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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEW YORK Date: SEP 2 3 2008

MSC-05-211-11084

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.

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. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, the applicant asserts that he has been residing in the United States since 1981. The applicant states that he has provided documents to support the credibility of his application. The applicant submits an additional affidavit as corroborating evidence.

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).

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 petitioner 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 or petitioner 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 Supplement to Citizenship and Immigration Services (CIS) on April 29, 2005. At part #30 of the Form I-687 application where applicants are asked to list all residences in the United States since first entry, the applicant showed his first address in the United States to be in New York, New York from June 1980 until May 1989. At part #33, he showed that he has been self-employed in the position of maintenance since July 1980.

The applicant submitted as corroborating evidence a fill-in-the-blank affidavit from [redacted] dated April 13, 2005. This affidavit provides that the affiant has personal knowledge of the applicant's residence at [redacted] from June 1980 until May **1989 and** [redacted] 1989 until present. It states that the affiant is able to determine the date of the beginning of his acquaintance with the applicant in the United States because they live in the same building. **However, the affidavit does not** provide the address of this building. Furthermore, the affidavit does not contain any details on their relationship in the United States during the requisite period. Given these deficiencies, this

affidavit is without any probative value as evidence of the applicant's residence in the United States during the requisite period.

On February 9, 2006, the director issued a Notice of Intent to Deny (NOID) to the applicant. The director determined that the applicant had not demonstrated eligibility for temporary resident status. The director afforded the applicant 30 days to overcome the basis for the NOID. Therefore, the applicant had until March 12, 2006 to submit additional evidence in rebuttal to the NOID. However, the director issued a decision to deny the application after only five days, on February 14, 2006. In denying the application, the director determined that the applicant failed to submit additional evidence in response to the NOID. The director concluded that the applicant failed to meet his burden of proof in the proceeding.

The director's decision to issue the denial notice without allowing the applicant 30 days to respond to the NOID was in error. Nevertheless, the director's action must be considered to be harmless error as the AAO conducts a de novo review, and the applicant can submit to the AAO any additional documentation he had intended to file in rebuttal to the NOID.

On appeal, the applicant asserts that he has been residing in the United States since 1981. The applicant states that he has provided documents to support the credibility of his application. The applicant submits a fill-in-the-blank affidavit from [redacted] as additional evidence.

The affidavit from [redacted] is dated November 29, 2005. The affidavit provides that the affiant has personal knowledge of the applicant's residence at [redacted] York, New York from June 1980 until May 1989 and [redacted] York from May 1989 until present. It states that the affiant is able to determine the date of the beginning of his acquaintance with the applicant in the United States because they have been friends for a long time. The affidavit fails to convey how the affiant and the applicant first became acquainted. Furthermore, it does not provide any details on their relationship in the United States during the requisite period. Given these deficiencies, this affidavit is without any probative value as evidence of the applicant's residence in the United States during the requisite period.

Moreover, the applicant's assertion on appeal regarding the start date of his residence in the United States is inconsistent with his Form I-687 and corroborating affidavits. The applicant asserts that he has resided in the United States since 1981. However, the applicant's Form I-687 and the affidavits from [redacted] that he has been residing in the United States since June 1980. This inconsistency undermines the applicant's own credibility as well as the credibility of his claim of residence in the United States during the requisite period.

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 inconsistency 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 inconsistency 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.