

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

11

[Redacted]

FILE:

[Redacted]
MSC-06-096-12330

Office: DETROIT

Date: DEC 15 2008

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.

J. King

John

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, 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 Director, Detroit. 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. 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. Therefore, the director determined the applicant was not eligible to adjust to temporary resident status pursuant to the CSS/Newman Settlement Agreements and denied the application.

On appeal, counsel for the applicant asserts that the application should not have been denied only because the majority of the evidence consisted of affidavits. Counsel further asserts that the United States Citizenship and Immigration Services (USCIS) officer who interviewed the applicant did not allow individuals to testify on behalf of the applicant at the time of his interview.

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 245(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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her 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).

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).

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.

The issue in this proceeding is whether the applicant has established that he (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of affidavits of relationship written by the applicant’s friends, three employment affidavits, and an envelope that indicates it was mailed to the applicant in the United States during the requisite period. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed. The AAO has reviewed each document in its entirety to determine the applicant’s eligibility; however, the AAO will not quote each witness statement in this decision.

The applicant’s Form I-687, submitted to United States Citizenship and Immigration Services (USCIS) on May 31, 2005 states that the applicant resided in Brooklyn, New York from November 1980 to October 1982; and then in Detroit, Michigan from October 1982 until December 1989. The applicant also stated that during the requisite period he was employed at “Bashmati” Indian Restaurant in New York from January 1981 until October 1981; at Sun Moon Indian Restaurant from November 1981 until October 1982 and then again starting in February 1992; and at Moti Mahal Indian Restaurant from November 1982 until December 1989.

The applicant also submitted affidavits and an envelope in support of his application.

New York. He states that the applicant resided with him from November 1980 to January 1982 in his home. He states that he was with the applicant on at least a weekly basis.

Affiant [REDACTED] states that he first met the applicant in Bangladesh and that when the applicant arrived in the United States in November of 1980, he called the affiant and borrowed money from him for an airline ticket to New York. He states that the applicant arrived in New York in November 1980 and that he called the applicant's cousin, [REDACTED] to ask him to pick the applicant up from the airport. It is noted that affiant [REDACTED] has stated that it was he who was called by this affiant to pick up the applicant at the airport.

Affiant [REDACTED] states that he first met the applicant through family in Bangladesh. He goes on to say that he met the applicant in the United States in 1982 at the Moti Mahal Indian Restaurant in Michigan. He states that he then saw the applicant at weddings, birthday parties and other celebrations. He states that the applicant was the only chef who prepared Indian food in the community from 1982-1985.

Affiant [REDACTED] states that he has known the applicant since May 1982 when he met him at the Moti Mahal Indian restaurant in Royal Oak, Michigan, where the applicant worked as a chef. He states that he was a regular customer at the restaurant until the restaurant shut down in 1994. He states that in October or November 1989 the applicant left that restaurant.

Affiant [REDACTED] states that he met the applicant in 1981 at the Basmati Indian Restaurant, where the applicant worked as a chef. He states that he also saw the applicant in 1981 and 1982 when he provided food for marriage ceremonies.

Affiant [REDACTED] states that he has known the applicant since 1981 when they were residing in New York. He states that he met the applicant at a mosque in February 1981 when they both prayed on a frequent basis. It is noted that the applicant did not indicate that he was a member of any mosques on his Form I-687. The affiant also states that the applicant worked at a restaurant called, [REDACTED] in New York as a cook. The affiant states that the applicant also prepared food for parties in 1981 and 1982.

Affiant [REDACTED] states that he knows the applicant through family in Bangladesh and asserts that he first met the applicant in the United States when the applicant was working as a chef for the Moti Mahal Indian Restaurant. He states that since that time he has also seen the applicant at events in the Bangladeshi community. However, he fails to state the frequency with which he has done so.

Affiant [REDACTED] asserts that though he did not meet the applicant until after the requisite period ended, he has seen a Bangladeshi passport issued to the applicant that contains a visa issued to the applicant by the Mexican Consulate on October 5, 1980. However, it is noted that this passport does not appear in the record of proceedings.

None of the previously noted witness statements provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the

applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that, individually and together, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

The applicant also submits employment affidavits from Basmati Indian Restaurant, Moti Mahal Indian Restaurant and Sun Moon Restaurant. These affidavits are signed by [REDACTED], and [REDACTED] who state that the applicant worked for their restaurants. The affidavit from Basmati Indian Restaurant states that the applicant worked for them from January 1981 until October 1981, when he moved to Michigan. The affidavit from Moti Mahal restaurant states that the applicant worked there from November 1982 until November 1986, and then resumed working there in January 1987 until December 1989. The affidavit from the Sun Moon Restaurant states that the applicant worked for them from "November 1981 until October 1981." The affidavit goes on to say that the applicant resumed his work with them from February 1982 until January 1995.

