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U.S. Citizenship
and Immigration
Services

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FILE:

MSC-06-059-10707

Office: MT. LAUREL

Date: NOV 14 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:

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.

John F. Grissom, Acting 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, Mount Laurel, New Jersey. 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. Specifically, the acting director stated in his Notice of Intent to Deny (NOID), that the evidence submitted by the applicant was insufficient to satisfy his burden of proof. The acting director granted the applicant 30 days within which to submit additional evidence in support of his application. Though the director noted that the applicant submitted additional evidence in response to the NOID, he found this evidence, when considered with evidence previously submitted by the applicant, did not satisfy his burden of proof. Therefore, the director determined the applicant was not eligible to adjust to temporary resident status pursuant to the CSS/Newman Settlement Agreements and denied the application.

It is noted that the director raised the issue of class membership in the decision. Since the application was considered on the merits, the director is found not to have denied the applicant's claim of class membership.

On appeal, counsel for the applicant asserts that the director failed to adequately consider the documents the applicant submitted in support of his application. Counsel also states that though the applicant brought a witness with him to testify at the time of the interview, the Citizenship and Immigration Services (CIS) officer refused to interview both the applicant and the witness at the time of the interview and would not take additional evidence from the applicant at that time.

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) 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 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.

An applicant who has been convicted of a felony or three or more misdemeanors is ineligible to adjust to Temporary Resident Status *See* 8 C.F.R. § 245a.2(c)(1).

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

The applicant was arrested for *Filing a False Document*, a violation of section 2C:21-1 of the New Jersey State Statute, on September 19, 2003. On February 12, 2004, the applicant was convicted of a violation of New Jersey State Statute 2C:28-3b, *Unsworn Falsification to Authorities*, which is a misdemeanor.

The applicant's single conviction for a misdemeanor offense alone does not cause him to be ineligible for temporary resident status pursuant to the regulation at 8 C.F.R. § 245a.2(c)(1).

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 November 28, 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 indicated his addresses in the United States during the requisite period were all in Atlantic City, New Jersey as follows: [REDACTED] from September 1980 to August 1981; [REDACTED] from August 1981 to February 1982; [REDACTED] from February 1982 to July 1984; and [REDACTED] from July 1984 to May 1988. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that he had one absence since January 1, 1982, when he went to Mexico from December 1986 to January 1987. At part #33, where the applicant was asked to list all of his employment in the United States since he first entered, he stated that he was employed by [REDACTED] in Atlantic City as a dishwasher from December 1980 until June 1988. The applicant also stated that he worked cleaning barns at [REDACTED] in Toms River, New Jersey from February 1981 to June 1981.

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. 8 C.F.R. § 245a.2(d)(5). To meet his burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. 8 C.F.R. § 245a.2(d)(6). The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of documentation that an applicant may submit to establish proof of continuous residence in the United States during the requisite period. This list includes: past employment records; utility bills; school records; hospital or medical records; attestations by churches, unions or other organizations; money order receipts; passport entries; birth certificates of children; bank books; letters or correspondence involving the applicant; social security card; selective service card; automobile receipts and registration; deeds, mortgages or contracts; tax receipts; and

insurance policies, receipts or letters. An applicant may also submit any other relevant document 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, in pertinent part: that letters from employers should be on the employer letterhead stationary, if the employer has such stationary and must include the following: an applicant's address at the time of employment; the exact period of employment; periods of layoff; duties with the company; whether or not the information was taken from the official company records; and where records are located and whether the Service may have access to the records. The regulation further provides that if such records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and noting why such records are unavailable may be accepted in lieu of statements regarding whether the information was taken from the official company records and an explanation of where the records are located and whether USCIS may have access to those records. 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.

