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

U.S. Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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[redacted]

FILE: [redacted] Office: Chicago Date: APR 30 2007

MSC-05-231-15807

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]

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

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, Chicago. It is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

It is noted that this application, filed on May 19, 2005, is the third application for temporary application submitted by the applicant. The fourth application, filed on January 3, 2006, was also denied and appealed. The second application, filed on March 27, 2002, was not adjudicated, and the first application, submitted on August 8, 1991, comprised part of a request for class membership and was not an officially-filed application requiring adjudication.

The director denied this application because the applicant had not demonstrated that he was in an unlawful status that was known to the Government as of January 1, 1982. The director also determined the applicant had not demonstrated that he *continuously* resided in the United States in an unlawful status through the date on which he attempted to file a Form I-687, Application for Status as a Temporary Resident, with the legacy Immigration and Naturalization Service (the Service, now Citizenship and Immigration Services or CIS) in the original legalization application period of May 5, 1987 to May 4, 1988. Therefore, the director determined that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements. It is noted that the director failed to apprise the applicant of his right to appeal. Nevertheless, an appeal has been filed and will be considered.

On appeal, counsel refers to the evidence previously submitted, and maintains the director failed to apply the appropriate law section.

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. In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2).

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. *See* Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, 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. *See* 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 including affidavits 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.* 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 (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.

On each of the From I-687 applications submitted by the applicant, covering a period of 15 years, he indicated that he commenced residing in the United States in 1981, after having arrived as a nonimmigrant visitor. While he has not provided a photocopy of his passport or Form I-94 Arrival/Departure Record reflecting that entry, the director stated in his decision that "Service records indicate you entered the United States on May 16, 1981 as a B-2 nonimmigrant." "B-2" was, and is, the nonimmigrant classification for visitors for pleasure. Although it is not apparent what Service records the director reviewed, the director's statement corresponds to the applicant's claim.

In 1981 visitors for pleasure were admitted for a maximum period of six months. If the applicant was admitted prior to July 1, 1981, and he received no extension of stay (which was rarely granted to a visitor), his authorized stay expired prior to January 1, 1982. As counsel reiterates, if a nonimmigrant alien's authorized stay expired prior to January 1 1982, he is not required to demonstrate that his status was *otherwise* unlawful through, for example, illegal employment, and that such unlawfulness was known to the Government.

In conjunction with his August 8, 1991 request for class membership the applicant furnished a letter from [redacted] who stated the applicant cleaned and performed other household duties for her from 1981 to 1990 in New York and in Florida since 1990. The applicant also provided a letter dated June 10, 1991 from [redacted] of Yonkers, New York, stating the applicant worked for her as a cleaning person on a part-time basis from 1982 to 1986. The applicant claimed to have worked for both women on all of his Form I-687 applications submitted from 1991 to 2006.

[redacted] later furnished an affidavit dated January 10, 2001, in which she greatly expanded on the information she provided earlier. She attested to the applicant having worked for her and her husband [redacted] in their home in New York and at their restaurant, [redacted] until 1990, when they closed the restaurant and moved to Florida.

In yet another letter, dated May 3, 2006, [redacted] reiterated that the applicant lived in their home and worked in their restaurant from 1981 to 1990. She explained in detail how she and [redacted] came to know him, and what duties the applicant performed in their home and restaurant. She stated that the applicant left the United States only twice, for a month or less each time. She also declared that he moved to Florida with them when they sold the restaurant in New York in 1990, but stayed with them only briefly in Florida. Ms. [redacted] provided her telephone number and indicated her willingness to furnish more information if necessary.

On May 19, 2006 the director denied the applicant's fourth temporary residence application, which was filed after this one. In that notice the director pointed out that an immigration officer called [redacted] and was told that [redacted] Restaurant closed in 1985 and that [redacted] and [redacted] moved to Florida then. The director pointed out that this contradicted the claim that the Nocero's and the applicant moved to Florida in 1990.

[redacted], in a letter dated May 31, 2006, stated that she was very surprised to learn that an immigration officer had called to inquire about the applicant. She further stated that her husband [redacted] has a failing memory due to dementia. Ms. [redacted] reiterated once again that they moved to Florida in 1990, and provided documents concerning the acquisition of their condominium, their application for a Florida tax exemption, and a settlement from the insurer for the moving company, which all support the premise that the move occurred in 1990. She asked that the immigration officer call again and speak to her. She also provided photographs of the applicant, [redacted] and her at the restaurant. The applicant also furnished a photocopy of his Florida identification card dated February 12, 1991, showing the same address as the Nocero's.

