U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEW YORK Date: FEB 26 2008

MSC 05 092 10064

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. 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 31, 2004. The director issued a Notice of Intent to Deny to the applicant and applicant's counsel on July 25, 2005. In the Notice of Intent to Deny, the director acknowledged that the applicant had provided two affidavits in support of his claim, and noted that one affiant, when contacted for verification, provided testimony inconsistent with the applicant's claims, while the other affiant could not be contacted. 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. On August 3, 2006, the director denied the application for the reasons stated in the Notice of Intent to Deny, noting that the applicant failed to submit additional evidence for consideration within the time allotted. The director determined 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 for the applicant asserts that the applicant never received the Notice of Intent to Deny, thus the denial of the petition based on the applicant's failure to submit additional evidence was unfounded. The applicant does not submit any additional evidence on appeal.

Upon review, the record reflects that the Notice of Intent to Deny dated July 25, 2005, was sent by certified mail with return receipt requested on July 28, 2005 to both the applicant and counsel for the applicant at their respective last known addresses, as required by regulation. *See* 8 C.F.R. § 103.5a. The record also reflects that the Notice of Intent to Deny addressed to the applicant was returned to Citizenship and Immigration Services (CIS) as unclaimed mail on or about August 23, 2005. However, the Notice of Intent to Deny addressed to counsel was in fact delivered to counsel on July 29, 2005. The record contains a certified mail return receipt, received by CIS on August 1, 2005, bearing counsel's signature acknowledging receipt of the notice. Therefore, the record shows that the Notice of Intent to Deny was properly served on both the applicant and applicant's counsel. Counsel's request that the director's decision denying the application for failure to respond to the NOID is therefore denied.

Therefore, the remaining issue 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.

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).

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 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, 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 record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to Citizenship and Immigration Services (CIS) on December 31, 2004. The applicant signed this application under penalty of perjury, certifying that the information 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 showed that he resided at [redacted] in Bronx, New York since May 1998. He did not indicate on his Form I-687 that he continuously resided in the United States during the requisite period.

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 her 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. An applicant may also submit any other relevant document pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). The applicant failed to provide any type of documents in support of his claim of continuous residence in the United States.

A CIS Officer interviewed the applicant under oath on July 12, 2005. The applicant testified that he entered the United States in 1981, when he was five years old. He stated that he did not go to school and that his uncle supported him, but that he was unable to obtain an affidavit from his uncle because his uncle had returned to Ivory Coast. At the time of his interview, the applicant submitted the following evidence in support of his application:

- A notarized letter dated July 6, 2005 from [redacted], who indicated that he lives at [redacted] Bronx, New York 10452. Mr. [redacted] stated that the applicant has resided with him at this address since December 1981, and that he is a reliable and trustworthy person. As noted above, the applicant stated on his Form I-687 that he had resided at [redacted] only since 1998; therefore, [redacted] statement that the applicant resided with him since 1981 is inconsistent with the applicant's own statement and the credibility of his statement is called into question. Although [redacted]y states that the applicant has lived with him in the United States for nearly 24 years, he provided no relevant, verifiable information regarding the events and circumstances of the applicant's residence in the United States that would lend credibility to his statement, nor does he provide proof of his relationship with the applicant, such as photographs. He does not indicate what his relationship is with the applicant or how he met him, nor does he explain the circumstances under which he came to take the applicant into his home when the applicant was five years old in 1981. Although not required to do so, it is noted that [redacted] did not provide proof of his identity or evidence that he himself was in the United States and residing at the claimed address since 1981. Because [redacted] statement was inconsistent with information provided by the applicant on his Form I-687 and significantly lacking in detail, it is lacking in probative value as corroborative evidence. Furthermore, the record shows that CIS's attempts to contact the affiant were unsuccessful because the contact telephone number he provided had been disconnected. Therefore, [redacted]'s testimony was not credible, probative or amenable to verification.

- A notarized letter from [redacted], a resident of Bronx, New York, who stated that he has known the applicant "since the year 1982." He provided no other information and did not indicate where or under what circumstances he met the applicant or whether he even met the applicant in

the United States. He did not state that he had direct, personal knowledge that the applicant was continuously residing in the United States for the duration of the requisite period, or how frequently he had contact with the applicant during the relevant period.

The record shows that CIS was able to contact by telephone in order to verify the information he provided. He stated that he himself first entered the United States in 1990 and confirmed that he met the applicant in 1982 in Ivory Coast. Therefore, he clearly does not have direct, personal knowledge that the applicant was residing in the United States during the requisite period and his statement has no probative value. Furthermore, he confirmed that the applicant was in Ivory Coast in 1982, and not residing in the United States as claimed by the applicant.

The district director issued a Notice of Intent to Deny on July 25, 2005, in which she acknowledged the applicant's testimony, but noted that the applicant failed to provide any medical, immunization or school records to establish his residence in the United States, despite the fact that he was of compulsory school age during the requisite period. She further noted that the applicant failed to submit any proof that the applicant's uncle was in the United States during the requisite period. Further, she addressed the deficiencies of the affidavits, noting that [redacted] testimony was misleading and frivolous, and that [redacted] could not be contacted for verification. The district director noted that the affidavits had no probative value, and that [redacted] testimony contradicted the applicant's own claims. It is noted that the district director incorrectly applied the regulation at 8 C.F.R. § 103.2(b) in evaluating the instant application and supporting evidence. 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.2(d)(6).

The applicant was granted 30 days in which to respond to the notice. As noted above, the notice was properly served on the applicant and to the applicant's counsel, and delivery of the notice to counsel has been confirmed. The applicant failed to submit a response to the Notice of Intent to Deny.

The director denied the application on August 3, 2006, noting that the applicant had failed to submit additional evidence and therefore the application was being denied for the reasons stated in the Notice of Intent to Deny.

On appeal, counsel for the applicant asserts that the applicant never received the notice of intent to deny, notwithstanding the fact that counsel did in fact receive the notice on July 29, 2005. As discussed above, this claim is without merit. The applicant has not submitted any additional evidence in support of his claim of continuous residence in the United States during the requisite period.

Therefore, the applicant has failed to overcome the many deficiencies and inconstancies addressed above. An application which is lacking in contemporaneous documentation cannot be deemed approvable if the entire period of claimed continuous residence relies solely on affidavits which are considerably lacking in credibility and probative value. Here, [redacted] testimony is significantly lacking in detail, is inconsistent with the applicant's own statements on Form I-687, and is not amenable to verification. Mr.

has stated that he was not in the United States prior to 1990, and that he met the applicant in Ivory Coast in 1982, which conflicts with the applicant's own testimony that he was residing in the United States at that time. Neither affidavit can be given any evidentiary weight and therefore they cannot satisfy the applicant's burden of proof.

The absence of sufficiently detailed, credible 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 documents with no probative value, 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.