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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE:

MSC-05-314-12665

Office: NEW YORK Date:

SEP 02 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:

[REDACTED]

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 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. 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, counsel for the applicant asserts that the director's stated requirements for credible affidavits are not consistent with regulatory requirements.

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).

An applicant shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no 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 is filed, unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that emergent means "coming unexpectedly into being."

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 United States Citizenship and Immigration Services (CIS) on August 10, 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 address in the United States during the requisite period was [REDACTED] [REDACTED] in the in Bronx, New York from December 1981 until July 1992. At part #31 where the applicant was asked to list all affiliations or associations with clubs, organizations, churches, unions, and businesses, the applicant did not indicate that he had any such affiliations or associations. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that he was absent from the United States once during the requisite period, when he traveled to Nigeria to visit family from February to April 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 not employed during the requisite period. However, it is noted that the applicant was born in 1981 and therefore he would have remained a minor for the duration of the requisite period.

The record also contains notes from the applicant's interview with a CIS officer on April 10, 2006. These notes indicate that the applicant stated that he was absent from the United States for two weeks in either 1985 or 1986 when he went to Nigeria with his mother. He stated that his mother stayed in Nigeria at that time and that he came back to the United States with an aunt named [REDACTED].

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).

Prior to the date the director of the National Benefits Center issued his Notice of Intent to Deny (NOID), the applicant did not submit evidence in support of his application other than his own testimony.

The director of the National Benefits Center issued a NOID to the applicant on November 15, 2005. In this NOID, the director stated that the applicant failed to submit evidence of the following: that he entered the United States before January 1, 1982 and then resided in a continuous unlawful status except for brief absences from before 1982 until the date he (or his parent or spouse) was turned away by Immigration and Naturalization Service (INS) when they tried to apply for legalization; that he was continuously physically present in the United States except for brief, casual and innocent departures from November 6, 1986 until the date that he (or his parent or spouse) tried to

apply for legalization; and that he was admissible as an immigrant. 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 evidence that is relevant to the requisite period:

- An affidavit from [REDACTED] that was notarized on December 1, 2005. The affiant states that he has known the applicant since December 1981 when he resided in the Bronx. Though he speaks of the applicant's moral character, he does not state where he first met the applicant. He fails to state how he is able to determine the date that he first met the applicant or to indicate the frequency with which he saw the applicant during the requisite period. He does not state whether there were periods of time during the requisite period when he did not see the applicant.
- An affidavit from [REDACTED] of Praise Ministries, Inc. that was signed by [REDACTED], who indicates that he is the President and Senior Pastor of the church. The affiant states that he was present at the applicant's christening. He states that the applicant is a member in good standing of the church. However, the affiant does not state when the applicant was christened or indicate whether this christening occurred during the requisite period. He further fails to state whether it occurred in the United States. The affiant also fails to indicate the dates associated with the applicant's membership in his church. Further, the applicant does not state that he was a member of any churches on his Form I-687. Because this affidavit does not state that the applicant was a member of the church during the requisite period, it carries no weight as evidence that the applicant resided in the United States during the requisite period.
- An affidavit from [REDACTED] that was notarized on December 5, 2005. The affiant states that he has known the applicant since May 1985 because his aunt would drop the applicant off at his workplace. However, the affiant does not state where this workplace was or whether it was in the United States. He further does not state that he knows the applicant resided in the United States during the requisite period. Therefore, this affidavit carries no weight as evidence that he did so.
- The record contains an immunization record that indicates that the applicant was immunized against both diphtheria and polio in 1981 in Nigeria. These records do not show that the applicant received any subsequent immunizations until 1993 when he received a measles mumps and rubella immunizations in the United States.

It is noted that though the applicant has not submitted school records that correspond with the requisite period he did submit school records that indicate that he attended Junior High and High School in the United States subsequent to that time. Though they are not relevant to the requisite period, these documents indicate that the applicant received an elementary school education prior to attending these schools. These documents submitted include: a transcript of a high school

record that indicates that the applicant attended high school in Queens, New York from September 1994 to June 25, 1998; a diploma that indicates that the applicant completed middle school in New York City in June 1994; and a diploma that indicates that the applicant graduated from high school in New York City in June 1998.

