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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: LOS ANGELES Date: AUG 22 2008

MSC-05-081-11976

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, Los Angeles. 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, on December 20, 2004 (together, the I-687 Application). 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 denied the application as 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, counsel submitted a Form I-694 Notice of Appeal of Decision Under Section 210 or 245A and a brief. On appeal, counsel states that the director "failed to issue a notice of intent to deny prior to rendering a final decision." Counsel also argues that the applicant's due process rights were violated because the director did not issue a notice of intent to deny. Counsel states that the applicant has met his burden of proof by the preponderance of the evidence submitted. Finally, counsel argues that the director's analysis was "inconsistent with precedent decisions." As of this date, the AAO has not received any additional evidence from counsel or the applicant. Therefore, the record is complete.

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 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).

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, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 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. *See* 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he entered before 1982 and continuously resided in the United States for the requisite period.

The applicant has submitted 13 affidavits and letters; a copy of the applicant's birth certificate; copies of the applicant's California identification cards issued on May 10, 1989 and on September 24, 2005; copies of the applicant' employment authorization cards issued on February 14, 2005 and on June 8, 2006; copies of the applicant's income tax returns for 1986, 1988, and 1989; copies of the applicant's Internal Revenue Service (IRS) Form W-2 for 1986, 1989 and for one other unknown year; and a copy of the applicant's Continental Coin Corporation identification card with an authorization date of December 14, 1984. The applicant's birth certificate, California identification cards, and employment authorization cards are evidence of the applicant's identity, but do not demonstrate that he entered before January 1, 1982 and resided in the United States for the requisite period. The following evidence applies to the requisite time period:

- A statement from [redacted] dated December 5, 2004. The declarant states that the applicant arrived in the United States "prior to 1982." The declarant states that he knows that the applicant resided in the United States "from 1982 to May 1988 because [they] would get together during the weekends and [] attend family gatherings together." The declarant also states that he and the applicant "kept each other company so that [they] wouldn't feel so lonely and so far away from [their] families." The declarant states that he and the applicant are "good friends and contact each other on a regular basis." Although the declarant states that he has known the applicant since 1982, the statement does not supply enough details to lend credibility to a 22-year relationship with the applicant. For instance, the declarant does not indicate how he dates his initial acquaintance with the applicant in the United States or how frequently he had contact with the applicant. Further, the declarant provides no specific information about the applicant's residence and whereabouts. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A statement from [redacted] dated December 7, 2004. The declarant states that the applicant arrived in the United States "prior to 1982" and the applicant visited him when the applicant first arrived. The declarant states that he knows that the applicant resided in the United States "from 1982 to May 1988 because [they] would get together during the weekends and [] attend family gatherings together." The declarant also states that to this date, he and the applicant "contact each other on a regular basis." Although the declarant states that he has known the applicant since 1982, the statement does not supply enough details to lend credibility to a 22-year relationship with the applicant. For instance, the declarant does not indicate how he dates his initial acquaintance with the applicant in the United States or how frequently he had contact with the applicant. Further, the declarant provides no specific information about the applicant's residence and whereabouts. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A statement from [redacted] dated December 3, 2004. The declarant states that the applicant arrived in the United States "prior to 1982" and the applicant visited him when the applicant first arrived. The declarant states that he is from the same home town as the applicant and that their "families are very close." The declarant states that he knows that the applicant resided in the United States "before 1988" because they have been in contact since the applicant arrived in the United States. The declarant also states that he and the applicant "celebrate every Thanksgiving and birthday together." The declarant states that in 1984 the applicant worked for [redacted], the same company that employed the declarant. Although the declarant states that he has known the applicant since 1982, the statement does not supply enough details to lend credibility to a 22-year relationship with the applicant. For instance, the declarant does not indicate how he dates his initial acquaintance with the applicant in the United States or how frequently he had contact with the applicant. Further, the declarant provides no specific information about the applicant's residence and whereabouts. In addition, the record of proceeding contains a letter from Hamburger Hamlets Inc. stating that the applicant began working for the company on March 6, 1989. 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. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A statement from [redacted] dated December 7, 2004. The declarant states that the applicant arrived in the United States "prior to 1982" and the applicant visited her when the applicant first arrived. The declarant states that she knows that the applicant resided in the United States from 1982 to May 1988 because they throw a party "every 4th of October since 1981." The declarant also states that she and the applicant "celebrate New Year's together along with any family member's birthday." The declarant states adds that she and the applicant "like to reminisce about the old days when [they] used to walk to school." Although the declarant states that she has known the applicant since 1982, the statement does not supply enough details to lend credibility to a 22-year relationship with the applicant. For instance, the declarant does not indicate how frequently she had contact with the applicant and provides no specific information about the applicant's residence and whereabouts. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A statement from [redacted]n dated December 4, 2004. The declarant states that she first met the applicant in Los Angeles on May 20, 1982 during a family

