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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEW YORK Date: APR 04 2008

MSC 06 077 10941

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. 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, New York, and that 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 acknowledged that the applicant submitted affidavits from individuals who claimed to have knowledge of the beneficiary's residence in the United States during the requisite period, but noted that the affidavits were insufficient to establish the beneficiary's continuous residence in the United States. The director also noted other facts in the record which the director believed cast doubt on the credibility of the applicant's claim. 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 submits new evidence, along with copies of previously submitted evidence. Counsel for the applicant asserts that the applicant has provided sufficient credible, probative evidence to meet his burden of proof.

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 be 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 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. 8 C.F.R. § 245a.2(d)(5).

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 a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on December 13, 2005. The applicant signed this form under penalty of perjury, certifying that the information he provided is true and correct. 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 indicated that he resided at [redacted], in Astoria, New York from September 1981 until June 1985, and at [redacted], in Astoria, New York from July 1985 until December 1990. Part # 33 of this application requests the applicant to list his employment in the United States since his entry. The applicant indicated that he: (1) was self-employed performing janitorial services in Pampanoo Beach, Florida from October 1981 until August 1985; (2) worked as a dishwasher for Spuzzi Restaurant in New York, New York from September 1985 until July 1987; and (3) worked as a cook for "Alo Alo New York Restaurant" in New York, New York from August 1987 until December 1990. The beneficiary also indicated that he worked as an independent contractor performing landscaping work in Pampanoo Beach, Florida from "01/1990 to 08/1987," which is assumed to be a typographical error. Nevertheless, the applicant indicated that he worked in Florida while residing in New York between 1981 and 1985, and this discrepancy has not been explained.

The applicant's administrative record also contains a Form I-687 application signed by the applicant on February 19, 1991. At that time, the applicant indicated that he was employed by Sfuzzi Restaurant from September 1981 until August 1985; by Alo Alo Restaurant from August 1985 until July 1987; and by "Landscaping NY" from July 1987 until January 1990. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to

where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. The applicant has not provided any explanation regarding the inconsistent employment information provided on his 1991 and 2005 egalization applications.

The applicant has the burden of proving by a preponderance of the evidence that he has resided in the United States for the requisite period. 8 C.F.R. § 245a.2(d)(5). To meet his burden of proof, an applicant must provide evidence of eligibility apart from his 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. The applicant did not submit any contemporaneous evidence of this nature pertaining to the requisite period.

An applicant may also submit any other relevant document pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). In an attempt to establish continuous unlawful residence in this country for the duration of the requisite period, the applicant submitted the following evidence:

- An employment letter dated April 24, 1989 from [redacted], general manager of DDL Wine and Liquor Third Avenue, Inc. doing business as "Alo Alo." [redacted] stated that the applicant had been employed by the restaurant for eight months as a "dishman" with a gross salary of $200 per week. Based on this letter, the applicant commenced employment with Alo Alo in approximately August 1988, outside of the requisite period. Furthermore, the applicant himself has provided inconsistent statements regarding his dates of employment with this company. As noted above, he indicated in 1991 that he worked for this employer from August 1985 until July 1987, and he indicated on the instant Form I-687 application that he worked for this employer from August 1987 until December 1990. Again, it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Regardless, as [redacted] does not confirm that the beneficiary worked for his company during the requisite period, his statement has no probative value in this matter. It is noted that the applicant also submitted several pay stubs from this employer, but none were dated during the requisite period.

- A handwritten employment letter dated March 27, 1995 from "[redacted] located in New York, New York. The author of the letter, whose name is illegible, stated that the applicant has been employed by the company "for the past four years," or since approximately March 1991. As this period of employment falls outside the requisite period, this evidence is not relevant and will not

be considered. However, it is noted that the applicant did not indicate on his Form I-687 that he was ever employed by a company called "Angels."

- A notarized letter dated December 1, 2005 from [redacted], who stated that she is a U.S. permanent resident residing in Ridgewood, New Jersey, and living in the United States since September 1980. She stated that she met the applicant at the Memorial Sloan-Kattering Cancer Center in 1981, at which time her son was undergoing medical treatment. [redacted] stated that the applicant was there to visit another child. Although [redacted] confirmed that she met the applicant in the United States in 1981, she did not indicate that she has any direct, personal knowledge of his continuous residence in this country for the duration of the requisite period. She offered no specific information regarding how frequently and under what circumstances she saw the applicant during the relevant period, nor did she provide any relevant details regarding the applicant's residence in the United States beyond her initial meeting with him. Given her claim that she has been a friend of the applicant's for 24 years, the lack of detail in her statement is significant, and its probative value is limited.

