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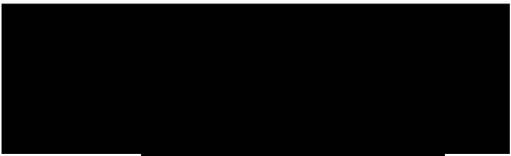
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U.S. Citizenship
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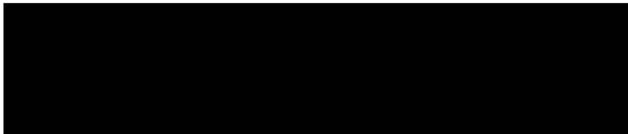
Office: NEW YORK

Date: OCT 17 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 be "Robert P. 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, 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. Specifically, in her Notice of Intent to Deny (NOID), the director stated that the applicant failed to meet his burden of proof. The director granted the applicant 30 days within which to submit additional evidence in support of his application. In denying the application, the director did not state whether her office received additional evidence from the applicant in response to the NOID. She reiterated that the applicant failed to meet 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.

On appeal, the applicant asserts through counsel that he submitted a response to the director's NOID that was not discussed in the director's decision. He argues that the director overlooked this response when she issued her decision.

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.

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 August 2, 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 stated he resided at the following addresses, all in New York, in the United States during the requisite period: [REDACTED] from February 1981 until August 1984; [REDACTED] from September 1984 until April 1987; and 95 [REDACTED] from May 1987 until March 1993. It is noted that [REDACTED] and [REDACTED] are located in Manhattan. 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 during the requisite period when he went to Bangladesh to see his sick father from January 1987 until March 1987. At part #33, where the applicant was asked to list all of his employment in the United States since he first entered, he showed that he was employed as a busboy at Bombay Curry House Inc. in New

York City from April 1981 until June 1984; as a waiter at Ai & Ji Restaurant, Inc in the Bronx, New York from December 1984 until October 1986; and as a food runner at Tandoori Garden in New York City from November 1986 to September 1990. It is noted that the applicant was born on July 2, 1974. Therefore, he would have been six years old in April 1981 when he indicates he began his work as a busboy at Bombay Curry House in New York. It is further noted that the applicant would have remained a minor for the duration of the requisite period.

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. 8 C.F.R. § 245a.2(d)(5). To meet his burden of proof, an applicant must provide evidence of eligibility apart from his 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 initially submitted the following with his Form I-687 as proof of his residence in the United States during the requisite period:

1. Affidavits from [REDACTED] and [REDACTED] all of whom submit photocopies of their New York Driver's Licenses with the exception of [REDACTED] who submits his learner's permit. All of the affiants state that they have personal knowledge that the applicant resided in Brooklyn, New York from September 1981 to the present. However, none of the affiants state how they met the applicant, where they first met him or whether they first met him in the United States. Each affiant asserts that the applicant has resided in Brooklyn for the

duration of the requisite period when the applicant indicated on his Form I-687 that he resided at addresses that are located in Manhattan during the requisite period. The affiants have failed to state the frequency with which he saw the applicant during the requisite period. Similarly, each affiant states that he did not see the applicant for periods of time ranging from five months to three years and seven months. However, the affiants fail to state when this period of time occurred or whether this period of time was during the requisite period. Because these affidavits provide testimony that is inconsistent with other documents in the record regarding the applicant's residence in the United States during the requisite period, doubt is cast on assertions made by this affiant regarding the applicant's residence in the United States during that time.

