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U.S. Citizenship
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Services

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FILE: MSC-05-250-14616 Office: NEW YORK Date: SEP 18 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: 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.

A handwritten signature in black ink, appearing to read "R. 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 she 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 because the affidavits the applicant submitted in support of her application were not amenable to verification, the applicant failed to meet her burden of proof. The director granted the applicant 30 days within which to submit additional evidence in support of her application. Because the applicant failed to submit additional evidence for consideration in response to the director's NOID, she did not overcome the director's reasons for denial as stated in that NOID. 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 states that she never received the director's NOID. She asserts that she met her burden of proof and she submits additional evidence in support of her application.

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 her 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 June 7, 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 her address in the United States is [REDACTED] in Staten Island, New York and that she has resided there from November 2, 1981 until the present date. At part #31 where the applicant was asked to list all of her associations and affiliations with unions, churches, organizations and businesses she indicated that she had no such associations or affiliations. At part #32 where the applicant was asked to list all of her absences from the United States, she indicated that she was absent once during the requisite period when she went to Sri Lanka from November 30, 1986 to December 28, 1986 to attend her father's funeral. At part #33, where the applicant was asked to list all of her employment in the

United States since she first entered, she showed that she was employed by Michele Gargano as a business helper and housekeeper from 1989 until the date she submitted her Form I-687.

Also in the record are the notes from the CIS officer who interviewed the applicant on March 7, 2006. The record shows that the applicant indicated that she first entered the United States on October 2, 1981 by traveling through Canada to the United States border at Pittsburgh. It is noted that Pittsburgh does not share a border with Canada.

The applicant has the burden of proving by a preponderance of the evidence that she has resided in the United States for the requisite period. 8 C.F.R. § 245a.2(d)(5). To meet her burden of proof, an applicant must provide evidence of eligibility apart from 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 applicant initially submitted the following evidence that is relevant to her claim of having resided continuously in the United States during the requisite period:

1. An affidavit from [REDACTED] that was notarized on May 10, 2005. The affiant submits a photocopy of the identity page of his passport. The affiant states that he knew the applicant's father through a friend in California. However, he does not provide details regarding when or where he first met the applicant. He states that the applicant came with her father to New York on November 2, 1981. The affiant does not indicate how he is able to verify the exact of the applicant's arrival. He states that the applicant's uncle had promised to adopt her when she arrived in the United States. However, the applicant's uncle decided not to adopt her after her arrival. The affiant goes on to say that the applicant and her father resided at his house beginning in November 1981. He states that the applicant's father became ill in August 1986 and returned to Sri Lanka at that time, where he passed away in November 1986. He asserts that the applicant returned to Sri Lanka for her father's funeral on November 30, 1986 and returned from that trip on December 28, 1986. The affiant states that he prepared an application for the applicant during the original legalization filing period but that the application was rejected when she attempted to file after the officer learned of her trip to Sri Lanka. The affiant states that though the applicant was of school age during the requisite period, she did not attend school while she resided with him because she was not interested in studying.

2. An affidavit from [REDACTED] that was notarized on May 10, 2005. The affiant submits a photocopy of a page of her passport that bears her name and photograph with her affidavit. She also submits proof that she resides at [REDACTED] in Staten Island. The affiant states that she knew the applicant's father through a friend named John in California. However, she fails to provide details regarding where she first met the applicant's father or to provide details regarding that first meeting. She states that she first met the applicant on November 2, 1981. She does not indicate how she is able to verify the exact date that she met the applicant. She states that the applicant's uncle had promised to adopt her when she arrived in the United States. However, the applicant's uncle decided not to do so after her arrival. She goes on to say that the applicant and her father resided at her house from November 1981. She states that the applicant's father became ill in August 1986 and returned to Sri Lanka at that time where he passed away in November 1986. She asserts that the applicant returned to Sri Lanka for her father's funeral on November 30, 1986 and returned from that trip on December 28, 1986. She does not indicate how she is able to verify the dates that correspond with this absence. She states that she prepared an application for the applicant during the original legalization filing period but that the application was rejected when she attempted to file after the officer learned of the applicant's trip to Sri Lanka. It is noted that this affiant's husband has also claimed that he prepared the affiant's application for this same benefit. She states that the applicant did not attend school while she resided with the affiant because she was not interested in studying.
3. An affidavit from [REDACTED] that was notarized on December 9, 2005. The affiant states that he is personally aware that the applicant resided in the United States from November 1981 until the date he submitted his affidavit. He states that he first met the applicant at the residence of [REDACTED] and [REDACTED] at [REDACTED] in November 1981. It is noted that the record indicated that the last name of the individuals with whom the applicant claims she resided is spelled [REDACTED] rather than [REDACTED]. The affiant states that when he met the applicant, she was with her father who is now deceased. He goes on to say that he remembers that the applicant's father was sick in August 1986 and that the applicant returned to Sri Lanka for his funeral in November 1986 and came back to New York at the end of December 1986. Though this affiant states that he met the applicant in 1981, he fails to indicate the frequency with which he saw the applicant during the requisite period.
4. An affidavit from [REDACTED] that was notarized on May 15, 2005. The affiant states that the affiant is a citizen of Canada and that the applicant came to his house to visit in December 1986. He states that while she was there, the applicant stated that she had been to Sri Lanka on an urgent personal matter and that she had left New York on November 1986. Because this affiant does not state that he personally knows that the applicant was residing in the United States during the requisite period, this affidavit carries no weight as evidence that she did so.

