U.S. Department of Homeland Security
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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: NEW YORK Date: APR 22 2008

MSC 05 314 10558

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 appeal will be dismissed.

The district director denied the application because the applicant failed to demonstrate credibly that he entered the United States before January 1, 1982, and thereafter resided in the United States in a continuous unlawful status.

On appeal, the applicant asserted that the director failed to adequately consider all of the evidence. Subsequently, the applicant submitted a brief to supplement the appeal.

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 Immigration and Nationality Act (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)(1).

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)(1) 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).

As to the requirement of continuous residence in the United States from January 1, 1982 through the date the application is filed, the regulation at 8 C.F.R. § 245a.2(h)(1) provides that an applicant shall be regarded as having resided continuously if no single absence during the salient period was longer than 45 days and the aggregate of all absences does not exceed 180 days.

8 C.F.R. § 245a.2(h) states,

Continuous residence. (1) For the purpose of this Act, an applicant for *temporary resident status* shall be regarded as having resided continuously in the United States if, at the time of filing of the application:

(i) 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 for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) The alien was maintaining a residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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 applicant 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.

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant's employment must provide the applicant's address at the time of employment, identify the exact period of employment, show periods of layoff, state the applicant's duties, declare whether the information was taken from company records, and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

The applicant filed the instant Form I-687 on August 10, 2005. In it, she stated that she entered the United States on September 22, 1981, and had left only one time, from March 5, 1987 to April 25, 1987. She further stated that she lived at [redacted], Staten Island, New York from September 1981 to July 1984 and at [redacted], also on Staten Island, from July 1984 to December 1990.

The record contains:

- an affidavit dated June 22, 2005 and sworn to by the applicant,
- an affidavit from [redacted] dated July 27, 2005,
- an affidavit dated June 24, 2005 from [redacted], and
- an affidavit dated March 2, 2006 from [redacted]

The record contains no other evidence directly relevant to the applicant's residence in the United States during the salient period.

In her June 22, 2005 affidavit the applicant again stated that she entered the United States on September 22, 1981, that she lived at [redacted], Staten Island, New York, from September 1981 to July 1984, and that she lived at [redacted], also on Staten Island, from then until December 1990.

In her affidavit the applicant also confirmed that she left the United States on March 5, 1987 and returned on April 25, 1987, and stated that during her return to the United States she stayed en route at a friend's house in Canada.

She also stated that she attempted to file a Form I-687 on September 17, 1987. Finally, she stated that she has one child, born to her in Sri Lanka on December 6, 1993. This office notes that the applicant's statement, that a child was born to her on December 6, 1993 in Sri Lanka, directly conflicts with her statement, made on the Form I-687 application that she signed on July 29, 2005, in and in her June 22, 2005 affidavit, that since entering the United States on September 22, 1981 her only absence from the United States was from March 5, 1987 to April 25, 1987.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, the applicant must resolve any inconsistencies in the record with competent, independent, objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The July 27, 2005 affidavit of [redacted] confirms that the applicant stayed at his house in Montreal from April 23, 1987 to April 25, 1987, and that she told him that she had been to Sri Lanka.

[redacted]s June 24, 2005 affidavit states that he owns a meat market on Staten Island, and that he employed the applicant from September 1981 to December 1990. He further stated that she took leave during March 1987 and returned to work on April 26, 1987, telling him that she had been to Sri Lanka. Finally, he stated he took the applicant to an INS office to file a Form I-687 on September 17, 1987.

[redacted]s March 2, 2006 affidavit states that he was the applicant's landlord from September 1981 until July 1984 at [redacted][1] Staten Island, New York, and from August 1984 to December 1990 at [redacted], also on Staten Island. He further confirmed that the applicant had worked at the Bhari Halal Meat Market as claimed, and that she went to Sri Lanka during 1987, returning on April 25, 1987.

With the instant Form I-687 application the applicant submitted her June 22, 2005 affidavit and the affidavits of [redacted]a and [redacted]

In a Notice of Intent to Deny (NOID), dated March 17, 2006, the director stated that the applicant failed to submit evidence sufficient to demonstrate her continuous residence during the requisite period. The director granted the applicant thirty days to submit additional evidence. The NOID requested certain specific items of identification pertinent to the applicant's affiants.

In response the applicant submitted the March 2, 2006 affidavit of and the items of identification pertinent to the other affiants. In the Notice of Decision, dated September 14, 2006, the director found that the evidence submitted still did not demonstrate the applicant's eligibility and denied the application.

On appeal, the applicant submitted copies of the evidence previously asserted but no new evidence. The applicant asserted that the evidence is sufficient to demonstrate her eligibility.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate entry into the United States prior to January 1, 1982, and continuous residence during the requisite period.

The applicant claims to have been present, without exception, in the United States from April 25, 1987 when she returned from Sri Lanka via Canada until she filed the instant Form I-687 on August 10, 2005. She also states that a child was born to her in Sri Lanka on December 6, 1993. The

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[1] The applicant spelled this street name [redacted] on her Form I-687 application and in her affidavit. In his affidavit, [redacted] spelled it [redacted], which this office notes is the correct spelling. That the applicant is unable to spell the street name does nothing to strengthen her claim of having lived there for almost three years.

contradiction is manifest. Absent the objective evidence required by *Matter of Ho*, 19 I&N Dec. 582, the reliability of the applicant's assertions in this matter and the evidence she has submitted is severely compromised. The application would correctly be denied on this basis alone.

The application is even more clearly deniable, however, because the applicant's admitted absence from the United States demonstrates that she is ineligible.

As per the regulation at 8 C.F.R. § 245a.2(h)(1) the applicant is likely ineligible if she was absent from the United States for more than 45 days during a single absence during the requisite period of residence. Her requisite period of residence is from January 1, 1982 to the date she attempted to file her initial Form I-687, which, according to the applicant's own June 22, 2005 affidavit and that of [redacted] was September 17, 1987. On the Form I-687 application and in her affidavit, the applicant stated that she was absent from the United States from March 5, 1987 to April 25, 1987, a period of 51 days. The applicant also submitted the sworn statements of [redacted], and [redacted] corroborating this absence, in whole or in part.

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined whether the applicant has demonstrated that the absence was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

On the Form I-687 application the applicant stated that her absence from March 5, 1987 to April 25, 1987 was to visit her sick mother. In his March 2, 2006 affidavit also stated that the applicant visited her sick mother during that period. The June 22, 2005 affidavit of and the June 24, 2005 affidavit of [redacted] confirm the absence, but do not state any reason for it. The June 17, 2005 affidavit states that the absence was "to attend to a private family matter."

That evidence may be sufficient to establish, by a preponderance of the evidence, that the applicant's absence from the United States was to visit her sick mother. The evidence does not establish, however, that the applicant's mother became ill while the applicant was in Sri Lanka, rather than while she was in the United States. The applicant's mother's illness was not, therefore, an emergent factor that prevented her return. Further, even if the applicant's mother's illness had been emergent, within the meaning of 8 C.F.R. § 245a.2(h)(1)(i), the record contains no evidence, nor even an assertion, that the applicant's visit could not have been accomplished within a shorter period.

Pursuant to 8 C.F.R. § 245a.2(h)(1) the applicant's single absence of more than 45 days during the requisite period renders her ineligible for temporary resident status under section 245A of the Act on this basis. The appeal will be dismissed.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.