2. An affidavit from [REDACTED], who submits a photocopy of his New York Identification Card and states that the applicant resided with him at [REDACTED] in New York City from February 1981 until August 1984. He states that rent receipts and household bills were in his name and that he took care of all of the applicant's expenses when they resided together. However, the affiant failed to indicate when and where he first met the applicant. He did not state whether there were periods of time during the requisite period when he did not see the applicant. Though the applicant would have been six years old when he began residing with this affiant, the affiant failed to indicate whether he was responsible for the applicant's well being, whether he was the applicant's legal guardian while the applicant resided with him or to indicate whether the applicant was attending school at that time. Because this affidavit is significantly lacking in detail, it can be accorded minimal weight as evidence that the applicant resided continuously in the United States for the duration of the requisite period.
3. An affidavit from [REDACTED] who submits a photocopy of his New York Identification Card and states that the applicant resided with him at [REDACTED] in New York from September 1984 until April 1987. He states that rent receipts and household bills were in his name and that he took care of all of the applicant's expenses when they resided together. However, the affiant failed to indicate when and where he first met the applicant. He did not state whether there were periods of time during the requisite period when he did not see the applicant. Though the applicant would have been ten years old when he began residing with this affiant, the affiant failed to indicate whether he was responsible for the applicant's well being, whether he was the applicant's legal guardian while the applicant resided with him or to indicate whether the applicant was attending school at that time. Because this affidavit is significantly lacking in detail, it can be accorded minimal weight as evidence that the applicant resided continuously in the United States for the duration of the requisite period.
4. An affidavit from [REDACTED], who submits a photocopy of his New York State Identification Card and states that the applicant resided with him at [REDACTED] in New York City from May 1987 until March 1993. He states that rent receipts and household bills were in his name and that he took care of all of the applicant's expenses when they resided

together. However, the affiant failed to indicate when and where he first met the applicant. He did not state whether there were periods of time during the requisite period when he did not see the applicant. Though the applicant would have been twelve years old when he began residing with this affiant, the affiant failed to indicate whether he was responsible for the applicant's well being, whether he was the applicant's legal guardian while the applicant resided with him or to indicate whether the applicant was attending school at that time. Because this affidavit is significantly lacking in detail, it can be accorded minimal weight as evidence that the applicant resided continuously in the United States for the duration of the requisite period.

5. An employment letter from Ai & Ji Restaurant, Inc. that is dated June 20, 1988 and was notarized July 22, 2005. This letter is signed by [REDACTED] who indicates that he was the manager of this restaurant. It is noted that there is no last name indicated for this individual. This letter states that the applicant worked part time at this restaurant from December 1984 until October 1986. It is noted that the applicant would have been ten years old in December 1984. This affiant did not indicate how he determined the applicant's start date at this restaurant. He did not state whether there were periods of layoff during this employment. He failed to state whether information regarding the applicant's employment was taken from official company records. Because this employment letter is lacking with regards to the criteria that the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states employment letters must adhere to, very minimal weight can be accorded to this letter as proof of the applicant's residence in the United States during the requisite period.
6. An employment letter from Bombay Curry Take Aways that is dated March 26, 1985 and was notarized on July 23, 2005. In this letter, [REDACTED] who indicates he is the owner of this place of employment, states that the applicant worked at his restaurant from April 1981 until June 1984 as a bus boy. It is noted here that the applicant would have been six years old in April 1981. Mr. [REDACTED] did not indicate how he determined the applicant's start date at this restaurant. He did not state whether there were periods of layoff during this employment. He failed to state whether information regarding the applicant's employment was taken from official company records. Because this employment letter is lacking with regards to the criteria that the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states employment letters must adhere to, very minimal weight can be accorded to this letter as proof of the applicant's residence in the United States during the requisite period.
7. A letter from [REDACTED] that is dated April 16, 1991 and was notarized on July 23, 2005. This letter is signed by [REDACTED] who indicates that he is the manager of the restaurant. The letter asserts that the applicant was employed at the Tandoori Garden from December 1986 to September 1990 as a food runner. It is noted that the applicant would have been 12 years old in 1986. This affiant did not indicate how he determined the applicant's start date at this restaurant. He did not state whether there were periods of layoff during this employment. He failed to state whether information regarding the applicant's employment was taken from official company records. Because this employment letter is

lacking with regards to the criteria that the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states employment letters must adhere to, very minimal weight can be accorded to this letter as proof of the applicant's residence in the United States during the requisite period.

