

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

41

FILE:

MSC-05-004-10580

Office: NEW YORK

Date:

SEP 24 2008

IN RE:

Applicant:

APPLICATION:

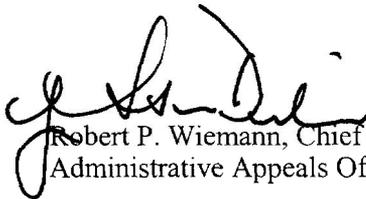
Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

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 further determined that the applicant failed to establish his class membership. 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 May 1986. The applicant states that during the period of May 1987 until May 1988, he attempted to submit an application for amnesty. The applicant states that the application was rejected by the Immigration and Naturalization Service due to his absence from the United States from July 1985 until August 1985. The applicant states that he submitted two affidavits from persons who are aware of this fact. The applicant states that he was employed with Yorkville East and Kismoth Restaurant and both of these businesses are located in New York.

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 or 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 Supplement to Citizenship and Immigration Services (CIS) on October 4, 2004. 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 1981 until December 1988. At part #33, he showed that during the requisite period he was employed with Kismoth Indian Cuisine in New York, New York from September 1981 until November 1982; self-employed as a “casual worker” in New York, New York from February 1983 until February 1986; and employed with Yorkville East Cameras & Electronics in New York, New York from April 1986 until June 1989.

The applicant submitted the following documentation:

- An affidavit from [REDACTED], dated August 12, 2004, which provides that the applicant resided with him at [REDACTED] from June 1981 until December 1988. This affidavit fails to provide any details on [REDACTED] first acquaintance with the applicant. Furthermore, it does not illustrate their living arrangement/agreement 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.
- An affidavit from [REDACTED] dated August 10, 2004, which provides that the applicant lived with him from June 1981 until December 1990. It states that on January 26, 1988, he went with the applicant to the Immigration and Naturalization Service to submit the applicant's legalization application. It states that this application was not accepted because the applicant had left the United States after January 1, 1982. This second affidavit from [REDACTED] fails to provide any additional details on his relationship with the applicant during the requisite period. Therefore, it is also without any probative value as evidence of the applicant's residence in the United States during the requisite period.
- An affidavit from [REDACTED] dated July 24, 2004, which provides that he first met the applicant in September 1981 in New York. It states that since then they have met each other at social, cultural, community and religious events in New York. However, the affidavit does not convey the location of these events and the time period during which they were held. This information is necessary to assess whether [REDACTED] had contact with the applicant 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.
- A letter from [REDACTED] Manager, Kismoth Restaurant, located in New York, New York. This letter, dated December 12, 1982, provides that the applicant was a part-time kitchen helper at the restaurant from September 1981 until November 1982. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers must include the applicant's address at the time of employment; duties with the company; whether or not the information was taken from official company records; and where the records are located and whether CIS may have access to the records. If the records are unavailable, the employer may furnish an affidavit form letter stating that such records are unavailable and the reason they are unavailable. 8 C.F.R. § 245a.2(d)(3)(i). This letter fails to comply with these delineated guidelines. Therefore, it is of little probative value as evidence of the applicant's residence in the United States during the requisite period.
- A letter from [REDACTED] dated July 15, 1989, which states that the applicant worked as a sales helper and loader/unloader of merchandise from April 1986 until June 1989. As stated above, the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers must include the applicant's address at the time of employment; duties with the company; whether or not the information was taken from official company records; and

where the records are located and whether CIS may have access to the records. If the records are unavailable, the employer may furnish an affidavit form letter stating that such records are unavailable and the reason they are unavailable. 8 C.F.R. § 245a.2(d)(3)(i). This letter fails to comply with these delineated guidelines. Therefore, it is of little probative value as evidence of the applicant's residence in the United States during the requisite period.

- An affidavit from [REDACTED], dated August 1, 2004, which provides that the applicant first entered the United States in 1981. It states that the applicant visits his house "now and then." It further states that on January 26, 1988, the applicant informed him that he went to the Immigration and Naturalization Service to submit a legalization application, but this application was not accepted because he had left the United States after January 1, 1982. This affidavit fails to establish [REDACTED] first hand knowledge of the applicant's entry into the United States in 1981. It also fails to illustrate how frequently they came into contact with each other 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 April 21, 2006, the director issued a Notice of Intent to Deny (NOID) to the applicant. The director found that the applicant furnished no evidence of his entry into the United State in May 1981. The director found that the applicant's corroborating affidavits do not contain the affiant's identity documents or poof that the affiants were in the United States during the requisite period. The director found that the employment letters from Yorkville East Cameras & Electronics and Kismoth Restaurant do not contain evidence that the employers did business in the United States during the requisite period. The director determined that the applicant failed to submit documents that would by a preponderance of the evidence establish his residence in the United States. The director afforded the applicant a period of 30 days to submit additional documentation in rebuttal to the NOID.

In response to the NOID the applicant issued a rebuttal statement, which provides that he has continuously resided in the United States since May 1981. The applicant states that he had one absence from July 1985 until August 1985. The applicant states that he entered the United States without inspection. The applicant states that Yorkville East Cameras & Electronics and Kismoth Restaurant respectively went out of business in 2001 and 1998. The applicant furnished the following documentation:

- An affidavit from [REDACTED] dated May 14, 2006, which provides that he first met the applicant in September 1981 in New York City at a marketplace. It states that they have been good friends since then and visit each other all the time. The affidavit provides [REDACTED] phone number. Attached to the affidavit is a copy of the biographic page of [REDACTED] United States passport to establish his identity. However, this second affidavit from [REDACTED] fails to provide any additional details on his relationship with the applicant during the requisite period. Given this deficiency, this affidavit is without any probative value as evidence of the applicant's residence in the United States during the requisite period.

