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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BOSTON Date: JUL 31 2008
MSC-05-313-13717

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, Boston. 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 August 9, 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 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 "erred in failing to issue a notice of intent to deny." 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. 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 record shows that the applicant submitted a Form I-687 Application and Supplement to Citizenship and Immigration Services (CIS) on August 9, 2005. At part #30 of the Form I-687 where applicants are asked to list all residences in the United States since first entry, the

applicant listed his first and only address in the United States as [redacted] Revere, Massachusetts, from October 2002 to the present. The applicant wrote "N/A" below the address at Revere, Massachusetts. At part #33, he listed his first and only employment in the United States as a self-employed vendor in New York, New York from April 1986 to April 2004. Although the applicant states that he worked in New York from April 1986 to April 2004, he does not provide an address in New York during that time. Furthermore, from October 2002 to April 2004, the applicant claims to have lived in Revere, Massachusetts. At part #32, the applicant listed one absence from the United States. The applicant visited [redacted] from "n/a to October 2002." At part #31, the applicant did not list any affiliations or associations.

The applicant has submitted six notarized affidavits; a copy of the applicant's passport issued on August 22, 2001; a copy of the applicant's Massachusetts's driver's license; a copy of the applicant's B-1 visa issued on December 28, 2001 in Abidjan; a copy of the applicant's employment authorization card issued on September 10, 2005; the applicant's Form I-94 dated October 6, 2002; and a letter and postmarked envelopes addressed to the applicant. The applicant's passport, Massachusetts's driver's license, and employment authorization card 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 record includes the following witness statements in support of the application:

- A notarized affidavit from [redacted] dated December 10, 2005. The declarant states that the applicant "first arrived in the United States of America in 1981." The declarant also states that he met the applicant in 1981 while working at his street job in Manhattan. Although the declarant states that he has known the applicant since 1981, the statement does not supply enough details to lend credibility to a 24-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 notarized affidavit from [redacted] dated December 7, 2005. The declarant states that he has known the applicant since 1982. The declarant also states that he first met the applicant in the Bronx and remembers the applicant telling him that the applicant "had been living in the United States for a year." Although the declarant states that he has known the applicant since 1982, the statement does not supply enough details to lend credibility to a 23-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 notarized affidavit from [redacted] dated November 29, 2005. The declarant states that he currently lives in the Bronx, New York. The declarant states that he has known the applicant since the applicant "moved into [his] apartment in 1981." The AAO notes that the applicant did not include an address in New York in his Form I-687. Although the declarant states that he has known the applicant since 1981, the statement does not supply enough details to lend credibility to a 24-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 does not state when the applicant stopped being his roommate. 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 form-letter affidavit from [redacted] dated December 1, 2005. The declarant states that he currently lives in the Bronx, New York. The declarant states that he has personal knowledge that the applicant lived at [redacted], [Bronx, New York] from November 1981 to October 2002" and at [redacted] [Revere, Massachusetts] from October 2002 to the present." The AAO notes that the applicant did not include an address in New York in his Form I-687. 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 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). The declarant also states that he met the applicant in 1981 at a friend's wedding ceremony. Although the declarant states that he has known the applicant since 1981, the statement does not supply enough details to lend credibility to a 24-year relationship with the applicant. For instance, the declarant does not indicate how frequently he had contact with the applicant. 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 December 1, 2005. The declarant states that he currently lives in the Bronx, New York. The declarant states that the applicant lived with him at [redacted] Bronx, New York from November 1981 to October 2002." The AAO notes that the applicant did not include an address in New

York in his Form I-687. The record does not resolve these inconsistencies. *Matter of Ho*, 19 I&N Dec. at 591-92. The declarant also states that the applicant contributed $200 per month for rent. Although the declarant states that he has known the applicant since 1981, the statement does not supply enough details to lend credibility to a 24-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. 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 form-letter affidavit from [redacted] dated November 30, 2005. The declarant states that he currently lives in the Bronx, New York. The declarant states that he has personal knowledge that the applicant lived at [redacted], [Bronx, New York] from November 1981 to October 2002" and at [redacted] [Revere, Massachusetts] from October 2002 to the present." The AAO notes that the applicant did not include an address in New York in his Form I-687. The record does not resolve these inconsistencies. *Matter of Ho*, 19 I&N Dec. at 591-92. The declarant also states that he met the applicant in 1981 at a friend's funeral. Although the declarant states that he has known the applicant since 1981, the statement does not supply enough details to lend credibility to a 24-year relationship with the applicant. For instance, the declarant does not indicate how frequently he had contact with the applicant. 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.

In addition, the applicant submitted a letter and a postmarked envelope addressed to the applicant at an address not included in the Form I-687.[2] The letter is dated May 1, 1981 and it is written in French. The envelope is postmarked May 14, 1981. The AAO notes that the applicant claims to have first entered the United States in November 1981 and the date on the letter and on the postmark pre-date the applicant's stated arrival into the United States. Further, the postmark on the envelope appears to have been altered. Finally, because the applicant failed to submit a certified translation of the document, the AAO cannot determine its exact content. *See* 8 C.F.R. § 103.2(b)(3) regarding an applicant's responsibility to provide a certified translation of a document in a foreign language. Accordingly, the letter and the postmarked envelope are not probative and will not be accorded any weight in this proceeding.

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 November 1981 without inspection. The applicant has not submitted any additional evidence in support of his claim that

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The AAO notes that while the address listed on the envelope is in the Bronx, New York, it is not the same address referred to in three of the affidavits submitted. The address listed on the envelope is [redacted]

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 issued a notice of intent to deny (NOID) on November 17, 2005. The director denied the application for temporary residence on June 27, 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 "erred in failing to issue a notice of intent to deny" and states that such a NOID is required by "8 C.F.R. § 245a.20(a)(2)." Counsel appears to have overlooked the director's November 17, 2005 NOID. With regards to the requirements of 8 C.F.R. § 245a.20(a)(2), counsel is mistaken in that 8 C.F.R. § 245a.20(a)(2) makes no mention of a NOID and instead states that "the alien shall be notified in writing of the decision of denial and of the reasons(s) therefore." *See* 8 C.F.R. § 245a.20(a)(2).[4]

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 rights to procedural due process were violated, counsel has not shown any violation of the regulations, or 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 director did issue a NOID and the denial was the proper result under the law. 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 did not consider the affidavits submitted by the applicant. 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 four of the affidavits submitted are inconsistent with the applicant's Form I-687 and the remaining affidavits fail to meet the

[4] 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 adjudicated the application for temporary residence on the merits.

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.

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.