5. A declaration from [REDACTED] who indicates he is the pastor of the Church of St. Joseph. This declaration is dated February 2, 2006. The declarant states that the applicant resides at [REDACTED] in Staten Island. Though the declarant speaks of the applicant's good moral character, he does not indicate that he knows whether or not the applicant resided in the United States for part or all of the requisite period. Therefore, this declaration carries no weight as evidence that she did so.

The director issued a Notice of Intent to Deny (NOID) to the applicant on April 22, 2006. In this NOID, the director stated that the applicant failed to meet her burden of proof because, though she submitted affidavits from [REDACTED] and [REDACTED] these affidavits were not submitted with telephone numbers and therefore they were not amenable to verification. The director further stated that the affidavit from [REDACTED] was not amenable to verification because the affiant resides in Canada. The director granted the applicant 30 days within which to submit additional evidence in support of her application. It is noted that the director sent this NOID by certified mail to the applicant at her address of record.

The director denied the application for temporary residence on June 10, 2006. In denying the application, the director stated that the applicant did not submit evidence in support of her application in response to the NOID. Therefore, the applicant failed to overcome the director's reasons for denial as stated in the NOID.

On appeal, the applicant submits a brief in which she asserts that she did not receive the director's NOID. She asserts that she has met her burden of proof, resubmits previously submitted evidence and also submits the following additional evidence in support of her application:

1. An affidavit from the applicant that contained identical testimony of that which was notarized on May 10, 2005. This new affidavit is notarized on August 3, 2006 and in it the applicant states that she entered the United States without inspection through Canada on October 2, 1981 with her father. She states that he father brought her to the United States so that her uncle could adopt her. However, her uncle decided not to do so. Therefore, the applicant states her father began to reside with her in Staten Island on [REDACTED]. She asserts that her father became ill in August 1986 and returned to Sri Lanka without her, where he passed away in November 1986. She states that she was absent from the United States when she went to Sri Lanka to attend her father's funeral from November 30, 1986 until December 28, 1986. She states that she returned to the same residence in New York when she came back from Sri Lanka. She states that she obtained a Canadian Visa that she used to enter Canada at that time but that she re-entered the United States without inspection. She states that she never attended school in the United States. She asserts that Michele urged her to apply for legalization during the original filing period and that she attempted to do so but was front desked when she went to the New York Immigration Office. She states that Michele supported her financially after her father passed away and gave her a job in 1989.

2. A declaration from [REDACTED] that is not dated. The declarant indicates that she is the applicant's mother. The declarant states that [REDACTED] is her brother and that he resided in California in 1981. She states that her daughter, the applicant, and her late husband came to the United States on October 2, 1981 because her brother invited them to do so. She asserts that her brother stated that he intended to adopt her daughter but that he changed his mind after the applicant arrived in the United States. She states that the applicant and the applicant's father resided with [REDACTED] until August 1986 but that the applicant's father became sick in August 1986 and returned to Sri Lanka where he passed away in November 1986. She states that she does not know where her brother is residing currently.
3. The applicant's father's death certificate and its English translation. This Death Certificate states that on November 27, 1986 [REDACTED] died at the age of 47 years of kidney failure.
4. An affidavit from [REDACTED] that is dated June 26, 2006. The affiant submits a FICA earnings statement that indicates that he was employed in the United States for all years during the requisite period. The affiant states that he resides at [REDACTED] in Staten Island and that he has done so since 1980. He states that the applicant resides with him and with his wife. He asserts that an officer informed the applicant that if CIS required further information, they would inform her of this by mail. He states that the applicant did not receive any correspondence from CIS until the letter dated June 10, 2006, which he refers to as the denial letter.

It is noted that though the record indicates that the director sent the NOID to the applicant at her address of residence by certified mail, the applicant asserts on appeal that she never received the NOID.

Paragraph 7, page 4 of the CSS Settlement Agreement and paragraph 7, page 7 of the Newman Settlement Agreement both state in pertinent part:

Before denying an application for class membership, the Defendants shall forward the applicant or his or her representative a notice of intended denial explaining the perceived deficiency in the applicant's Class Member Application and providing the applicant thirty (30) days to submit additional written evidence or information to remedy the perceived deficiency.

In this case the director decided the applicant's case on the merits rather than denying her claim of class membership. Therefore, the director was not required to issue a NOID prior to issuing her final decision.

Though the applicant has provided affidavits from individuals who claim that the applicant resided with them for the duration of the requisite period, these individuals have not stated the events and circumstances of their first meeting the applicant and her father. They have not stated how they are able to verify the date that they first met the applicant or the dates that correspond with the applicant's absence from the United States during the requisite period. They further do not state the events and circumstances of the applicant's return to the United States as a minor after her father passed away.

Though the applicant has stated that she had a visa that she used to enter Canada after her return to the United States from Sri Lanka in 1986, she has not provided evidence of such a visa or produced her passport showing the dates of travel to and from Canada. She has stated that she first entered the United States in 1981 by entering through the border at Pittsburgh, though Canada does not share a border with Pittsburgh. This casts doubt on the credibility of applicant's testimony regarding her manner of initial entry into the United States.

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 her 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 she 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.