The applicant submitted the following evidence that is relevant to his claim that he resided in the United States during the requisite period:

- An affidavit from [REDACTED] who states that the applicant was turned away by an officer in Camden, New Jersey in August of 1987 when he attempted to apply for legalization. The affiant states that the applicant also went to the Patterson immigration office and was also told that he did not qualify to apply because of an absence from the United States.
- An affidavit from [REDACTED] who states that he took the applicant to an immigration office in Patterson, New Jersey, where he was told that he did not qualify to apply because he had been absent from the United States. The affiant states that the applicant tried to apply for a second time at the Patterson office and then attempted to apply at the Camden office but was also denied at that time. The affiant further states that the applicant resided with him and two other men at [REDACTED]. However, the affiant does not state when the applicant resided at that address.
- An affidavit from [REDACTED] who submits a photocopy of the identity page of her passport and indicates that she is representing [REDACTED]. However, the affiant does not state her position with the Pizzeria. The affiant states that the applicant worked for [REDACTED] between December 1980 until June 1982 as a dishwasher. However, the affiant does not state whether she personally recalls these dates or how she was able to determine his dates of employment. This is significant because the affiant's passport indicates that she was born in 1967. Therefore, she would have been 13 years old on the date she asserts the applicant's employment began. She states that a priest from a church in Atlantic City brought him to the restaurant and that the applicant also resided in a room above the restaurant, which the affiant states is located at [REDACTED]. It is noted

that on his Form I-687 the applicant indicated that he resided at he resided at [REDACTED] [REDACTED] from September 1980 to August 1981 and also at [REDACTED] from July 1984 to May 1988. However, he did not indicate that he ever resided at [REDACTED] on that application. It is also noted that the dates of employment at [REDACTED] stated in this affidavit are not consistent with those the applicant's Form I-687. This affidavit states the applicant was employed only from December 1980 until June 1982. However, the applicant stated that he was employed by [REDACTED] from December 1980 until June 1988 on his Form I-687. Because of this inconsistency and because this affidavit is significantly lacking with regards to the criteria that the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states employment affidavits must adhere, it can only be accorded minimal weight as evidence of the applicant's residence in the United States prior to January 1, 1982.

- An affidavit from [REDACTED], who states that she began to work for [REDACTED] in January 1981, and that the applicant was working for the restaurant when she started. She states that the applicant resided in a room upstairs from the pizzeria with three other people. However, the affiant does not state the date through which the applicant either worked at the pizzeria or resided above that business.
- An affidavit from [REDACTED] which is dated November 17, 2005. The declarant submits a photocopy of his New Jersey Driver's License and his Social Security Card, and states that the applicant worked for him from October 1980 until September 1982 planting trees and flowers in residential areas. He states that a priest asked him to give the applicant a job. The affiant states that the applicant left in 1982 because the affiant's business cutting lawns closed at that time. It is noted that the applicant did not state that he was employed doing landscaping work during the requisite period on his Form I-687.

The applicant also submitted evidence of his residence in the United States subsequent to the requisite period. However, the issue in this proceeding is whether the applicant has satisfied his burden of proving that he resided in the United States for the duration on the requisite period. Therefore, because evidence that does not pertain to that period is not relevant to the matter at hand, it is not discussed here.

The director issued a Notice of Intent to Deny (NOID) to the applicant on January 18, 2007. In the NOID, the director stated that the applicant failed to satisfy his burden of proof with the evidence he submitted. Specifically, the director noted that the affiants from whom the applicant submitted affidavits failed to submit evidence that they, themselves resided in the United States during the requisite period. The director also noted that the testimony from [REDACTED] and [REDACTED] was not consistent regarding which immigration office the applicant first went to when he attempted to file for legalization during the requisite period. The director asserted that the signatures on identity documents submitted with affidavits were not consistent with those shown on the affidavits from those respective individuals. The director granted the applicant 30 days within which to submit additional evidence in support of his application.

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

A letter from counsel, who states that both the applicant and a witness he brought with him were denied the opportunity to testify before an officer on the date of his interview.