- A notarized letter dated December 2, 2005 from [redacted], who stated that he is a permanent resident of the United States currently residing in New York. [redacted] indicated that he has known the applicant since 1981. Although not required to do so, he provided a copy of his New York State driver license as proof of his identity. Here, [redacted] did not indicate where or how he met the applicant, or how frequently or under what circumstances he saw the applicant during the requisite period, nor did he provide any other details regarding the events and circumstances of the applicant's residence in the United States that would tend to lend probative value to his statement. Moreover, he did not specifically state that he has direct, personal knowledge that the applicant continuously resided in the United States during the requisite period. For these reasons, this affidavit can be given only minimal weight as corroborating evidence.

- A notarized letter dated December 1, 2005 from [redacted] who stated that he is a permanent resident residing in Astoria, New York. [redacted] stated that he has known the applicant since 1981, that he met him at a soccer game in Central Park, and that they have been friends since that time. Although not required to do so, [redacted] provided a copy of his New York State driver license as proof of his identity. While the affiant identified the circumstances under which he met the applicant, he did not indicate how frequently he saw the applicant during the requisite period, or state that he has direct, personal knowledge that the applicant continuously resided in the United States. Thus, his affidavit does little more than confirm that the applicant was in the United States in 1981.

- A notarized letter dated November 2005 from [redacted], who stated that he is an employee of the Permanent Mission of Brasil to the United Nations currently residing in New York, New York. [redacted] **stated that he has known the applicant since 1981. Although not** required to do so, [redacted] provided proof of his identity and evidence that he was in the United States in the early 1980s. Like the other affiants, [redacted] merely confirmed that he met the applicant in 1981, yet he failed to state where or under what circumstances he met him,

nor did he provide any specific details regarding the events and circumstances of the applicant's residence in the United States. He did not indicate that he has direct, personal knowledge that the applicant resided in the United States for the duration of the requisite period. Due to the significant lack of detail, this affidavit can be given minimal weight as corroborating evidence.

- A notarized letter dated March 15, 2002 from [redacted], who stated that he is a U.S. permanent resident residing in Long Island City, New York. [redacted] stated that he has known the applicant since 1981. Although not required to do so, it is noted that he did not provide proof of his identity or evidence that he was in the United States during the requisite period. The same deficiencies discussed above also apply to this affidavit. The fact that [redacted] states that he met the applicant in 1981 falls significantly short of establishing that [redacted] has direct, personal knowledge of the beneficiary's continuous residence in the United States for the duration of the requisite period.

The applicant was interviewed under oath by a Citizenship and Immigration Services (CIS) officer on March 9, 2006. On March 20, 2006, the applicant submitted the following additional evidence:

- A notarized letter dated March 17, 2006 from [redacted], who stated that she is a Brazilian citizen residing in the United States since November 25, 1980. She stated that she met the applicant in 1981 at a Thanksgiving dinner at a friend's home in Maryland, and described the applicant as a good friend. [redacted] provided partial copies of two expired passports showing that she entered the United States in B-2 status on November 25, 1980, and that she was later admitted to the United States in A-2 status on January 3, 1982. While [redacted] has identified the specific date and circumstances under which she met the applicant, her statement is lacking in details that would tend to lend credibility to her claim that she has personal knowledge of the applicant's residence in the United States. Like most of the other affiants, she merely confirms that she met the applicant in 1981, without providing any corroborating information regarding the applicant's residence in the United States during the 1982 to 1988 period.

- A new notarized letter dated March 13, 2006 from which is essentially identical in content to the letter submitted previously and is therefore deficient for the same reasons discussed above. [redacted] provided a copy of his New York State driver license as proof of his identify and a partial copy of his expired Brazilian passport which shows that he was admitted to the United States in B-2 status on August 29, 1981.

- A new notarized letter dated March 10, 2006 from [redacted] who reiterated that she met the applicant at the Memorial Sloan-Kattering Cancer Center in 1981 when her son was undergoing medical treatment. She stated that the beneficiary was "one among so many other wonderful people who visited us." She provided a partial copy of her Brazilian passport issued on September 24, 1980. The passport contains a B-2 visa issued on September 25, 1980, and three U.S. arrival stamps, showing that [redacted] entered the United States on September 29, 1980, August 2, 1982 and January 17, 1983. However, this affidavit was also nearly identical to that previously provided by [redacted] and is deficient for the reasons discussed above.

