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

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FILE:

MSC-05-225-10173

Office: NEW YORK Date:

JAN 16 2008

IN RE:

Applicant:

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:

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. Wieman, 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. 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. The director specifically mentioned that the applicant had failed to establish that he entered the United States prior to January 1, 1982.

On appeal, counsel for the applicant asserted that the director's decision was arbitrary, she abused her discretion, and her findings were not grounded in the record. Counsel asserted that the applicant entered the United States without inspection, and therefore was unable to provide documentary evidence of his entry. Counsel stated that the affidavits provided by the applicant are not boilerplate templates; the affidavits include contact information and were credible and verifiable; the director did not specify which of the affiants could not be contacted; the applicant should have been informed of verification attempts and allowed to submit a rebuttal; the affidavits submitted are sufficient to establish that the applicant resided in the United States throughout the requisite period; and the applicant's right to due process was violated.

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 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).

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 furnished sufficient credible evidence to demonstrate that he resided in the United States for the duration of the requisite period. Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant submitted a Form I-687 application and Supplement to Citizenship and Immigration Services (CIS) on May 13, 2005. 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 listed the following addresses during the requisite period: [REDACTED], Brooklyn, New York from February 1981 to November 1985; and [REDACTED] Brooklyn, New York from December 1985 to November 1989. At part #31 where applicants were asked to list all affiliations or associations, clubs, organizations, churches, unions, businesses, et cetera, the applicant stated, “N/A.” At part #33 where applicants were asked to list all employment in the United States since entry, the applicant indicated he was

working in construction from March 1981 to December 1985; and at 7 Star Construction Co. as a laborer in Brooklyn, New York from January 1986 to November 1989.

In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant provided multiple attestations. The applicant submitted an affidavit from [REDACTED]. In this affidavit, [REDACTED] stated that he has known the applicant since January 1985, when the applicant was living at [REDACTED] in Brooklyn. This affidavit confirms the applicant resided in the United States since January 1985 except for brief visits to Pakistan.

The applicant provided an affidavit from [REDACTED]. In this affidavit, [REDACTED] stated that he has known the applicant since 1975 from Pakistan. [REDACTED] stated that the applicant came to the United States in February 1981 and asked for [REDACTED] help in finding a place to live. The applicant stayed with the affiant for one week and then the affiant arranged a place to live for the applicant at [REDACTED]. The affiant stated that the applicant moved to [REDACTED] in Brooklyn in December 1985. The affiant stated that the applicant lived in the United States continuously from November 1986 to May 4, 1988 except for a brief visit to Pakistan. The affiant stated that he has personal knowledge of the applicant's presence in the United States because the applicant regularly met the affiant during this period.

The applicant provided an affidavit from [REDACTED]. Mr. [REDACTED] stated that he has known the applicant since June 1981. The applicant worked at the affiant's house as a painter. Mr. [REDACTED] stated that the applicant worked for the affiant from December 1984 to November 1989 as a handyman in the Bronx on the weekends. This affidavit is inconsistent with the information provided on the applicant's Form I-687 application, where the applicant failed to list his employment as a handyman when asked to list all employment in the United States. This inconsistency calls into question [REDACTED]'s ability to confirm the applicant resided in the United States during the requisite period. In addition, this affidavit fails to conform to regulatory standards for letters from employers as described at 8 C.F.R. § 245a.2(d)(3)(i). Specifically, the declaration does not include the applicant's address at the time of employment, whether or not the information was taken from official company records, where the records are located, and whether the service may have access to the records.

The applicant submitted an affidavit from [REDACTED]. In this affidavit, [REDACTED] stated that he owns the apartment building at [REDACTED] in Brooklyn. He stated that he has known the applicant since April 1981 when the applicant came to the affiant looking for a place to live, and the affiant had no space to offer the applicant. In December 1981 the applicant worked as a painter in [REDACTED]'s apartment. In December 1985, the applicant moved into the affiant's building and lived there until November 1989. [REDACTED] stated that he has personal knowledge that the applicant was living in the United States continuously from November 6, 1986 to May 4, 1988. Mr. [REDACTED] stated that the applicant was living in the same building where [REDACTED] lives, and that the affiant met the applicant regularly except for a brief absence when the applicant left for Pakistan to see his family. This affidavit fails to specifically confirm the applicant resided in the United States continuously from prior to January 1, 1982 until November 1986.

The applicant provided an affidavit from [REDACTED]. In this affidavit, the affiant stated that he has known the applicant since April 1982. The applicant did paintwork at the affiant's apartment. In November 1987, as part of the company Seven Star Construction Company the applicant did repair work at the affiant's house in New Jersey. The affiant stated that, sometime in December 1987, the applicant went to Pakistan and returned by January 1988. This affidavit fails to confirm the applicant resided continuously in the United States during the requisite period.

The applicant submitted a form affidavit from [REDACTED]. In this affidavit, [REDACTED] stated that he has known the applicant since January 1984 and he knows the applicant had been a continuous resident of the United States since that time. The affiant is a friend of the applicant. This affidavit fails to provide details regarding the date and manner in which the applicant and the affiant became acquainted, and their frequency of contact during the period of residence the affiant confirms. Therefore, this affidavit is found to lack sufficient detail.