In a statement dated October 10, 2005, [redacted], a citizen and resident of Brazil, explained that she knew that the applicant, her first cousin, went to the United States in 1981. She stated he only returned twice, briefly, to Brazil, in 1982 and 1987, and that she had always kept in touch with him. Similarly, in a statement dated September 10, 2005, [redacted], also a citizen and resident of Brazil, explained that he is the applicant's best friend and knows the applicant traveled to the United States in 1981.

United States citizen [redacted] stated in an affidavit dated May 5, 2006 that he met the applicant at [redacted] Steak House in New York in 1981, became friends with him, and knows the applicant worked at [redacted] from 1981 to 1990.

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. The individuals who have

attested to the applicant's claim of residence in the United States have provided their addresses and, in most cases, telephone numbers, thus making the information they provided amenable to verification.

Regarding the credibility of the documentation, although the director's effort at verification through contact with [redacted] led to a conclusion that the documents from the [redacted] were not credible, it appears that [redacted] later explanation overcomes that finding. Additionally, the Service has already made a favorable finding concerning the applicant's credibility. In a letter dated February 25, 2002, the Director, Vermont Service Center, stated that the applicant had submitted credible information to establish that he had attempted to file a legalization application in the May 1987 to May 1988 period but had it rejected by a Service employee.

While seemingly credible, the applicant's documentation is not particularly extensive. Nonetheless, over a period of 15 years the [redacted] have provided numerous statements that corroborate his claim. The information in their affidavits and letters, and the information in the statements of others who have attested, is consistent with the claims made on the application. Affidavits in certain cases can logically meet the preponderance of evidence standard. As stated on *Matter of E--M--, supra*, when something is to be established by a preponderance of the evidence, the applicant only has to establish that the proof is *probably* true. That decision also points out that, under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence.

The documents, including affidavits submitted by persons who are willing to testify in this matter, may be accorded substantial evidentiary weight, and are sufficient to meet the applicant's burden of proof. It is concluded that he has established that he resided in the United States from prior to January 1, 1982 as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--, supra.*

The issue of *continuous* residence must be addressed. An alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

The applicant has stated that he departed the United States on two occasions, in 1982 and 1987, and returned to the United States within one month each time with a visitor visa. There is no evidence or implication that he was absent for more than 45 days on either occasion. Therefore, it is concluded that he meets the continuous residence standard.

Section 245A(a)(3) of the Act states the following regarding *continuous physical presence* since the date of enactment (November 6, 1986):

(A) In general – the alien must establish that the alien has been continuously physically present in the United States since the date of enactment of this section.

(B) Treatment of brief, casual and innocent absences – An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual and innocent absences from the United States.

The Service originally held, at 8 C.F.R. § 245a.1(g), that "brief, casual and innocent" meant only departures authorized by the Service under the advance parole provisions. However, pursuant to the CSS litigation, the Service withdrew its finding that only absences authorized under the advance parole provisions could be considered brief, casual and innocent. Based on the applicant's description of his departure in 1987 and reentry on June 14, 1987 with a visitor visa, his absence is deemed to have been brief, casual and innocent, and not violative of the continuous physical presence requirement.

Also at issue is whether the applicant resided *unlawfully* in the United States, given the fact that he was twice readmitted into the United States as a visitor. Pursuant to 8 C.F.R. 245a.2(b)(9), an alien is eligible for legalization if he was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished residence. Pursuant to 8 C.F.R. 245a.2(b)(10), an alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19), now section 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i).

The applicant was readmitted into the United States on June 14, 1987 as a nonimmigrant visitor. His intent was not to visit, but rather to return to his unrelinquished unlawful residence. Therefore, he is eligible for legalization consideration, although he is inadmissible under section 212(a)(6)(C)(i) for procuring entry by misrepresentation. He is also inadmissible under section 212(a)(1)(A)(1), as he has been determined to have a communicable disease of public health significance. He has filed an application for waiver of inadmissibility.

In summary, all aspects of the applicant's claim seem "more likely than not" to be true: that he entered the United States prior to January 1, 1982, that his authorized stay expired prior to that date, and that he resided in the United States in an unlawful status without violating the continuous residence and continuous physical presence requirements. Therefore, he has established his claim to eligibility by a preponderance of evidence.

ORDER: The appeal is sustained. The director shall complete the adjudication of this application, after adjudicating the pending application for waiver of inadmissibility pursuant to the precedent decision *Matter of P--*, 19 I&N Dec. 823 (Comm. 1988).