- A notarized letter dated March 14, 2006 from [redacted], who stated that he is a U.S. permanent resident, and that he has known the applicant since 1986. He stated that he worked with the applicant at Sfuzzi Restaurant from June 1986 until May 1987. [redacted] provided a copy of an expired Brazilian passport showing that he was admitted to the United States in B-2 status on May 5, 1986, and a copy of his New York State driver license. As noted above, the applicant himself has provided inconsistent information regarding his dates of employment at the Sfuzzi Restaurant. Although [redacted]s statement is consistent with what the beneficiary indicates as his dates of employment on the instant application, the fact remains that the applicant indicated in 1991 that he worked for this restaurant from September 1981 until August 1985, during a period in which [redacted] does not claim to have been in the United States. Because this conflicting information has not been resolved, [redacted]'s statement has little probative value.

- A notarized letter dated March 13, 2006 from [redacted], who stated that she is a U.S. citizen residing in New York. She stated that she is well-acquainted with the applicant and that she met him in the summer of 1981 through her brother, [redacted], who brought the applicant home after a soccer game in Central Park. She indicated that she saw the applicant nearly every weekend after soccer games and has remained friends with him to the present time. Ms. [redacted] provided a partial copy of her expired Brazilian passport showing that she was admitted to the United States in B-2 status on October 19, 1980. Here, [redacted] stated that she met the applicant in 1981 and saw him "every weekend" but she did not specifically reference whether her contact with him was within the requisite period or provide any details regarding the events and circumstances of the applicant's residence in the United States.

  A notarized letter dated March 17, 2006 from [redacted], who stated that he has resided in the United States since 1979. He stated that he was introduced to the applicant by mutual friends while working as a ski patrol in Windom, New York, and that the applicant is a good and responsible person. [redacted] provided a copy of his New York State driver license, a 1983 registration card issued to him by National Ski Patrol System, Inc., and a copy of his U.S. Certificate of Naturalization issued on April 10, 1985. [redacted] did not state where or when he met the applicant, nor did he indicate that he had direct, personal knowledge of the applicant's continuous residence in the United States for the duration of the requisite period.

On April 24, 2006, the director issued a Notice of Intent to Deny (NOID) to the applicant. The director acknowledged the applicant's claim that he entered the United States on August 13, 1981, but noted that he furnished no evidence of such an entry. The director noted that the applicant testified that he gave his passport to immigration, but found that the applicant's testimony was not credible. The director also noted that the applicant's interview was conducted with the assistance of a Portuguese translator, and observed that "it is not credible that you claim to have lived in the United States for 25 years, yet you could not communicate in the English language."

The director acknowledged the affidavits submitted by the applicant, but noted that they were not accompanied by proof that the affiants were in the United States during the statutory period. The director advised that credible affidavits are those which include some document identifying the affiant, some

proof the affiant was in the United States during the statutory period, and some proof of a relationship between the affiant and the applicant. Upon review, it appears that the director did not review the additional evidence submitted by the applicant on March 20, 2006 prior to issuing the NOID. However, a review of the director's decision reflects that this additional evidence was considered before the final decision was rendered.

The director advised the applicant that he had failed to submit documents that would establish by a preponderance of the evidence that he continuously resided in the United States for the duration of the requisite period, and afforded him 30 days in which to submit additional evidence in support of his application.

Counsel for the applicant responded to each issue raised in the NOID in a letter dated May 17, 2006. Counsel asserted that the applicant did not claim during his interview that he gave the passport he used for his initial entry to the United States to immigration; rather, he stated that he showed the passport to the officer at the airport when he arrived, and that he does not know what has become of it.

Counsel further explained that the applicant requested a Portuguese interpreter during his interview because he has a heavy accent that is sometimes difficult to understand, and he wanted to ensure that he was clearly understood when responding to the CIS officer's questions.

With respect to the affidavits, counsel stated that "the proof of the relationship is in the affidavits themselves." Counsel asserted that "the affiants state that they knew [the applicant] during the statutory period. Because he neither married any of them nor entered into contractual relationships with them, there is no other proof of their relationship." In support of the NOID response, the applicant submitted copies of the applicant's children's birth certificates, showing that they were both born in New York on November 25, 1989 and March 18, 2006, respectively. The applicant also provided evidence relating to two of the affiants, which had been submitted previously.