The applicant provided an affidavit from [REDACTED], in which the affiant stated that he has known the applicant since January 1986. The affiant met the applicant at Makki Mosque in Brooklyn, New York. The affidavit states that the applicant has been living in the United States since January 1986 except from brief visits to Pakistan to see the applicant's family. This affidavit is inconsistent with the information on the applicant's Form I-687, where the applicant failed to list any mosques when asked to list all affiliations or associations. This inconsistency calls into question the affiant's ability to confirm that the applicant resided in the United States during the requisite period.

The applicant submitted an affidavit from [REDACTED] in which the affiant stated that he has known the applicant since August 1983, when he met the applicant at Al Farooq mosque in Brooklyn. The affiant stated that he visited the applicant several times when the applicant was living at [REDACTED]. The affiant has personal knowledge that the applicant moved to [REDACTED] in December 1985 because the applicant informed the affiant of his new address, and the affiant visited the applicant at his new address several times. The affiant stated that he has personal knowledge that the applicant has been living in the United States since August 1983 except for brief visits to see his family in Pakistan. This affidavit is inconsistent with the information on the applicant's Form I-687, where the applicant failed to list any mosques when asked to list all affiliations or associations. This inconsistency calls into question the affiant's ability to confirm that the applicant resided in the United States during the requisite period.

The applicant submitted a letter from [REDACTED] of Seven Star Construction Co. This letter states that the applicant was working as a construction helper from 1986 to 1989. The letter confirms the applicant was continuously present in the United States from 1986 to 1989 except for a brief visit to Pakistan. The declaration does not conform to regulatory standards found at

8 C.F.R. § 245a.2(d)(3)(i) for letters from employers. Specifically, the declaration does not include the applicant's address at the time of employment, whether or not the information was taken from official company records, where the records are located, and whether the service may have access to the records.

In denying the application the director noted 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 specifically mentioned that the applicant had failed to establish that he entered the United States prior to January 1, 1982.

On appeal, counsel for the applicant asserted that the director's decision was arbitrary, she abused her discretion, and her findings were not grounded in the record. Counsel stated that the applicant entered the United States without inspection, and therefore was unable to provide documentary evidence of his entry. Counsel stated that the affidavits provided by the applicant are sufficient to establish that the applicant resided in the United States throughout the requisite period, and the applicant's right to due process was violated.

As indicated by the director, the majority of the applicant's evidence that he resided in the United States prior to January 1, 1982 is flawed. Specifically, the record indicates that the applicant's statements regarding his first entry into the United States are contradictory. The record of the applicant's interview with an immigration officer for his Form I-485 Application to Register Permanent Resident or Adjust Status on June 12, 2002, indicates the applicant stated that he entered the United States in February 1981 with a photo-substitution passport in New York. The record of the applicant's interview with an immigration officer in connection with his application for temporary resident status indicates the applicant stated that the applicant entered the United States for the first time in February 1981 at John F. Kennedy International Airport. The applicant also stated in this interview that he re-entered the United States in January 1988 and was smuggled from Canada at this time. However, in an affidavit signed by the applicant on June 23, 2001, the applicant stated that he first entered the United States in February 1981 without inspection. In addition, on appeal counsel asserted that, since the applicant's first entry into the United States was without inspection, it is unreasonable for the director to expect the applicant to provide evidence of his first entry other than his own testimony. The applicant's statements regarding his first entry into the United States are inconsistent. The applicant claimed in his interviews that he first entered by airplane in New York, yet he claimed in his affidavit that he entered the United States without inspection. If the applicant entered the United States in New York by airplane, the applicant could potentially have some tangible record of his entry. However, counsel for the applicant argues that the applicant could not have any evidence of his entry because he entered without inspection. The record contains no explanation for this apparent inconsistency.

In summary, the applicant has not provided any contemporaneous evidence of residence in the United States relating to the requisite period, and has submitted attestations that are inconsistent with the applicant's Form I-687 application, fail to confirm the applicant resided in the United

States continuously during the requisite period, lack sufficient detail, do not conform to regulatory standards, or only confirm the applicant's continuous residence for a portion of the requisite period. The affidavits from [REDACTED] and [REDACTED] are inconsistent with the applicant's Form I-687. The affidavit from [REDACTED] fails to confirm the applicant resided continuously in the United States during the requisite period. The affidavit from [REDACTED] lacks sufficient detail. The letter from [REDACTED] and the affidavit from Mr. [REDACTED] fail to conform to regulatory standards. The affidavit from [REDACTED] confirms the applicant resided in the United States since January 1985 except for brief absences. The affidavit from [REDACTED] appears to confirm the applicant's residence in the United States from February 1981 to May 1, 1988. The affidavit from [REDACTED] confirms that the applicant resided in the United States continuously from November 6, 1986 to May 4, 1988. Considering that the only credible evidence provided by the applicant to establish his residence in the United States from January 1, 1982 to 1985 was one affidavit, he failed to establish by a preponderance of the evidence that he resided in the United States continuously from before January 1, 1982 until January 1985.

The absence of sufficiently detailed supporting 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 contradictions between the documents provided by the applicant and his statements on his Form I-687 and given the applicant's significant reliance upon documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States for the requisite period 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.

Although counsel for the applicant argues that the applicant's right to procedural due process was violated, he 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 application. The applicant's primary complaint is that the director denied the petition. As previously discussed, the applicant has not met its burden of proof and the denial was the proper result under the statute and regulations. Accordingly, the applicant's claim is without merit.

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