the applicant contends that the director erred in denying his application without first issuing a notice of intent to deny to him as required under paragraph 7 of the CSS/Newman Settlement Agreements. While the applicant is correct regarding an application that has been denied for failure to establish class membership in one of the requisite legalization class action lawsuits, paragraph 7 of the CSS/Newman Settlement Agreements contains no requirement that a notice of intent to deny be issued to an applicant whose application have been denied for reasons other than a failure to establish class membership. Paragraph 11 of the CSS/Newman Settlement Agreements states in pertinent part that CIS:

...shall adjudicate each application for temporary residence filed on Form I-687 in accordance with the provisions of section 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255a, regulations, and administrative and judicial precedents the INS [the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS)] utilized to adjudicate I-687 applications timely filed during the IRCA [Immigration and Reform Control Act of 1986] application period.

The relevant statutory and regulatory provisions as well as administrative and judicial precedents require that a notice of intent to deny must be issued to an applicant whose application have been denied for reasons other than a failure to establish class membership when such reasons are based upon derogatory information of which the applicant is not aware as put forth in 8 C. F. R. § 103.2(b)(16)(i). As the applicant's Form I-687 application has been denied for a failure to establish continuous unlawful residence in the United States for the requisite period and the denial was not based upon derogatory information of which the applicant is not aware, the director was not required to issue a notice of intent to the applicant prior to denying his Form I-687 application in this particular case.

The lack of sufficient credible evidence that provides relevant and material testimony to corroborate the applicant's claim of continuous residence for the period in question seriously detracts from the credibility of this claim. Moreover, the applicant's admission that he had only previously lived in this country for one year in the Form I-867B sworn statement dated November 7, 1999 as well as his subsequent admission that he had only lived in the United

States for about three years in a separate Form I-867B sworn statement dated September 18, 2002 negated the credibility of his claim of residence in the United States from prior to January 1, 1982 through the date he purportedly attempted to file a Form I-687 application with the Service in the original legalization application period from May 5, 1987 to May 4, 1988. 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. The applicant has failed to submit sufficient credible documentation to meet his burden of proof in establishing that he has resided in the United States since prior to January 1, 1982 by a preponderance of the evidence as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E-M-*, 20 I&N Dec. at 77.

Given the applicant's own admissions that he did not begin residing in the United States until well after the requisite period and failure to provide sufficient credible evidence to corroborate his claim of residence, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 as required under section 245A(a)(2) of the Act. 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.