The director denied the application on August 8, 2006. The director acknowledged the additional affidavits submitted, but found that given the paucity of evidence in the record, the applicant had failed to establish by a preponderance of the evidence that he had continuously resided in the United States for the duration of the requisite period. The director again questioned the applicant's need for an interpreter during his interview, and also found that it was not credible that the applicant left the United States for less than 45 days in 1987 in order to get married. The director noted that the record did not reflect when the applicant met his spouse or when the applicant's spouse first came to the United States. Finally, the director stated that "it is not credible that you went from being a landscaper and a cook to then becoming a driver for the United Nations while in the United States."

The director's comments regarding the beneficiary's use of a Portuguese interpreter during his interview with a CIS officer are inappropriate and are therefore withdrawn. There is no requirement that the applicant's interview be conducted in English, and the fact that he chose to have an interpreter present is irrelevant and should have no bearing on the applicant's eligibility or his credibility. Furthermore, the director's comments regarding the applicant's career path and cohabitation with his spouse are purely

speculative and are also withdrawn. The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Nevertheless, the district 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.12(f).[1]

On appeal, counsel for the applicant addresses each issue raised in the director's decision and submits the following new evidence:

- An affidavit from the applicant dated September 6, 2006, in which he indicates that his passport was likely stolen by his roommate in 1987.

- A letter dated May 25, 1993 addressed to the Astoria, New York police department from the Consulate General of Brazil in New York, indicating that the applicant declared his Brazilian passport stolen.

- A copy of the applicant's spouse's expired Brazilian passport issued on August 26, 1987, which shows that she entered the United States in B-2 status on December 3, 1987.

- A new notarized letter dated September 6, 2006 from [redacted], who stated that he first met the applicant at a bar in Manhattan in 1981, during a billiard championship. [redacted] states that he has worked for the Permanent Mission of Brazil to the United Nations since 1981, and that he and the applicant currently work for the same ambassador. He states that the applicant is a person of good morals and integrity.

- An envelope addressed to the applicant at Queens, New York. The envelope bears Brazilian postage stamps and ostensibly shows that the envelope was mailed by the beneficiary's spouse from Brazil. The postage cancellation stamp is dated July 5, 1981. The applicant testified under oath during his interview with a CIS officer that he first entered the United States on August 13, 1981, and he indicated on his Form I-687 that he first resided at this address in September 1981. As the applicant never claimed that he resided in the United States in July 1981, it is reasonable to question the authenticity of this new evidence and its probative value is limited.

- An affidavit of residence dated January 26, 1990 from [redacted], who stated that he resides at [redacted] in Brooklyn, New York, that the applicant is his cousin, and that

[1] 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).

the applicant resided with him at that address from August 1981 until the date on which the affidavit was executed. [redacted] indicated that the recent receipts and bills were in his name, and that the beneficiary contributed to the payment of household bills. He did not, however, provide corroborating evidence that he resided at the listed address for the duration of the requisite period, nor did he offer any details regarding the events and circumstances of the applicant's residence in the United States. The lack of detail is significant given the affiant's claim that he resided with the applicant for a period of more than eight years.

Counsel asserts that the affidavits are credible and that each affiant "establishes the validity of their relationship with [the applicant]."

Upon review, counsel's assertions are not persuasive. While an applicant's failure to provide evidence other than affidavits shall not be the sole basis for finding that he or she failed to meet the continuous residency requirements, an application which is lacking in contemporaneous documentation cannot be deemed approvable if considerable periods of claimed continuous residence rely entirely on affidavits which are considerably lacking in certain basic and necessary information. As discussed above, the affiants' statements are significantly lacking in detail and do not establish that the affiants actually had personal knowledge of the events and circumstances of the applicant's residence in the United States. Few of the affiants provided much relevant information beyond acknowledging that they met the applicant in 1981. Overall, the affidavits provided are so deficient in detail that they can be given no significant probative value. Further, this applicant has provided no contemporaneous evidence of residence in the United States relating to requisite period, and he has submitted inconsistent testimony and evidence pertaining to his employment in the United States during the requisite period.

As is stated above, 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). The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence pursuant to 8 C.F.R. § 245a.2(d)(3).

The absence of sufficiently detailed 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 affidavits with minimal probative value, and his own inconsistent statements on his Forms I-687, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application 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.