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[REDACTED]

FILE: [REDACTED]  
MSC-05-293-13228

Office: NEW YORK Date: **SEP 23 2008**

IN RE: Applicant: [REDACTED]

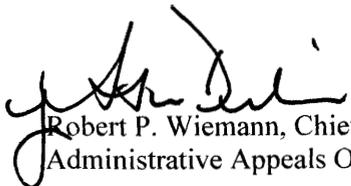
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the  
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

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 failed to prove by a preponderance of the evidence that he 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 that he is otherwise eligible for adjustment of status under this section. Specifically, the director noted that the applicant failed to indicate that he had departed the United States during the requisite period.

On appeal, counsel for the applicant stated that the documentation and oral testimony provided was sufficient to warrant a favorable exercise of discretion in this case; that the director's decision is arbitrary and is not supported by facts and circumstances in this case; and the applicant's testimony was detailed, consistent and believable to support a plausible claim of the benefit sought.

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 July 20, 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 listed multiple addresses in the Bronx, New York but failed to provide the dates during which he resided at the addresses. The applicant’s failure to specifically indicate on his Form I-687 that he resided in the United States during the requisite period casts some doubt on his claim to meet the residency requirements for temporary resident status. At part #32 where applicants were asked to list all absences from the United States since entry, the applicant stated “N/A.” The applicant answered “Yes” to part #1 of the Form I-687 Supplement, which states the following:

During the period between May 5, 1987 and May 4, 1988, did you (or a parent or spouse) visit an office of the former Immigration and Naturalization Service (INS) to apply for legalization, but were turned away because the INS or the

Qualified Designated Entity (QDE) believed that (1) you had traveled outside the United States after November 6, 1986, without advance parole, OR (2) you had traveled outside the United States and returned after January 1, 1982, with a visitor's visa, student visa or any other type of visa or travel document?

It is noted that, since part #1 asks about the belief of the INS regarding the applicant's travel outside of the United States, rather than the applicant's actual travel behavior. Therefore, the applicant's response to the question at part #1 is found not to be inconsistent with his response to part #32 of his Form I-687 application indicating that he had not traveled outside the United States during the requisite period.

The applicant provided two attestations in support of his application for temporary resident status. The affidavit from [REDACTED] dated December 1, 2005 states that the affiant has known the applicant, "back home, Ghana when we were living in the same neighborhood." The affiant stated that, in July 1986, when he was on his way to work on the D train to Manhattan, he met the applicant in the train the first time since the affiant had left Ghana. The affiant stated that, since then, he and the applicant have been going to church together. This affidavit fails to state that the applicant resided in the United States prior to July 1986. In addition, it fails to provide detail regarding where the applicant resided during the requisite period and which church he attended with the affiant. As a result, this affidavit will be given only limited weight in establishing that the applicant resided in the United States from July 1986 to the end of the requisite period.

The affidavit from [REDACTED] states that the applicant had lived in the affiant's house as a tenant from 1983 to 1986, and the applicant was a good tenant and paid his rent "at all times." This affidavit fails to state that the affiant's house was located in the United States. In addition, the affidavit fails to provide information regarding the applicant's residence during the requisite period except from 1983 to 1986. Lastly, this affidavit fails to provide detail regarding where the applicant and the affiant lived together, how they met and came to be living together, whether the affiant has any records of the rent paid by the applicant and, if not, why not. As a result of these deficiencies, this document carries no weight in establishing that the applicant resided in the United States during the requisite period.

On March 14, 2006 the director issued a Notice of Intent to Deny (NOID) to the applicant. In the NOID, the director stated that the officer who interviewed the applicant in connection with his application for temporary resident status asked whether the applicant left the United States during the requisite period, and the applicant stated that he never traveled outside of the United States until 2003. The applicant also signed a sworn statement providing the same information. As noted above, the applicant's failure to indicate that he departed the United States during the requisite period is not necessarily inconsistent with his response to part #1 of the Form I-687 Supplement. For this reason, any aspect of the director's decision that is based on a finding of inconsistency between the applicant's claims not to have traveled during the requisite period and his assertions on the Form I-687 Supplement is withdrawn. Any related error on the part of the director 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).

In response to the NOID, counsel for the applicant stated that the inconsistencies found in the applicant’s written application and testimony were very minor and they do not lead to questions of credibility. Counsel stated that the applicant’s claim that he had not traveled outside the United States during the requisite period was a misunderstanding, and the applicant had mistakenly thought that the travel involved was going back to his native country, Ghana. Counsel stated that the applicant made a brief trip to Canada in December 1986 and forgot to include that in his oral testimony. It is noted that, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As a result, counsel’s factual assertions regarding the applicant’s activities will not be considered.

In denying the application the director concluded that the applicant failed to prove by a preponderance of the evidence that he 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 that he is otherwise eligible for adjustment of status under this section.

On appeal, counsel for the applicant stated that the documentation and oral testimony provided was sufficient to warrant a favorable exercise of discretion in this case; that the director’s decision is arbitrary and is not supported by facts and circumstances in this case; and the applicant’s testimony was detailed, consistent and believable to support a plausible claim of the benefit sought.

In summary, the applicant has provided two attestations. One of these fails to state that the applicant resided in the United States prior to July 1986 and lacks sufficient detail. The other affidavit fails to state that the applicant resided in the United States, fails to provide information about the applicant’s residence during the requisite period except from 1983 to 1986, and lacks sufficient detail. The absence of sufficiently detailed supporting documentation to corroborate the applicant’s claim of continuous residence for the entire requisite period seriously detracts from the credibility of this 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 applicant’s reliance upon documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States for the requisite period 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.