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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: LOS ANGELES Date: DEC 05 2008

MSC-06-031-12581

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.

John F. Grissom, Acting 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, or *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, Fresno, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 October 31, 2005 (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, 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, counsel submitted a Form I-694 Notice of Appeal of Decision Under Section 210 or 245A, a brief, and additional evidence. On October 2, 2008, the AAO requested evidence to establish that the applicant was not likely to become a public charge. On November 3, 2008, the AAO received counsel's response to the RFE. 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)(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 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. 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. Although not required, the credibility of an affidavit may be assessed by taking into account such factors as whether the affiant provided some proof that he or she was present in the United States during the requisite period. 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 resided in the United States for the requisite period. In this case, the submitted evidence is relevant, probative and credible.

On October 31, 2005, the applicant filed his Form I-687 Application. The record includes the following documents in support of her claim of residence in the United States during the requisite period:

- An employment letter from [redacted] dated June 16, 2005 stating that the applicant worked from May 1981 to 1982 and again in 1983;
- Copies of the applicant's 1981 paystubs from [redacted];

- Copies of the applicant's 1983 and 1984 paystubs from [redacted];

  Copies of the applicant's 1986 paystubs and a Form W-2 from [redacted] and,

- Declarations from [redacted], and [redacted].

On December 6, 2006, the director issued a denial notice. In the denial, the director concluded that the applicant had failed to establish that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. The director also noted inconsistencies in the record of proceeding and stated that an employment letter from [redacted] "appears to be fraudulent."

On appeal, counsel submits a brief and additional evidence of the applicant's residence in the United States during the requisite period. In his brief, counsel addresses the director's concerns regarding inconsistencies in the record by explaining that the information record during prior interviews was obtained without the assistance of an interpreter fluent in the applicant's native language. Counsel states that the applicant's "first language is Mixteco" and that the applicant speaks only "limited Spanish." In his decision, the director noted that the applicant signed a sworn statement indicating a different date of entry into the United States. However, although the statement is written in English and states that the interview was conducted in "Spanish," it does not indicate that an interpreter was used. On appeal, the applicant and declarants also state that the applicant's first language is Mixteco. The AAO is persuaded by counsel arguments regarding the applicant's inability to understand the sworn statement in the record of proceeding.

Counsel argues that the applicant was not given the opportunity to review the evidence provided by Five Star Bookkeeping with regards to the credibility of his employment for [redacted] LP. According to a notation in the record of proceeding, [redacted] ceased operating as a business in June 2006. The AAO is unable to determine that the letter submitted by is fraudulent based on the record of proceeding.

The contemporaneous documents submitted by the applicant appear to be credible. The declarations and other documentation submitted by the applicant appear to be credible and amenable to verification in that each include contact telephone numbers and/or contact addresses. Upon review of the totality of the record, although the AAO has some doubt as to the truth, the record contains sufficient relevant probative, and credible evidence that leads the AAO to believe that the claim is "probably true" or "more likely than not." Thus the applicant 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).

The director has not established that the information on the supporting documents in the record was inconsistent with the applicant's testimony or with the claims made on his I-687 Application; that any inconsistencies exist *within* the claims made on the supporting documents; or that the documents

contain false information. As stated in *Matter of E-M-*, 20 I&N Dec. at 80, when something is to be established by a preponderance of the evidence, the proof submitted by the applicant has to establish only that the asserted claim is probably true. That decision also states that, under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence. *Id.* at 79. The documents that have been furnished in this case may be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of residence in the United States for the requisite period.

Beyond the decision of the director, also at issue in this proceeding is whether the applicant is likely to become a public charge. An applicant must establish that he is not ineligible for admission under one or more of the categories listed in section 212(a) of the Immigration and Nationality Act. 8 U.S.C. §1182(a). Among the categories of inadmissible aliens are those likely to become a public charge. If an applicant is determined to be inadmissible under section 212(a)(4) of the Act, he or she may still be admissible under the Special Rule described under paragraph (d)(3) of this section. *See* 8 C.F.R. § 245a.18(c)(2)(iv).

The regulations at 8 C.F.R. § 245a.18(d)(1), 8 C.F.R. § 245a.18(d)(2), and 8 C.F.R. § 245a.18(d)(3) provide the factors to be considered in determining whether an applicant is likely to become a public charge and whether the special rule applies.

> (1) In determining whether an alien is "likely to become a public charge," financial responsibility of the alien is to be established by examining the totality of the alien's circumstance at the time of his or her application for adjustment. The existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, family status, assets, resources, education and skills.
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> (2) An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level is not excludable under paragraph (c)(2)(vi) of this section. The alien's employment history need not be continuous in that it is uninterrupted. In applying the Special Rule, the Service will take into account an alien's employment history in the United States to include, but not be limited to, employment prior to and immediately following the enactment of IRCA on November 6, 1986. However, the Service will take into account that an alien may not have consistent employment history due to the fact that an eligible alien was in an unlawful status and was not authorized to work. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. It is not necessary to file a waiver in order to apply the Special Rule for determination of public charge.
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> (3) In order to establish that an alien is not inadmissible under paragraph (c)(2)(vi) of this section, an alien may file as much evidence available to him or her establishing that the

> alien is not likely to become a public charge. An alien may have filed on his or her behalf a Form I-134, Affidavit of Support. The failure to submit Form I-134 shall not constitute an adverse factor.

The burden is on the applicant to establish that he is not likely to become a public charge. The record of proceeding indicates that the applicant is currently unemployed. In response to the AAO's request for evidence counsel stated that the applicant is unemployed "due to health problems." However, counsel submitted an affidavit of support for the applicant signed by [redacted]. In his affidavit of support, [redacted] states that his current household annual income is $55,000.00 per year and including the applicant, his household size would include ten individuals. [redacted] also submitted copies of recent paystubs from Philips Oral Healthcare Inc. confirming his employment and his 2006 – 2007 Internal Revenue Service (IRS) Forms W-2 and 1040A verifying his income. **The record of proceeding also contains an** employment letter and paystubs from 13 Coins Acquisition LLC confirming [redacted] employment. According to the 2008 Form I-864P, Poverty Guidelines, the minimum income requirement for a household of ten that applies to [redacted]s is $53,500, or 125% of the poverty line. [redacted]s household income meets the minimum required by Form I-864P. In addition, the applicant has submitted a letter from [redacted] stating that she is the applicant's daughter and the applicant lives with her. [redacted] also states that she provides the applicant with food, housing and medical expenses and that her siblings contribute an additional $500. The applicant has submitted evidence to establish that he is not likely to become a public charge. Thus, the applicant has met his burden of proof.

The applicant has established by a preponderance of the evidence that he entered the United States before January 1, 1982 and maintained continuous, unlawful residence for the duration of the requisite period. In addition, the applicant has established that he is not likely to become a public charge. Consequently, the applicant has overcome the particular basis of denial cited by the director.

The appeal will be sustained. The director shall continue the adjudication of the application for temporary resident status. According to the applicant's 1988 Medical Examination Form I-693 he is not current for recommended age-specific immunizations.

ORDER: The appeal is sustained.