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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: CHICAGO

Date: **SEP 05 2008**

consolidated herein]

MSC 06 098 17161

IN RE:

Applicant:

[REDACTED]

APPLICATION: Application for Temporary Resident Status under 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.

Handwritten signature of Robert P. Wiemann in black ink.

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 (director) in Chicago, Illinois. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish his continuous unlawful residence and continuous physical presence in the United States for the requisite time periods set by law – section 245A of the Immigration and Nationality Act (Act) – and the settlement agreements.

An applicant for temporary resident status under section 245A of the Act 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. *See* 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. *See* 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. *See* 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term “until the date of filing” in 8 C.F.R. § 245a.2(b)(1) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. *See* 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.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 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 applicant, a native of Mexico who claims to have resided in the United States since January 1981, submitted his application for temporary resident status (Form I-687) under section 245A of the Act, together with a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet, to the Chicago District Office on December 31, 2005.

On March 29, 2006, the director issued a Notice of Intent to Deny (NOID), indicating that the evidence of record did not establish the applicant’s continuous unlawful residence in the United States from before January 1, 1982, and his continuous physical presence in the United States from November 6, 1986, through the date of attempted filing during the original one-year application period that ended on May 4, 1988. The applicant was granted 30 days to submit additional evidence.

On September 6, 2007, the director issued a Notice of Decision denying the application. The director noted that the applicant had not responded to the NOID and had stated in an interview at the Chicago District Office on February 13, 2007 that he had no further documentation to submit. The director denied the application on the grounds indicated in the NOID.

The applicant filed a timely appeal, asserting that the director did not properly consider the evidence of record in reaching his decision.

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 record does contain considerable evidence of the applicant's residence and physical presence in the United States during the 1980s, which was submitted at the time the applicant applied for class membership in the CSS class action lawsuit in 1990. This evidence includes the following documentation:

- A California Identification Card issued to the applicant on July 18, 1983.
- Four pay statements issued to the applicant by ██████████ in Laguna Beach, California, for pay periods ending on October 16, 1983, December 11, 1983, January 22, 1984, and February 26, 1984.
- A series of pay statements issued to the applicant by ██████████ at an unidentified locale, for pay periods ranging from June to September 1985.
- A series of pay statements issued to the applicant by ██████████ the French Restaurant in South Laguna, California, for pay periods ranging from October 1985 to May 1986.
- A series of pay statements issued to the applicant by ██████████'s in Laguna Beach, California, for pay periods ranging from November 1986 to June 1987.
- A series of pay statements issued to the applicant by ██████████, at an unidentified locale, for pay periods ending on May 15, 1988 and July 8, 1988.
- An Identification Card issued to the applicant by the California Department of Motor Vehicles on September 12, 1988.
- A series of pay statements issued to the applicant by ██████████ in Beverly Hills, California, for pay periods ranging from October 1989 to January 1990.
- An affidavit by ██████████, a busboy residing in Laguna Beach, California, dated June 23, 1990, stating that he met the applicant in May 1981 because they rented rooms at the same address and that they had stayed in touch since then.
- An affidavit by ██████████ a painter residing in Anaheim, California, dated July 11, 1990, stating that he met the applicant through a friend in March 1981, knows that the applicant had resided in the United States since then, and that they worked together.

The foregoing evidence was considered by the director in the adjudication of an application for permanent resident status (Form I-485) under the Legal Immigration and Family Equity (LIFE) Act (MSC 02 137 63357) which the applicant filed on February 14, 2002. No further documentation was submitted in that proceeding. In denying the application on April 25, 2005, the director cited the pay statements "as evidence of your residence in the United States between 1984 and 1989," but noted that the affidavits were the only evidence of the applicant's continuous residence in the United States during the years 1982 and 1983, and ruled that this evidence was insufficient to establish the applicant's continuous U.S. residence for the entire period required (before January 1, 1982 through May 4, 1988) for legalization under the LIFE Act. No appeal was filed by the applicant.

In the current proceeding the applicant once again relies exclusively on the evidence he submitted in 1990. No additional documentation has been submitted in support of the applicant's claim to have resided in the United States continuously since January 1981. The earliest contemporary documentation of the applicant's residence in the United States is the Identification Card issued by the State of California on July 18, 1983. That is followed by a succession of pay statements from various businesses – mostly restaurants, according to the applicant – dating from October 1983 to early 1990. Considering the amount of documentation dating from mid-1983 onward, it is noteworthy that the applicant has not produced a solitary piece of evidence during the two and one-half years before then – back to January 1981 – when he claims to have been living in the United States. The AAO notes that the applicant has not identified any other employer(s) before October 1983.

Thus, the only evidence of the applicant's residence in the United States before July 1983 are the affidavits in 1990 by [REDACTED] and [REDACTED]. Both affidavits have minimalist, fill-in-the blank formats with limited personal input by the affiants. Neither of the affidavits provides any meaningful details about the applicant's life in the United States during the 1980s, where he lived, and where he worked. Neither of the affiants describes the circumstances of meeting the applicant, or the nature and extent of their interaction over the years. Nor are the affidavits accompanied by any documentary evidence from the affiants – such as photographs, letters, and the like – of their personal relationship with the applicant in the United States during the 1980s. In view of these substantive shortcomings, the AAO finds that the affidavits have little probative value. They are not persuasive evidence of the applicant's continuous unlawful residence in the United States from before January 1, 1982 through the date of attempted filing for temporary resident status during the original one-year application period that ended on May 4, 1988.

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant has failed to establish that his continuous unlawful residence in the United States began before 1983. The record does not establish that the applicant entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from that date through the date he attempted to file a Form I-687 during the original one-year application period that ended on

May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A(a)(2) the Act.

The appeal will be dismissed, and the application denied.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.