As was previously noted, affiants [REDACTED], [REDACTED] and [REDACTED] stated that the applicant resided in Brooklyn during the requisite period, when the applicant stated on his Form I-687 and submitted affidavits from [REDACTED] and [REDACTED] that assert that the applicant resided at addresses that are located on the island of Manhattan rather than in Brooklyn during much of the requisite period. This inconsistency casts doubt on the testimony in the record regarding the applicant's residence in the United States during the requisite period.

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 also submitted documents as proof of his residence in the United States subsequent to the requisite period. The issue in this proceeding is whether the applicant has submitted sufficient evidence to meet his burden of proving that he resided in the United States continuously in an unlawful manner during the requisite period. As these documents do not pertain to the requisite period, they are not relevant to this proceeding.

The director issued a NOID to the applicant on October 23, 2006. In her NOID, the director stated that though the applicant was of school age for the duration of the requisite period, he failed to submit school records from that time. She went on to say that he failed to submit medical records relevant to the requisite period or documents that would prove his claimed departure and re-entry dates pursuant to his alleged January 1987 to March 1987 absence from the United States. She stated that the applicant did not submit sufficient evidence to prove that he resided continuously in the United States for the duration of the requisite period. The director granted the applicant 30 days within which to submit additional evidence in support of his application.

In response to the director's NOID, the applicant, through his attorney, submitted a letter that is dated November 21, 2006. This letter asserts that because of the applicant's age at the time he entered the United States, he is unable to establish that he was actually physically present during the requisite period. He argues that the applicant provided consistent information regarding his addresses of residence and employment history with his application. He states that all of the evidence submitted by the applicant in support of his application, when considered together, will prove that the applicant has met his burden of proof.

The director denied the application for temporary residence on November 28, 2006. In denying the application, the director reiterated that the applicant failed to submit school records though he would have been of school age during the requisite period, and went on to say that he also failed to provide immunization records or medical records as proof of his presence during the requisite period. The director noted that though the applicant previously submitted affidavits in support of his application, these affidavits do not contain contact information that her office could use to verify information in the affidavits. The director states that for those reasons, the applicant failed to meet his burden of proof.

Here, the AAO notes that though the director stated that the affidavits submitted by the applicant contained no contact information for the affiants, each of the documents submitted by the applicant was submitted with an address at which the affiant could be contacted. The director's error is harmless because 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 AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO withdraws the directors statement that the applicant failed to provide contact information for affiants from whom he submitted evidence.

On appeal, the applicant's attorney states that he submitted a response to the director's NOID that was not considered by the director when she made her decision. He argues that the applicant provided consistent information regarding his addresses of residence and employment during the requisite period as well as affidavits from individuals who had direct knowledge of his residency in the United States since 1981.

The AAO has reviewed the evidence in the record as noted above and finds that counsel's argument is not persuasive. Though the applicant did submit affidavits regarding his residence during the requisite period, affiants [REDACTED], and [REDACTED] all state that the applicant resided in Brooklyn during the requisite period. However, the applicant has indicated that he resided at addresses that are located in Manhattan during that time. Though the applicant submitted affidavits from Noor [REDACTED] and [REDACTED] who each state that the applicant resided with them for part of the requisite period, those individuals did not indicate whether there were periods of time when they did not see the applicant during the requisite period. Similarly, these individuals provided affidavits that were significantly lacking in detail regarding the events and circumstances of the applicant's residency in the United States as a minor during the requisite period. Further, in spite of the fact that affiants [REDACTED], and [REDACTED] state in their affidavits that they provided for all of the applicant's expenses during the requisite period, the

applicant has indicated on his Form I-687 and provided employment verification letters from restaurants that assert that the applicant worked for the duration of the requisite period, beginning when he was six years old.

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.