- An affidavit from [REDACTED], dated May 15, 2006, which provides that the applicant lived with him from June 1981 until December 1988 at [REDACTED] New York. It states that on January 26, 1988, he went with the applicant to the Immigration and Naturalization Service to submit the applicant's legalization application. It states that this application was not accepted because the applicant had left the United States after January 1, 1982. The affidavit provides [REDACTED]'s phone number. Attached to the affidavit is a copy of the biographic page of [REDACTED] United States passport and New York State driver license to establish his identity. However, this third affidavit from [REDACTED] fails to provide any additional details on his relationship with the applicant during the requisite period. Therefore, it is without any probative value as evidence of the applicant's residence in the United States during the requisite period.
- An affidavit from [REDACTED] dated May 19, 2006, which provides that the applicant has been known to him since 1981. It states that to the best of his knowledge the applicant first came to the United States in 1981. It states that he frequently meets the applicant in the marketplace and various cultural community events in New York, New York. It further states that on January 26, 1988, the applicant informed him that he went to the Immigration and Naturalization Service to submit a legalization application, but this application was not accepted because he had left the United States after January 1, 1982. The affidavit provides [REDACTED] phone number. Attached to the affidavit is a copy of the biographic page of [REDACTED] United States passport and New York State driver license to establish his identity. However, this second affidavit from [REDACTED] fails to provide any additional details on his relationship with the applicant during the requisite period. Therefore, it is without any probative value as evidence of the applicant's residence in the United States during the requisite period.

On April 5, 2007, the director issued a notice to deny the application. In denying the application the director found that the applicant failed to produce any supporting documentation and additional evidence for consideration. The director noted that the applicant testified that he did not submit or attempt to submit a legalization application during the original legalization period, and he did not have this application reject or refused because of travel outside the United States after November 6, 1986, as required for CSS/Newman class membership. The director determined that the applicant failed to establish his entry into the United States prior to January 1, 1982 and continuous residence in the United States since this date, and proof of financial responsibility and employment in the United States between January 1, 1982 and May 4, 1988. The director concluded that the applicant failed to meet his burden of proof in the proceeding. It should be noted that although the director issued a finding that the applicant failed to establish his class membership, the director did not deny the application for class membership. Instead the director treated the applicant as a class member and adjudicated the application for temporary residence on the merits.

Although the director was correct in her overall decision that the applicant failed to meet his burden of proof in the proceeding, there was an error in her analysis. The director determined that the applicant failed to establish his entry into the United States prior to January 1, 1982 and continuous residence in the United States since this date. However, at issue in this proceeding is the applicant's 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). According to 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. *See* CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10. The director further determined that the applicant failed to establish proof of financial responsibility and employment in the United States between January 1, 1982 and May 4, 1988. However, there is no requirement for an applicant to establish proof of financial responsibility and employment during the requisite period. According to the regulation at 8 C.F.R. § 245a.2(d)(3)(L), an applicant may submit any relevant document to establish his residence in the United States during the requisite period. Nevertheless, the director's actions must be considered to be harmless error as 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).

On appeal, the applicant asserts that he mailed documents in response to the NOID via certified mail, which might have reached the director after the due date. The applicant states that he has been residing in the United States since May 1986¹ except for one absence from July 1985 until August 1985. The applicant states that during the period of May 1987 until May 1988, he attempted to submit an application for amnesty. The applicant states that the application was rejected by the Immigration and Naturalization Service due to his absence from the United States from July 1985 until August 1985. The applicant states that he submitted two affidavits from persons who are aware of this fact. The applicant states that he was employed with "Yorkville East" and Kismoth Restaurant and that both of these businesses are located in New York. The applicant states that Yorkville East was in business until 2001 and Kismoth Restaurant was in business from 1983 until 1988.

The applicant has failed to provide credible, reliable and probative evidence of his residence in the United States during the requisite period. The applicant has not provided sufficient evidence to establish that he entered the United States prior to January 1, 1982. Nor has he established that he has resided in the United States during the requisite period. The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence. *See* 8 C.F.R. § 245a.2(d)(3). The applicant submitted as evidence of his residence in the United States during the requisite period, seven affidavits. These affidavits lack considerable detail on the affiants'

¹ Since the applicant has maintained that he first entered the United States in May 1981, this date appears to be a misprint.

relationship with the applicant in the United States during the requisite period. As such, they are without any probative value as corroborating evidence. The applicant also submitted as evidence of his residence in the United States during the requisite period, two employment letters. However, these letters fail to comply with the regulatory guidelines for employment letters delineated at 8 C.F.R. § 245a.2(d)(3)(i). As such, they are of little probative value. Pursuant to 8 C.F.R. § 245a.2(d)(6), the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. Since the applicant's documentation is at best of little probative value, he has not furnished sufficient evidence to meet his burden of proof in this proceeding.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts 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 lack of credible supporting documentation, it is concluded that he 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.