The director denied the application for temporary residence on January 11, 2007. In denying the application, the director noted that her office received evidence from the applicant in response to the NOID. However, the director found that this evidence was not sufficient to overcome the reasons for denial in the NOID. The director stated she did not find the affidavits from [REDACTED], [REDACTED], [REDACTED] or [REDACTED] to be credible. She stated that credible affidavits include documents identifying the affiant, proof that the affiant was in the United States during the requisite period and proof that there was a relationship between the applicant and the affiant such as photos as well as a current phone number at which the affiant can be contacted to verify information in the affidavit. The affidavits submitted by this applicant were lacking with regards to these criteria. The director went on to state that the applicant failed to submit evidence of his initial entry into the United States through Canada. She noted that the applicant's testimony at the time of his interview, when he stated that he left the United States in 1985 or 1986 was not consistent with what he indicated on his Form I-687, where he stated that his only absence from the United States was from February to April in 1987. The director also stated that the applicant failed to submit school records or immunization records that correspond with the requisite period, which is notable because he had such records for the periods both before the requisite period and after that time. The director stated that the lack of credible, probative, consistent evidence caused the applicant to fail to meet his burden of proof.

On appeal, the applicant submits a brief through counsel and additional evidence as follows:

An affidavit from [REDACTED] that was notarized on January 22, 2007. The affiant states that she is friends with the applicant's mother. She goes on to state that she knows that the applicant's mother traveled with the applicant to New York in December 1981 and returned [to Nigeria] in 1985. She states that since 1985 the applicant's mother has not been able to return to the United States. The affiant does not clearly state whether the applicant was with his mother when she returned to Nigeria in 1985. Because this affiant did not ever reside in the United States during the requisite period, she is not personally aware of the events and circumstances of the applicant's residence there. As such, this affidavit carries no weight as evidence of the applicant's residence in the United States during the requisite period.

- An affidavit from [REDACTED] that was notarized on January 22, 2007. The affiant states that she is the applicant's mother. She states she and the applicant entered the United States in December 1981 and that they resided in the Bronx at that time. She states that she traveled back to Nigeria in 1985 and was denied entry back into the United States after that absence. She states that a relative, [REDACTED] offered to raise the applicant. She states that in 1993, the applicant returned to the United States and has

resided in the United States since that time. The affiant does not clearly state whether the applicant was with her when she returned to Nigeria in 1985. She does not state whether the applicant was ever absent from the United States from December 1981 until 1995. She further does not indicate whether the applicant returned to Nigeria during the requisite period.

The brief from counsel is dated March 9, 2007. Counsel asserts that affidavits submitted by the applicant in support of his application were notarized. He indicates that the director's statement that the affidavits are not credible because they do not contain identity documents for the affiants, proof that the affiants were in the United States during the requisite period and proof that there was a relationship between the affiant and the applicant is not consistent with the regulation at 8 C.F.R. § 245a.2(d)(3)(iv)(L) which states that applicants are permitted to submit any other relevant document. He states that the applicant's two absences from the United States should not be held against the applicant. He argues that the applicant was not provided with an opportunity to file a waiver for any period of travel and states that the applicant was a young juvenile at the time he traveled and therefore, he did not make the decision to travel at that time.

Counsel is not persuasive. Though counsel is correct in stating that the applicant is permitted to submit affidavits under the regulation he refers to, the director did not prevent the applicant from submitting affidavits in this case. And though an applicant's claim cannot be denied solely on the basis that an applicant only submitted affidavits in support of his claim, in this case the director denied the application because the applicant submitted evidence and testimony that was not consistent regarding his absence from the United States and that was not sufficiently detailed to allow him to meet his burden of proof. Further, the director did not state that the fact that the applicant was absent from the United States caused him to fail to meet his burden of proof. In this case, the applicant stated on his Form I-687 that he was only absent from the United States once, when he went to Nigeria to visit relatives from February to April in 1987. However, at the time of his interview with a CIS officer, he stated that he was absent for two weeks in 1985 or 1986 and did not state that he was absent in 1987. Because the applicant has not submitted consistent testimony regarding his absences, doubt is cast on whether he has fully and accurately disclosed his absences from 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).

In this case, the absence of credible and 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 the applicant 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.