It is noted that the letter from the Sun Moon restaurant is not consistent with other evidence in the record. Though the applicant's Form I-687 states that the applicant's periods of employment were from November 1981 until October 1982 and then from February 1992 until January 1995.

It is also noted that the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states, in pertinent part: that letters from employers should be on the employer letterhead stationary, if the employer has such stationary and must include the following: an applicant's address at the time of employment; the exact period of employment; periods of layoff; duties with the company; whether or not the information was taken from the official company records; and where records are located and whether the Service may have access to the records. The regulation further provides that if such records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and noting why such records are unavailable may be accepted in lieu of statements regarding whether the information was taken from the official company records and an explanation of where the records are located and whether USCIS may have access to those records. This affidavit form-letter 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.

In this case, none of the affiants indicate the applicant's address during his period of employment or state whether information regarding his dates of employment were taken from official company records or, if not, how the employers were able to determine his dates of employment. Because these affidavits are lacking with regards to the regulatory requirements and because of the inconsistencies in the affidavit from the Sun Moon Restaurant, these employment affidavits are of minimal probative value.

The applicant also submits an original envelope that was postmarked February 12, 1981. The envelope indicates it was mailed from Bangladesh, bears two Bangladeshi postage stamps, and is addressed to the applicant at an address where he claimed to have resided in the United States during the requisite period.

An examination of the Bangladeshi stamps on the envelope revealed that the stamp was not issued prior to the postmark date on that envelope. The envelope bears two postage stamps, each with a value of eight taka and depicting the late [REDACTED]. This stamp is listed at page 749 of Volume 1 of the *2009 Scott Standard Postage Stamp Catalogue* and is listed as catalogue number 706 A347. The catalog lists the issue date of this stamp as December 4, 2005.

The fact that the envelope is postmarked on February 12, 1981, but bears stamps that were not issued until December 4, 2005 establishes that the applicant utilized documents in a fraudulent manner and made material misrepresentations in an attempt to establish his residence within the United States for the requisite period. By engaging in such an action, the applicant has seriously undermined his own credibility as well as the credibility of his claim of continuous residence in this country for the requisite period.

Though the applicant submitted affidavits from individuals attesting to his residency in the United States during they requisite period, these affidavits are of little probative value. Though the applicant submitted employment affidavits, for the reasons stated above they are similarly of little probative value. More significantly, the applicant also submitted an envelope that bears a postmark date that indicates it was mailed to the applicant during the requisite period. However, as previously noted the stamps on this envelope were issued after the post-mark date that appears over the stamps. This casts grave doubt on the credibility of this evidence.

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 his 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).

Section 212(a)(6)(C) of the Act provides:

Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The AAO issued a notice to both the applicant and counsel on October 15, 2008, informing them that it was the AAO's intent to dismiss the applicant's appeal based upon the fact that he had submitted fraudulent evidence and made material misrepresentations in an attempt to establish his residence within the United States for the requisite period and thus gain a benefit under the Act. The AAO further informed the applicant that, as a result of his actions, his appeal would be dismissed, a finding of fraud would be entered into the record, and the matter would be referred to the U.S. Attorney for possible prosecution. *See* 8 C.F.R. § 245a.2(t)(4).

The applicant was granted fifteen days to provide substantial evidence to overcome, fully and persuasively, these findings. He failed to submit any evidence addressing the discrepancies and contradictions that were found to undermine the basis of his claim of residence in the United States for the requisite period. As noted above, it is incumbent on the applicant to resolve inconsistencies by independent objective evidence. *Matter of Ho, supra*. The applicant has failed to provide any such evidence and has not overcome the basis for a finding of fraud.

The absence of probative and credible documentation and the conflicting evidence and contradictory claims in the record seriously undermine the credibility of the applicant's claim of residence in this country for the requisite period, as well as the credibility of the documents submitted in support 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. The applicant has failed to submit sufficient credible documentation to meet his burden of proof in establishing by a preponderance of the evidence that he has resided 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-*, 20 I&N Dec. 77 (Comm. 1989). The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

In addition, as the record reflects that the applicant has made material misrepresentations to gain lawful status in the United States, the AAO finds that the applicant has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Because the applicant has failed to provide independent and objective evidence to overcome this finding, fully and persuasively, the AAO affirms its finding of fraud. A finding of fraud is entered into the record, and the matter will be referred to the U.S. Attorney for possible prosecution, as provided in 8 C.F.R. § 245a.2(t)(4).

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