gathering. The declarant states that she knows that the applicant resided in the United States from 1982 to May 1988 because she saw him "every day when he came from work" and the applicant "would invite [her] to attend family gatherings." Although the declarant states that she has known the applicant since 1982, the statement does not supply enough details to lend credibility to a 22-year relationship with the applicant. For instance, the declarant provides no specific information about the applicant's residence and whereabouts. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A statement from [redacted] dated December 6, 2004. The declarant states that the applicant arrived in the United States prior to 1982 "because [she is] friends with his wife" and she would send her email. Although the declarant states that she has known the applicant in the United States since prior to 1982, the statement does not supply enough details to lend credibility to a 22-year relationship with the applicant. For instance, the declarant does not indicate how frequently she had contact with the applicant. Further, the declarant provides no specific information about the applicant's residence and whereabouts. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A notarized affidavit from [redacted] dated October 20, 1993. The declarant states that he drove the applicant to the Mexican border on June 5, 1987 so that the applicant could cross the border into Mexico and see a doctor. The declarant provides no further evidence that the applicant entered the United States prior to January 1, 1982 and resided in the United States continuously throughout the requisite period. The declarant states that he saw the applicant again on June 27, 1987. The declarant provides no specific information about the applicant's residence and whereabouts during the requisite period. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A notarized affidavit from dated October 10, 1993. The declarant states that he has known the applicant since 1981 when he met the applicant "at a friend's house." The declarant states that he told the applicant about vacancies in his building and that the applicant moved into the building a few weeks later. The declarant also states that he and the applicant are "very good friends" and that he often has the applicant over for dinner or he eats at the applicant's home several times a week. The declarant adds that he and the applicant have become very close and that they consider each other "family." Finally, the declarant states that he has personal knowledge that the applicant lived in Los Angeles from March 1981 to the present. Although the declarant states that he has known the applicant since 1981, the statement does not supply enough details to lend credibility to a 12-year relationship with the applicant. For instance, the declarant

does not indicate how he dates his initial acquaintance with the applicant in the United States. The declarant does not provide details about or dates when he and the applicant resided together. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A notarized affidavit from [redacted] dated October 15, 1993. The declarant states that he has known the applicant since 1981 when he met the applicant while "shopping for groceries" at a local supermarket. The declarant states that he and the applicant had a discussion about the use of tools for plumbing jobs. The declarant also states that he gave the applicant his telephone number so that he could call him for help and invited him over to his house for Sunday dinner. The declarant adds that he and the applicant have become "good friends" and enjoy going to "the beach, fishing, and going to the movies." Finally, the declarant states that he has personal knowledge that the applicant lived in Los Angeles from March 1981 to September 1989. Although the declarant states that he has known the applicant since 1981, the statement does not supply enough details to lend credibility to a 12-year relationship with the applicant. For instance, the declarant does not indicate how he dates his initial acquaintance with the applicant in the United States or how frequently he had contact with the applicant. Further, the declarant provides no specific information about the applicant's residence and whereabouts. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A letter dated October 6, 1993 from [redacted] signed by [redacted] vice president of human resources. Mr. [redacted] states that the applicant worked for [redacted]. as a busboy beginning on March 6, 1989. Although the statement is on company letterhead, it is not notarized. It also fails to meet certain regulatory standards set forth at 8 C.F.R. § 245a.2(d)(3)(i), which provides that letters from employers must include whether the information was taken from official company records and where records are located and whether CIS may have access to the records (if records are unavailable, an affidavit form-letter stating that the employment records are unavailable may be accepted which shall be signed, attested to by the employer under penalty of perjury and shall state the employer's willingness to come forward and give testimony if requested). The statement by [redacted] does not describe the applicant's work for the company during the requisite period. It does not include the required information and can be afforded minimal weight as evidence of the applicant's employment or residence in the United States for the duration of the requisite period. Furthermore, the information provided by [redacted] is inconsistent with the applicant's Form I-687. On the Form I-687, the applicant stated that he worked for [redacted]. from 1984 to 1994. 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. It is incumbent upon the applicant to

resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Given these deficiencies, this letter has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A letter dated September 30, 1993 from [redacted] signed by [redacted] states that he "operate[s] the building located at [redacted], Los Angeles, California" and certifies that the applicant resided in this building "since May 1981." [redacted] provides information that is inconsistent with the applicant's Form I-687. On the Form I-687, the applicant stated that he lived at [redacted] Los Angeles, California beginning in March 1981. In addition, [redacted] does not state the source of the information provided, how he knows that the applicant moved into the building in May 1981, or give other details that might lend credibility to the assertions. Given these deficiencies, this letter has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A copy of the applicant's Continental Coin Corporation identification card with an authorization date of December 14, 1984. Although the identification card may indicate presence in the United States on the date issued, it can only be accorded minimal weight as evidence of continuous residence.

- Copies of the applicant's income tax returns for 1986 and 1988. These documents are evidence of the applicant's residence in the United States in 1986 and 1988.

The remaining evidence in the record is comprised of the applicant's statements and application forms, in which he claims to have entered the United States in March 1981 without inspection. The applicant has not submitted any additional evidence in support of his claim that he was physically present or had continuous residence in the United States during the entire requisite period or that he entered the United States in 1981.

The director denied the application for temporary residence on December 13, 2006. In denying the application, the director found that the applicant failed to establish that he entered the United States prior to January 1, 1982 or that he met the necessary residency or continuous physical presence requirements. Thus, the director determined that the applicant failed to meet his burden of proof by a preponderance of the evidence.

Counsel states that the director failed to issue a notice of intent to deny prior to rendering a final decision. According to the settlement agreements, the director shall issue a NOID before denying an application for class membership. Here, however, the director did not deny the

application for class membership. Instead, the director, based on the applicant's class membership, adjudicated the application for temporary residence on the merits. As the director did not deny the applicant the benefit of class membership, the director was not required to issue a NOID prior to issuing the final decision in this case.

Counsel also argues that the applicant's due process rights were violated because the director did not issue a NOID. Although counsel argues that the applicant's right to procedural due process was violated, counsel has not shown that any violation of the regulations resulted in "substantial prejudice" to the applicant. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The applicant has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the applicant's case. The applicant's primary complaint is that the director denied the petition. As previously discussed, the applicant has not met his burden of proof and the denial was the proper result under the settlement agreements. Accordingly, counsel's claim is without merit.

On appeal, counsel states that the applicant has met his burden of proof by the preponderance of the evidence submitted. Counsel argues that the director "ignored substantial evidence on record and misinterpreted the testimony given at the interview." In determining the weight of an affidavit, *Matter of E-M-* states that what is "most important is whether the statement of the affiant is consistent with the other evidence in the record." *Id.* The AAO has noted that two letters and one of the affidavits submitted are inconsistent with the applicant's Form I-687 and the remaining affidavits fail to meet the applicant's burden of proof. As noted above, 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. Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought.

Finally, counsel argues that the director's analysis was "inconsistent with precedent decisions." In his appeal brief, counsel does not provide citations for such decisions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant'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).

In this case, the absence of sufficient credible and probative documentation to corroborate the applicant's claim of continuous residence for the 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 the applicant 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.