- An affidavit from the applicant that is dated January 29, 2007. The affiant details his attempts to apply for legalization at various offices in New Jersey and his work history. He states that he first arrived in the United States in May 1980, at which time he began to work for [REDACTED]. He states that a church helped him find work with [REDACTED], who also gave him a place to live. However, he does not state the address associated with this residence or state when he resided there. He states that he worked for [REDACTED] for two years part-time. He states that he had other jobs at that time, but that he went to Atlantic City and worked for [REDACTED] from 1988 to 1993 as a part-time worker. The applicant states that [REDACTED] was the owner of the restaurant and let him sleep upstairs from the restaurant at that time. The applicant also recounts his employment subsequent to the requisite period. The applicant further states that he feels he was mistreated at the time of his interview. Though this affidavit indicates that the applicant worked for [REDACTED] from 1988 to 1993, this is not consistent with other evidence in the record. In her affidavit, [REDACTED] states that the applicant worked for the Pizzeria from December 1980 until June 1982 and affiant [REDACTED] states that the applicant was working for the Pizzeria when she began working there in January 1981. The applicant's Form I-687 indicates that the dates of his employment for the restaurant were from December 1980 until June 1988. It is also noted that the applicant did not indicate on his Form I-687 that he had ever worked for either [REDACTED] or for [REDACTED]. Similarly, the applicant did not indicate on this form that he ever resided in Texas or in any cities other than Atlantic City, New Jersey during the requisite period.
- An affidavit from [REDACTED] who submits identity documents, including his Texas Driver's License. The affiant states that he has known the applicant since 1980, when he hired him to work for his business, [REDACTED] in Houston, Texas. He states that the applicant worked for him from May to September 1980 as a drywall tapper. He states that he personally drove the applicant to an immigration office in Patterson and Newark, New Jersey, where his papers were not accepted by immigration officials. The affiant states that he attempted to provide testimony for the applicant in January 2007, but was not allowed to testify.
- A second affidavit from [REDACTED] that was notarized on January 30, 2007. The affiant submits identity documents and states that he met the applicant in October 1980 when his church asked him to provide the applicant with employment. He states that he gave the applicant a place to live at that time. He states that he also employed the applicant cleaning equipment and cutting grass. He states that the applicant worked for him until September 1982, when he opened another company and could no longer employ the

applicant, because he was not documented. He states that he drove the applicant to an immigration office in Hackensack, New Jersey, where the applicant was turned away because he had traveled to Mexico. He states that he also went to an immigration office in Camden with another application. He states that he is willing to provide live testimony if necessary.

The director denied the application for temporary residence on February 23, 2007. In denying the application, the director stated that though the applicant submitted two additional affidavits with his response to the NOID, the affidavits did not include evidence that verified the affiants' claims that they resided in the United States during the requisite period. The director also stated that the applicant failed to address the previously identified inconsistencies as stated in the NOID. The director went on to state that CIS is not obligated to take witness testimony. The director concluded by stating that the evidence submitted by the applicant was insufficient to satisfy his burden of proof.

On appeal, the applicant resubmits previously submitted evidence, and submits a statement from counsel. Counsel reiterates that the officer who interviewed the applicant was aware that a witness brought with the applicant was present but refused to interview him. He reiterates that the officer also refused to interview the applicant. He asserts that the director did not accord due weight to the evidence that the applicant submitted with his application.

The AAO has reviewed the record and has found that the applicant has failed to satisfy his burden of proving that he resided in the United States for the duration of the requisite period because documents submitted by the applicant are lacking in detail and are not consistent regarding his employment or his residence in the United States during the requisite period.

The applicant's Form I-687 indicates that the applicant was employed by both [REDACTED] Farms in New Jersey as a barn cleaner from February 1981 until June 1981 and by [REDACTED] [REDACTED] from December 1980 until June 1988. However, the applicant has submitted an affidavit from [REDACTED], who states that the applicant worked for [REDACTED] between December 1980 until June 1982 as a dishwasher. The applicant further submitted an affidavit from [REDACTED], who stated that the applicant was working for the Pizzeria when she began working there in January 1981. The affiant's statement from January 2007 states that the applicant worked for [REDACTED] beginning in 1988.

The applicant also submitted affidavits from [REDACTED], who states that he employed the applicant in his business in Texas from May to September in 1980 and from [REDACTED] who states that he employed the applicant from October 1980 to September 1982. Neither of these places of employment are indicated on the applicant's Form I-687. These inconsistencies are significant and cast doubt on whether the applicant has accurately represented his employment during the requisite period to CIS.

Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The applicant has further not been consistent regarding his residences in the United States. Though [REDACTED] states that the applicant resided and worked in Texas in 1980, the applicant did not indicate he had ever resided in Texas.

In summary, though the applicant has provided evidence in support of his claim that he resided in the United States during the requisite period, this evidence is not consistent. These inconsistencies are significant, such that they cast doubt on his claim of continuous residence in the United States during the requisite period.

In this case, the absence of credible, probative documentation to corroborate the applicant's claim of continuous residence for the 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.